

The impact of the ECtHR's evolving approach to reparations on the supervision of the execution of judgments

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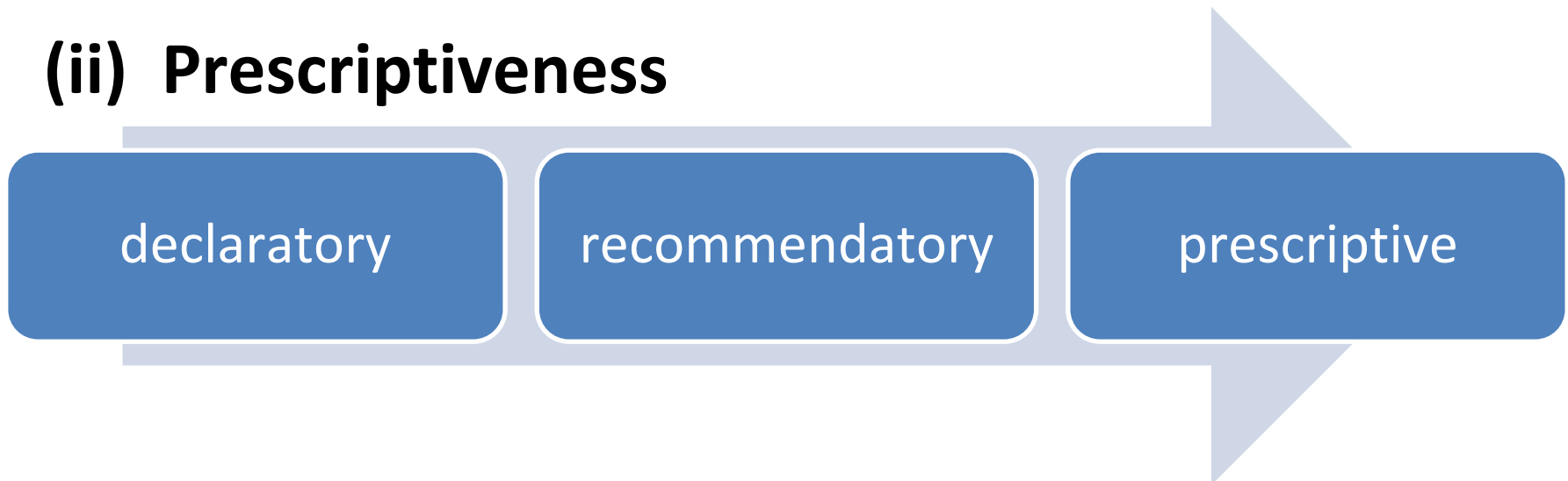
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Two-tier typology

(i) Specificity

indication of specific non-monetary individual or general measures

(ii) Prescriptiveness



Recent trends in the ECtHR's remedial practice – consistent?

“I am not sure that the analytical framework ... is clear at all. I think it is, at this point in time, a rather haphazard case law, when we are, on a case-by-case basis, looking into the possibilities of saying something more than simply declaring a violation.”

Judge at the ECtHR, June 2017

“Ideally, it would have been better of course to have a more coherent and coordinated approach. But I think that this is normal as it stands now. It is timid steps in this direction that are being taken by the Court. ... I think the Court is exploring this field, and for the time being, this is positively assessed and has not created any tensions.”

Official at the CoE's Directorate General
Human Rights and Rule of Law, April 2017

Recent trends in the ECtHR's remedial practice – Judges as pragmatic actors

“Inevitably, policy factors will always come into play: it’s as simple as that. You may think that that is difficult to accept but that is simply the case. Law and policy at the ECtHR is a very vague distinction as you know...”

Judge at the ECtHR, June 2017

“It becomes ridiculous to go further with Article 46 in a situation where we have states like Russia and they confront the Court with a message: ‘We pick and choose which judgments are binding or which we consider binding.’ Then the whole story becomes really absurd.”

