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Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights

Expert analysis

Improving socially-oriented legislation as part of the execution of the European Court of Human Rights judgments. Selected practice of the Council of Europe member states

Strasbourg, September 2020

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LIST OF ABBREVIATIONS

CoE	Council of Europe
CM	Council of Ministers of the Council of Europe
Convention or ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Charter	European Social Charter
Draft National Strategy	Draft National Strategy for the implementation of general measures for the execution of the pilot judgments in the cases of *Yuriy Nikolayevich Ivanov v. Ukraine* and *Burmych and Others v. Ukraine*
ECSR	European Committee of Social Rights

INTRODUCTION

The Directorate General of Human Rights and Rule of Law of the CoE assists the Ukrainian authorities in the execution of judgments of the European Court of Human Rights ("the ECtHR"). This assistance is provided through the project "*Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights*" ("the Project") funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the CoE. Following the request of the Ukrainian authorities, the Project organised a number of activities in the context of the execution of the *Burmych* group of cases[1]. This group, *inter alia*, concerns to systemic non-enforcement of the national judicial decisions compelling the state authorities and state-owned entities to grant certain social benefits and uphold social security rights as provided by the Ukrainian legislation.

Among its activities, the Project organised an expert discussion on the topic of "*Improving socially-oriented legislation in the context of the execution of the European Court of Human Rights judgements in the Yurii Nikolaevich Ivanov v. Ukraine and Burmych and others v. Ukraine group of cases"*. In this context and to benefit the Ukrainian authorities in the execution of the *Burmych* group of cases, the Project invited Mr. Lilian Apostol, an international expert of the CoE, who researched good practices in the CoE member states in the area of social legislation and systems on data collection of social benefits. The present paper reflects the results of the said research and it mainly explores experiences of some countries in reforming their social security systems as a follow-up process of execution of the ECtHR's judgments. As a result, the study draws recommendations on the steps to be considered by the Ukrainian authorities in view of resolving their own systemic failure to pay social benefits and to erase one of the root-causes of non-enforcement identified by the *Burmych* group of cases.

The meaning of "social security rights" employed by the present analysis is wide[2]. Yet, for the purposes of the present analysis, these rights were examined from the limited perspective, as they are part of general measures implemented by the states pending execution of the ECtHR judgments. Moreover, only the systemic non-execution of judicial decisions in the social security field was selected as a criterion to choose the relevant general measures. In addition, the analysis compiled the key-requirements of the Charter and the Convention and took into consideration the policies envisaged by the strategic documents drafted by the Ukrainian authorities. In the latter sense, the analysis overviewed the Draft National Strategy.

The Draft National Strategy qualifies the non-enforced judicial decisions granting social benefits as the most numerous group from the other three types. In the essence, these judicial decisions concern different social benefits to be paid by the state authorities, either directly or on behalf of state-owned entities, that are being kept unenforced or delayed for a variety of reasons. They grew almost in geometrical progression, mostly because of a socially-oriented and rather populist legislation unsubsidized by State budgetary funds that are not yet repealed due to the lack of the political will. Moreover, this legislation appears to be poorly drafted and unclear thus leading to inconsistent interpretation and incoherent administrative or judicial practices. In addition to these legislative shortcomings, the administrative system of data collection and statistical evidence in

[1] Committee of Ministers: *ZHOVNER v. Ukraine* group of cases (2004); *YURIY NIKOLAYEVICH IVANOV v. Ukraine* group of cases (2009); *BURMYCH AND OTHERS v. Ukraine* group of cases (2017)

[2] I.e. "the entitlement of individual members of a society to income security and health care provision" that presupposes "substantive equality and solidarity" and belongs to "the category of socio-economic rights, implying positive duties on public authorities to undertake actions addressed to an adequate fulfilment of these rights" I. S. Guijarro (2017), "Right to Social Security", *Max Planck Encyclopaedia of Comparative Constitutional Law [MPECCoL],* at 1 and 2.

Ukraine is defragmented. As a consequence, the recording of social benefits payments produces unreliable data for budgetary planning and strategic vision on policies in the social security area.

Accordingly, the present analysis, as commissioned by the Project, compiles the information on the CoE standards and good practices of some members-states suggesting ways to tackle the deficiencies of socially-oriented legislation.

THE COUNCIL OF EUROPE PRINCIPLES IN THE FIELD OF SOCIAL SECURITY

Social rights are to be granted primarily by legislation. In litigious cases these rights often are prescribed by a court decision acquiring the same enforceability as any social security law. The below selection of the relevant principles reflects only the key-elements relevant to the question on how to set up compatible social security legislation. For obvious reasons, the principles concerning effective enforcement of the judicial decisions, be that in the social security field or any other areas, are outside of the scope of the present chapter. It addresses only the key-principles on the feasibility of certain social benefits in view of the commonly acceptable standards of the CoE.