Judge at the ECtHR, June 2017

Interaction between Court and CM

“[S]ome judges think that execution either is completely incompetent or doesn't exist and it's only the Court that can act with any authority, and [they] somehow divorce themselves from the reality of the whole picture. I think you see this tendency throughout the Court.”

Registry lawyer at the ECtHR, April 2017

- Secondments / movement between institutions
- Training of Registry lawyers
- High-level tripartite meetings
- HUDOC-EXEC → visibility!

... but concern to maintain judicial independence!

Implications for institutional roles within the Council of Europe

“I think here there is a strange kind of echo effect in the sense that almost everyone *beyond* the Court would welcome specificity.”

Academic, May 2017

“[W]e hear from the Execution Department that they want us to give as specific indications concerning the implementation as possible.”

Judge at the ECtHR, June 2017

... Committee of Ministers seems not to be concerned about potential encroachment onto its role under Article 46(1) ECHR

Impact on the supervision process: the view from Strasbourg (I)

“I think [specificity / prescriptiveness have] a tremendous effect in framing the discussion within the Committee of Ministers.”

Official at the CoE’s Directorate General
Human Rights and Rule of Law, April 2017

Potential benefits of greater specificity / prescriptiveness

- Reduces the risk of obfuscation or minimalist implementation
- Facilitates measuring and monitoring of implementation
- Allows other states and the CM to apply more pressure
- Heightens scrutiny in conjunction with enhanced supervision
- Creates a framework for discussion of shared problems

Impact on the supervision process: the view from Strasbourg (II)

Potential risks of greater specificity / prescriptiveness

- “[S]ometimes an indicative measure is problematic because it **heightens the stakes** for everybody... When [indicative measures are] good, they're great, and when they're not, they're a disaster.”

Registry lawyer at the ECtHR, April 2017

- Deadlines: “I think in some ways putting a deadline is the most dangerous territory because it's difficult for the Court not to be arbitrary.”

Impact on the supervision process: the view from states (I)

Pushback?

- No evidence of pushback on *principle* of the Court giving specific indications
- Not much evidence of pushback on remedial measures in *specific judgments*

... this may be in part because it's a more technical issue, grasped only (or mainly) by the Government Agent and a limited number of domestic actors

Impact on the supervision process: the view from states (II)

Specificity / prescriptiveness – empowering willing actors

- Helps NGOs / NHRIs “hold up a mirror to the state”, both domestically and in Strasbourg
- Helps keep the CM mobilised on an issue
- Helps *any* willing actor - could also be parliament, executive, judiciary
- Can be especially useful in positivist states

“If we’re getting the message back from the Agent that it’s useful to have very prescriptive or directive judgments, then I think we should support that.”

Need or appetite for reform?

“I don’t think [reform] is necessary at this stage. The Court’s practice is not sufficiently ... coherent to be codified. If we try to take a further step in order to enable the Court to do these ... things in a stricter way, in accordance with specific criteria, this may create, to the contrary, ... unnecessary discussion as to the distribution of competences. For the time being, the Court is very cautious. It is better to let it try to identify itself what the limits of its prescriptive approach are.”

Official at the CoE’s Directorate General
Human Rights and Rule of Law, April 2017

“I don’t think reforms of the *Convention* need to be made, but reforms of the *case law* – definitely yes, and that I think will happen.”

Judge at the ECtHR, June 2017

Future direction

“[There] has to be a principled view of the types of situation that merit the Court providing for individual or general measures, and the possible backlash in a state should not be a relevant factor ... But if we’re going to have a situation where the Court provides for remedial measures which are consistently being rejected, what is the point of the whole enterprise? ... The mere fact that ... we, in an international court, where the system of enforcement is based on political will and pressure ... provide for a remedial system of measures which is persuasive [and] acceptable to the stakeholders ... as a matter of principle, is something that I don’t think is unjustified to take into account ... [A]t the end of the day, the system doesn’t work unless the recipients are willing to acquiesce to the system of judicial power that is at play here.”

Judge at the ECtHR, June 2017