Social legislation of a member state of the CoE could raise questions concerning compatibility with the requirements of both the Charter and the Convention. The member states should pay equal attention to these fundamental treaties while implementing their social policies. Accordingly, before reflecting on the states' experience in executing the ECtHR judgments concerning the social security payments one should begin with reflecting on the interaction between these legal instruments and on their interpretation.

At the first glance, the Charter appears to be the primary legal framework regulating social security rights at the pan-European level. It draws the core principles and detailed rules in this regard, yet, it neither benefits from judicial supervision nor has a proper enforcement mechanism. The reporting duties of the member states and the collective complaints procedure of the Charter could be hardly compared with the right to individual petition and the execution of the ECtHR judgments, as provided by Articles 34 and 46 of the Convention, respectively. The Charter mechanism is largely non-compulsory and widely discretionary for the signatory states in the field of social security policies. Thus, its effects over the social security legislation of the member states should be seen as complementary[3] to the Convention machinery[4].

Both the Charter and the Convention are being interpreted by the ECSR[5]. Viewed in this way, it has been recognised by the ECSR that certain social rights can be implemented only **progressively**[6] and with due consideration of the **equity principle**[7]. These are the core

[3] The Social Charter is a human rights treaty. Its purpose is to apply the Universal Declaration of Human Rights within Europe, as a supplement to the European Convention on Human Rights. In this perspective, while respecting the diversity of national traditions of the Council of Europe's member States, which constitute common European social values and which should not be undermined by the Charter nor by its application; it is important to: - consolidate adhesion to the shared values of solidarity, non-discrimination and participation; - identify the principles that ensure that the rights embodied in the Charter are applied equally effectively in all the Council of Europe member States." ECSR (2018), *Digest of the case law of the European Committee of Social Rights*, p. 40.

[4] For the term "the Convention machinery" see ECtHR, *Broniowski v. Poland [GC]* (2004), paragraph 190.

[5] ECSR, *Digest of the case law of the European Committee of Social Rights*, p. 42.

[6] ECSR, *Digest of the case law of the European Committee of Social Rights*, p. 41.

[7] "Two primary forms of discriminatory treatment are alleged to exist in this complaint: (i) discrimination on the grounds of territorial and/or socio-economic status between women who have relatively unimpeded access to lawful abortion facilities and those who do not; .... The Committee considers that these different alleged grounds of discrimination are closely linked together and constitute a claim of 'overlapping', 'intersectional' or 'multiple' discrimination, whereby certain categories of women in Italy are allegedly subject to less favorable treatment in the form of impeded access to lawful abortion facilities as a result of the combined effect of their gender, health status, territorial location and socio-economic status." ECSR, *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy* (2013), paragraphs 190–194.

principles, in view of the ECSR, that should guide the states in the implementation of their social security policies. Indeed, Article 12 (social security) of the Charter, is the framework provision relevant for the present analysis and it underpins these principles[8].

The ECtHR on its part has also considered both instruments as equally valid for its own cases involving social security rights. Yet it normally gives priority to the Convention as the primary source of law[9].

Generally, the complaints on social issues often amount into the so-called "fourth instance cases"[10], unless they imply **procedural violations** or reveal a **manifestly discriminatory** implementation of the social policies. Still, the application of the Convention to social matters remains controversial. The rule is that the Convention is not a social treaty and, in ordinary fashion, it does not apply to social security rights. Yet, its character as a treaty of civil and political rights does not prevent the questions of social welfare from falling into the scope of the Convention[11].

From the perspective of the ECtHR, the member states benefit from much wider discretion on how to construe their economic and social policies[12]. Normally, a person cannot bring an application before the ECtHR complaining about the amount of a pension[13] or even about

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[8] Article 12. "With a view to ensuring the effective exercise of the right to social security, the Parties undertake: … 3. to endeavour to raise progressively the system of social security to a higher level; 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure: a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties; b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties." Council of Europe, *European Social Charter (revised)* (1996).

[9] "Insofar the applicant relies on provisions of the European Social Charter, the Commission recalls that under Article 19 of the [ECHR] it is only competent to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention." *Handwerker v. Germany* (dec.), no. 28610/95, 4 September 1996. See also *Kucherenko v. Ukraine*, no. 27347/02, 15 December 2005, paragraph 28; *Vladimir and Valentina Rudenko v. Ukraine*, no. 19441/03, 12 July 2007, paragraph 18; *Sheidl v. Ukraine* (dec.), no. 3460/03, 25 March 2008.

[10] See, for example, *Marion v. France*, paragraph 22; *Spycher v. Switzerland* (dec.), paragraphs 27-32.

[11] "Finally, … the Court considers that to hold that a right to a non-contributory benefit falls within the scope of Article 1 of Protocol No. 1 no more renders otiose the provisions of the Social Charter than to reach the same conclusion in respect of a contributory benefit. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention." ECtHR, *Stec and Others v. the United Kingdom [GC]* (dec.) (2005), paragraph 52.

[12] "A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for example, *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98, and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, *Reports* 1997-VII). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation' (ibid.)." ECtHR, *Stec and Others v. the United Kingdom [GC]* (2006), paragraph 52.

[13] See, for example, *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 39, ECHR 2004‑IX; *Domalewski v. Poland* (dec.), no. 34610/97, ECHR 1999‑V; *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000‑X.

differences in social security payments, unless they stem from manifestly discriminatory treatment[14]. In other words, **the Convention does not guarantee a particular social benefit or an amount of payment but it does regulate the manner of its implementation**[15]. This implementation should not be based on the so-called "suspect grounds of discrimination"[16] but it can and must take into account the "factual differences" calling for specific treatment[17]. On the other hand, the reduction or withdrawal of social payments will be always regarded as an interference into the right to a **peaceful possession**. It remains, then, to be seen whether this interference complies with the Convention requirements[18].

Overall, from the perspective of the ECtHR it is important how the member states implement their social policies and not what type of policies they have chosen. The states are in principle free to choose their social policies[19] providing that they do not manifestly discriminate or, otherwise, treat equally where the factual situation calls for special treatment. Once they have chosen to grant a particular social security benefit, the states must secure enforceability of this right in a **non-discriminatory manner**[20].

The enforceability of a social right is another question under the ECtHR case-law. Mostly, the ECtHR qualifies the welfare benefits as falling under the right to a peaceful possession, which

[14] "The applicants complain about inequalities in a welfare system, ... Court underlines that Article 1 of Protocol No. 1 does not include a right to acquire property. It places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see the admissibility decision in the present case, §§ 54-55, ECHR 2005-X)." ECtHR, *Stec et al.*, paragraph 53.

[15] "Although [Article 1 of] Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14." ECtHR, *Stec et al.*, paragraph 55.

[16] J. Gerards (2013), "The Discrimination Grounds of Article 14 of the European Convention on Human Rights", *Human Rights Law Review*, 13:1, pp. 99–124 at 114.

[17] ECtHR, *Andrejeva v. Latvia [GC]* (2012) paragraph 82. Thus, for example, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article (see ECtHR, *Stec et al.*, paragraph 51). In more general terms, the Court has held that the provisions of the Convention did not prevent Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals was treated differently from others, provided that the interference with the rights of the statutory category or group as a whole could be justified under the Convention, see ECtHR, *Ždanoka v. Latvia [GC]* (2006) paragraph 112.

[18] "Where the amount of a benefit is reduced or discontinued, this may constitute interference with possessions which requires to be justified", *Valkov and Others v. Bulgaria*, nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, § 84, 25 October 2011; and *Grudić v. Serbia*, no. 31925/08, § 72, 17 April 2012.

[19] *Sukhanov and Ilchenko v. Ukraine*, nos. 68385/10 and 71378/10, §§ 35-39, 26 June 2014; *Kolesnyk v. Ukraine* (dec.), no. 57116/10, §§ 83, 89 and 91, 3 June 2014; and *Fakas v. Ukraine (dec.)*, no. 4519/11, §§ 34, 37-43, 48, 3 June 2014.

[20] "In cases, such as the present one, concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question", ECtHR, *Stec et al.*, paragraph 55.

however is conditional upon the freedom of the state to grant or not to such a right[21]. The right to possession becomes applicable only if it is certain and has a clear legal basis in the domestic law[22]. In other words, a person has no legitimate expectations, within the meaning of the right to possession, to receive a pension or another social security payment unless the state wrote it down in the domestic law[23].

Another principle relevant for the purposes of the present paper concerns the **question of mandatory contributions** in view of receiving a social payment. In this sense, the ECtHR changed its approach in the case of *Stec et al.* (dec.) and broke the link between the mandatory contributions and the entitlement to receive social benefits[24]. Currently, the only criterion for applicability of the Convention in the social welfare cases is the question of whether a particular social entitlement has any legal basis in the domestic law. In other words, **the entitlement to receive a social benefit normally does not depend on the condition of mandatory contributions to the state budget or social insurance fund**. If the states chose themselves to write down a social right in the law the right to possession is deemed to arise[25]. The only condition

[21] "Article 1 of Protocol No. 1 … places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme … If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements." ECtHR, *Stec et al.*, para. 54.

[22] The Court has also held that all principles which applied generally in cases concerning Article 1 of Protocol No. 1 were equally relevant when it came to welfare benefits. See ECtHR, *Stec et al.*, para. 54.

[23] Article 1 of Protocol No. 1 does not guarantee as such any right to become the owner of property (see *Van der Mussele v. Belgium*, 23 November 1983, § 48, Series A no. 70; *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II; and *Kopecký v. Slovakia* [GC], no. 44912/98, § 35 (b), ECHR 2004-IX.

[24] "The Court's approach … should reflect the reality of the way in which welfare provision is currently organised within the member States of the Council of Europe. It is clear that within those States, and within most individual States, there exists a wide range of social security benefits designed to confer entitlements which arise as of right. Benefits are funded in a large variety of ways: some are paid for by contributions to a specific fund; some depend on a claimant's contribution record; many are paid for out of general taxation on the basis of a statutorily defined status … Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No. 1. … In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable. … If any distinction can still be said to exist in the case-law between contributory and non-contributory benefits for the purposes of the applicability of Article 1 of Protocol No. 1, there is no ground to justify the continued drawing of such a distinction." ECtHR, *Stec et al.* (dec.), p. 50 et seq.

[25] "Although there was no obligation on a State under Article 1 of Protocol No. 1 to create a welfare or pension scheme, if a State did decide to enact legislation providing for the payment as of right of a welfare benefit or pension – whether conditional or not on the prior payment of contributions – that legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements." ECtHR, *Carson and Others v. the United Kingdom [GC]* (2010), paragraph 64.

for benefitting from such a right is to fulfil the necessary statutory conditions[26], except those which are manifestly discriminatory[27].

It does not mean that the states are prohibited to change their social policies, to reduce payments or even to withdraw them[28]. The social payments can be changed – and this would constitute an interference into the possession right of the concerned person - providing that the change is justified by pressing general interest[29]. Yet, an interference by changing social policies should not be regarded as a violation by default; a number of factors should be taken into account to conclude that the reduction or revocation of social benefits would breach the Convention[30]. All these factors serve the proportionality test and they are always individual, i.e. applicable to particular circumstances and particular cases. They could not be generalised and regarded as mandatory for the state public policies, unless, again, the state itself chooses to make them legally binding general policies.

[26] ECtHR, *Bellet, Huertas and Vialatte v. France (dec.)* (1999), paragraph 5; ECtHR, *Rasmussen v. Poland* (2009) paragraph 71; ECtHR, *Richardson v. the United Kingdom (dec.)* (2012) paragraph 17.
[27] See ECtHR, *Andrejeva*.
[28] "The fact that a person has entered into and forms part of a State social-security system, albeit a compulsory one, does not necessarily mean that that system cannot be changed, either as to the conditions of eligibility of payment or as to the quantum of the benefit or pension." ECtHR, *Carson et al.*, paragraphs 85–89; ECtHR, *Richardson* (dec.), paragraph 17.
[29] *Kjartan Ásmundsson v. Iceland*, §§ 39-40; *Rasmussen v. Poland*, § 71; *Moskal v. Poland*, §§ 51 and 64; *Grudić*
v. Serbia, § 72; *Hoogendijk v. the Netherlands* (dec.); *Valkov and Others v. Bulgaria*, § 84; *Philippou*
v. Cyprus, § 59.
[30] Such as "the aim of the reduction; the fact that the authorities sought to limit any loses to the social security scheme; that the applicants continued to receive oldage pensions; that they were not discriminated against or at any disadvantage to pensioners under the ordinary scheme; that measures had not been retroactive in effect; and that the length of the applicants' service had been taken into account for the calculation of their statutory contribution periods." ECtHR, *Yavaş and Others v. Turkey* (2019) paragraphs 47–50.

THE SELECTED PRACTICE ON EXECUTION OF THE ECtHR JUDGMENTS IN THE SOCIAL SECURITY AREA

The ECtHR judgments should not be seen as *carte blanche* to either introduce or lift social security legislation at will only because a violation has been found in a given case. The states still benefit from a **wider margin of appreciation** and **freedom to choose means of execution** in this area. Still, the ECtHR judgments on social security rights are difficult to implement because of a large discretion and economic restraints. Thus, the state practices fluctuate and universal standards cannot be easily drawn from this variety of general measures.

Firstly, it cannot be clearly ascertained whether and to what extent the practices of the states in the social security area could be regarded as good examples to follow. Implementation of social rights is closely linked with **a particular domestic context, economic and political situation** in a given country and in a given **period of time**. A measure of social security can be quite successful in the short term but in the long run it may produce unexpected results and be the cause of systemic problems. On the other hand, a social benefit can be granted by a state without relatively much effort but it cannot be so easily withdrawn. Even if it pulls back the government funds and appears to be economically unsustainable, lifting social benefits will be always regarded as an unpopular measure among the governments. Accordingly, the assessment of a social measure is relative and should be dependent upon the context and the scope of such an evaluation. In other words, for the purposes of the present paper, the state practices will be regarded only within the limited scope of the execution of the ECtHR judgments, based on the impact a particular measure had on the implementation of judgements and whether it was successful in terms of the whole execution process.

Secondly, it should be noted that the CoE member states do not only benefit from **a large discretion in the social area** but they retain **a wide freedom to choose the means of implementation** of the ECtHR judgments. This double discretion makes the assessment of their practices even more difficult. Each social policy remains connected with the particular context and situation in a given country. Taking it outside of this context and applying this measure to another country would not necessarily produce the same results as in the country of origin. Thus, any experience from which the Ukrainian authorities might get inspiration should be adjusted to the particular domestic context and be thoroughly evaluated in advance of its implementation. It could not be blindly applied only because the execution of the *Burmych* group so required and, therefore, left without assessment of its consequences in the shorter and the longer terms.

The below examples were selected in connection with the execution proceedings of the ECtHR judgments. Moreover, these are the execution measures of a general character only. Many CoE member states have encountered a number of social issues and lost cases before the ECtHR. Still, their cases have been isolated and implied no general measures. On the contrary, some other cases that the CM qualifies as raising **complex, structural and systemic problems will always require general measures such as changing legislation** or developing new social policies. Accordingly, when assessing the state practices in the field of social security, only the former category of cases was taken into account. Isolated violations of social claims even if they resulted in the amendments of social legislation were disregarded because they rather imply measures of individual settlement.

Thus, only an ECtHR judgment raising structural issues may lead to the need for changing social legislation. Yet it rarely indicates, or almost never suggests the need to introduce social benefits as practised in other states; here the states retain a large margin of appreciation in the social

security area. At the same time, a judgment may imply the measure of lifting social benefits if their implementation is problematic or burdensome for the state budget and economy. Indeed, the provisions granting social rights and extra-benefits evolve in time into genuine propriety entitlements (for example, compensations for war damages, restitution of proprieties, temporary housing for IDPs and migrants, etc.) thereby exhausting budgetary resources and becoming economically unfeasible; there could be a public interest to draw them back. However, the last option remains fully discretionary and neither the ECtHR nor the CM would dare to suggest such a measure of execution. It is up to the concerned state to decide whether to lift or keep a social security benefit, yet its choice is subjected to the scrutiny within the context of the execution of a particular judgment of the ECtHR.

The States, however, should **pay due regard to the legal certainty principle**, when they change legislation, no matter how extraordinary the circumstance, including following implementation of the ECtHR judgment. In general, for the sake of legal certainty, a change in legislation cannot make futile a litigious claim, i.e. when the case is pending before the courts[31]. However, the amendments of legislation can be accepted after a judicial decision became final providing that they would not make impractical the process of execution itself[32]. Such changes in legislation should not be applied retroactively to a final judicial decision[33]. A final and enforceable court decision is not an absolute guarantee that the legislation on which it was issued would not change in the future. If there is a general interest at stake, such as the amendment of social policies in view of the new economic situation, the legislation can be reviewed despite the current execution claims. However, the authorities must be diligent while operating the changes in the social legislation as they cannot reason on the lack of funds or austerity of the state budget and, thus, make the execution with no avail[34].

Accordingly, to summarise the practices of the CoE member states in the social security area, there could be two ways to implement the ECtHR judgments. The **first way is positive,** usually resulting in the enactment of new legislation filling the gap in the social security area. It could be also an amendment of the old legislation developing a particular social benefit which lacked proper implementation compatible with the Convention. At any rate, in this way, the state always chooses to keep the social benefit, which is not the case with the second execution avenue. The **second way is negative** when the states prefer to abolish the social benefit or to reduce its excessive amount. Mostly these situations cover the cases when the social legislation is at the root cause of the systemic problem or structural deficiencies (e.g. the legislation on the restitution of confiscated proprieties or excessive social housing policies). Still, even in these situations, not all the states have chosen to lift in full all social benefits.

Other ways of dealing with social security rights cannot be properly classified and will be illustrated by miscellaneous examples.

1. Keeping or updating social security benefits

In this sense, the following examples could be relevant for the present paper.

[31] e.g. *Zielinski et Pradal et Gonzalez et autres c. France* or *Topal v. the Republic of Moldova*
[32] e.g. *Stran Greek Refineries and Stratis Andreadis v. Greece*
[33] e.g. *Arras and others v. Italy*
[34] e.g. *Sukhobokov v. Russia*

Keeping the contested social legislation unchanged yet settling individual claims

The case of *Kjartan Ásmundsson v. Iceland*[35] concerns a temporary lapse in payments of disability pensions due to the changes of legislation. The Icelandic authorities changed the method of evaluation so that the disability was no longer assessed in relation to the ability to perform the same work as the applicant performed when he became disabled, but rather to the ability to work in general. Accordingly, the applicant's disability pension lapsed for a short period of time because he was unable to receive the pension until its re-evaluation according to the new criteria. It became payable later and the applicant did not complain about the reduction of the pension. Other 53 people found themselves in the same situation as the applicant.

The Icelandic authorities preferred to keep the legislation unchanged and rather deal with all consequences on an individual basis. The people affected by new changes were advised to apply for compensation that had to be calculated in the same way as the ECtHR did in its judgment under Article 41 of the Convention. There has been no fallback from the amended legislation and the supervision of the case by the CM was closed.

Temporary payments on an extra-statutory basis until the changes in legislation

The *Cornwell and Leary group of cases v. the United Kingdom*[36] illustrates these practices. All cases depicted discriminatory treatment in paying some social benefits to widowers. At the relevant time, according to the UK statutory provisions, the widows' benefits were allowed only to widows and not widowers. The UK authorities acknowledged the problem and preferred to settle the cases pending the ECtHR proceedings and the CM's supervision. More than 56 repetitive cases were decided on that basis and the friendly settlements were concluded based on the model provided by the ECtHR. Until the entry into force of the new legislation granting equal treatment to widowers, the applicants received the amounts they would have received if they had been widows. The only condition was imposed by the UK authorities, that is to have a judgment of the ECtHR as enforceable title. In this sense, the UK retained the legislation until amendment and without creating legal uncertainty.

Allocation of budgetary funds to enforce social policies

Among many cases, the *Zahirović v. Bosnia and Herzegovina*[37] judgment better reflects this practice. It concerned the delayed enforcement of the applicant's work-related benefits by public companies due to the lack of budgetary funds. The government allotted sufficient budgetary funds to secure the payment of its debts arising from final court decisions. The case was resolved with no substantive adjustments to the legislation.

Improvement of social housing programs without a substantive annulment of social housing benefits

The biggest group of cases concerning non-enforcement of judicial decisions granting social housing showed that some states could not easily abandon their social policies even if these had proven to be problematic. The group of cases *Shpakovskiy v. Russia*[38] refers to non-enforcement

[35] *KJARTAN ASMUNDSSON v. Iceland*, no. 60669/00, judgment of 12 October 2004, final on 30 March 2005, Final Resolution CM/ResDH(2011)223

[36] *CORNWELL v. the United Kingdom*, no. 36578/97, judgment of 25 April 2000, final on 25 July 2000, Final Resolution DH (2002) 95 and *LEARY v. the United Kingdom*, no. 38890/97, judgment of 25 April 2000, final on 25 July 2000, Final Resolution DH (2002) 96

[37] *ZAHIROVIC v. Bosnia and Herzegovina*, no. 4954/15, judgment of 16 October 2018, final on 16 October 2018, Final Resolution CM/ResDH(2019)293

[38] *SHPAKOVSKIY v. Russia*, no. 41307/02, judgment of 7 July 2005, final on 7 October 2005, Final Resolution CM/ResDH(2020)37

of domestic judicial decisions ordering authorities to provide the applicants with flats to which they were entitled as former military servicemen. It took almost 10 years for the Russian authorities to develop and start the implementation of proper housing programs for former military personnel and to perform an inventory check of existing housing facilities. As a result, the number of unenforced judicial decisions in favour of granting housing to military personnel dropped by over 75%. Similarly, the group of cases *Kuksa*[39] followed the same pattern of execution measures. It referred to the state-funded housing rights of acting or retired judges, former participants in the Chernobyl cleaning-up operations and other categories of persons entitled by law. Measures to implement new housing programmes resulted in the final resolution of the CM to close supervision.[40]

Updating judicial practice rather than changing social legislation

In rare instances, if the substance of the problem of non-enforcement lies in the domestic judicial practice, an amendment of legislation would not solve the problem. The *Panorama Ltd and Miličić v. Bosnia and Herzegovina*[41] group of cases illustrate this type of measures. The cases from this group also concerned non-enforcement of final domestic decisions ordering payment of default interests for war damages. In the specific domestic context of Bosnia and Herzegovina, the problem mostly resulted from the courts' practice to refuse execution and to grant payments of the default interests. The Constitutional court found this practice unconstitutional and these types of unenforced decisions were made part of the public federal debt, thus paid by the Federation, rather than by the entities and cantons.

Harmonisation of legislation and unifying social security schemes

The *Karanović v. Bosnia and Herzegovina*[42] group of cases has arisen from a larger context of post-war policies in Bosnia and Herzegovina and evolved into one of its largest systemic problems. It affected a whole class of pensioners living either in the Federation or being internally displaced in the Republika Srpska during the armed conflict. Initially, the Federation did not adopt any coherent legislation on validation and portability of pensions and social security rights. Consequently, the grieved persons had to apply to the human right courts and were left with unenforced judicial decisions for lengthy periods because the administrative authorities refused to implement these decisions in lack of proper domestic legislation granting portability or validity of pensions between the Entity (Republika Srpska) and the Federation.

In other cases, a variety of other grounds for refusing payments and execution of judicial orders were invoked by the administrative authorities. For example, in the case of *Šekerović and Pašalić,*[43] the state failed to comply with domestic court orders requiring the applicants' pension entitlements to be transferred from Republika Srpska, where they had been internally displaced during the war, to the Federation of Bosnia and Herzegovina.

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[39] *KUKSA v. Russia*, no. 35259/04, judgment of 15 June 2006, final on 15 September 2006, Final Resolution CM/ResDH(2019)329

[40] Resolution CM/ResDH(2019)329 *Execution of the judgments of the European Court of Human Rights 33 cases against Russian Federation* (Adopted by the Committee of Ministers on 5 December 2019 at the 1362nd meeting of the Ministers' Deputies)

[41] *PANORAMA LTD v. Bosnia and Herzegovina*, no. 69997/10, judgment of 25 July 2017, final on 25 October 2017, Final Resolution CM/ResDH(2019)172

[42] *KARANOVIC v. Bosnia and Herzegovina*, no. 39462/03, judgment of 20 November 2007, final on 20 February 2008, Final Resolution CM/ResDH(2012)148.

[43] *Šekerović and Pašalić v. Bosnia and Herzegovina* (2011).

The problems in the present group of cases were rooted in the fact that pensions were generally lower in Republika Srpska than in the Federation of Bosnia and Herzegovina. This fact incited many requests before the administrative authorities to draw pensions from the Federal Fund, which were unsuccessful. People, however, received favourable judicial decisions recognising the discriminatory treatment in the enjoyment of their social security rights. Despite of the courts' orders to take appropriate legislative and administrative steps to end such discrimination and pay the differences of pensions, the situation did not change until the ECtHR pilot judgments.

The ECtHR directly instructed the respondent state to amend the relevant legislation in order to put all persons in a similar position and to become eligible to apply for the Federation pensions. That order did not, however, apply to those who had not returned to the Federation after the war, although those who were granted Federation pensions after their return from the Republika Srpska were to keep their pension entitlements even if they moved abroad in the afterwards. As a result, the Federation introduced the legislation to validate pensions and instituted such a social security scheme that would remedy the defects in the pension system. It made all IDPs returning to Bosnia and Herzegovina eligible for the Federation pension. All issues were solved by passing validation laws and equating the social security rights of the federative entities.[44]

2. Lifting or Reducing Social security benefits

The *Velikoda* decision[45] remains the leading authority for the Ukrainian authorities to deal with the root causes of the *Burmych* execution. It allowed to reduce the scale of the problem and showed one of the ways to resolve the Ivanov-type cases[46]. Moreover, the measures described in the decision alleviated the impact on the already overburdened Ukrainian state social budget. In brief, the case is about complaints against certain amendments to social legislation that had drastically reduced the amounts to be paid to the applicant following a final decision issued in her favour. The legislation has neither invalidated nor set aside the original judicial decision; it just reviewed the calculation of the social benefits. Still, the legislative changes have to be proportional and balanced with individual interests[47].

For obvious reasons, the present paper will not analyse in detail this decision and its impact on the execution of the *Burmych* judgment. Its purpose is to reflect on the practices of other countries for the benefit of the Ukrainian process of execution. Still, the *Velikoda* decision should be mentioned because it unveils all the above-described principles relevant for resolving the issues

[44] Committee of Ministers, *KARANOVIC* CM/ResDH(2012)148; Committee of Ministers, *SEKEROVIC v. Bosnia and Herzegovina*, no. 5920/04, judgment of 8 March 2011, final on 15 September 2011, Final Resolution CM/ResDH(2012)148; Committee of Ministers, Resolution CM/ResDH(2012)148, 2 cases against Bosnia and Herzegovina, Execution of the judgments of the European Court of Human Rights.
[45] ECtHR, *Velikoda v. Ukraine* (dec.) (2014).
[46] ECtHR, *Burmych and Others v. Ukraine [GC]* (2017) paragraphs 33–35.
[47] ECtHR, *Velikoda* (dec.), paragraphs 25–26 ("Article 1 of Protocol No. 1. does not guarantee, as such, the right to any social benefit in a particular amount. ... A “claim” can constitute a “possession” within the meaning of Article 1 of Protocol No. 1 only if it is sufficiently established to be enforceable. ... The Court recalls that the first and most important requirement of that provision is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful and that it should pursue a legitimate aim “in the public interest”. ... A “fair balance” must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden.")

in the social security area. Should the Ukrainian authorities choose to lift or reduce social benefits again they definitely should follow the same pattern as in the case of *Velikoda*.

Withdrawing social privileges and housing rights

The group of cases *Olaru v. Moldova*[48] represents the most relevant example in the context of the *Burmych* execution. It called for a review of social legislation that was at the root of the systemic problem in Moldova. To recall, the cases concerned the non-enforcement of housing rights granted to certain categories of persons: civil servants, high public officials, judges, prosecutors, police officers, IDPs, etc. The housing legislation at the relevant time in Moldova was old and soviet-made, in force since 1983. It had been briefly adjusted to the transitional period of the Moldova's independence and later it became impractical in the context of the meagre Moldovan economy. It granted housing and other social rights for free but without budgetary coverage on part of the central government. Eventually, these free housing rights, being granted by the central government, became enforceable with great difficulty by the local administration. As a result, the right-holders were compelled to initiate judicial proceedings against both the central government and local authorities. The judicial decisions granted relief but stood unenforced for long. With many repetitive cases, it became a pattern and along with other social problems, this housing became the cause of the systemic problem of non-enforcement of judicial decisions.

After acknowledging the problem, the Moldovan authorities identified that the problem of non-enforcement lied, inter alia, in the socially-oriented legislation granting housing rights without real perspectives of its implementation in practice. The housing legislation was reviewed and the housing rights were lifted in 2010. The ministries started implementing their own mortgage programs to secure housing rights for their employees and public officials. Later, the housing rights were reinforced by the new housing code adopted in 2015. It, however, changed the status of social/service housing allowing no privatisation and no acquiring of the ownership.

Review of the framework trade union agreements and social legislation reducing excessive salary rights

The case of *Kunić and others v. Bosnia and Herzegovina* (pending)[49] concerns non-enforcement of the domestic judgments ordering four cantons of the Federation of Bosnia and Herzegovina to pay work-related benefits to public service employees. The problem originated from the trade union agreements concluded at the level of the Federation of Bosnia and Herzegovina in the early 2000s. These agreements were not implemented as the employment benefits were disproportionate and had no real guarantees. In fact, the excessive remuneration terms created significant financial problems after the cantons had acquired full responsibility for them. The Federation did not offer the promised budgetary support. The problem has augmented when a bulk of domestic judgments recognising the payment benefits remained unenforced along with the failure to pay both the salaries and the interests. As a matter of execution, these trade agreements have been amended to abolish unrealistic remuneration terms. Those amendments should prevent the recurrence of similar violations in the future. Yet, the historic debts remain to be paid.

[48] *OLARU v. the Republic of Moldova*, no. 476/07, judgment of 28 July 2009, final on 28 October 2009, latest decision: CM/Del/Dec(2012)1136/15

[49] *KUNIC AND OTHERS v. Bosnia and Herzegovina*, no. 68955/12, judgment of 14 November 2017, final on 14 February 2018, latest decision CM/Del/Dec(2020)1377/H46-6

Lifting immunities or moratoria to public assets taken in conjunction with the use of special remedy mechanisms

This approach was taken by the Turkish authorities in the case of *Kiliç v. Turkey* (pending)[50]. It recognised the failure of administrative bodies to enforce judicial decisions awarding the applicants compensation and other pecuniary awards. The root causes of the violations were due to the inactivity of the administrative authorities in seeking sufficient funds in the state budget and the immunity of municipal property from enforcement proceedings.

The authorities addressed the problem by enacting special remedies (the "Law on the Settlement of Applications Lodged with the Convention" (2013)) and granting special jurisdiction to the Human Rights Compensation Commission to deal with the lengthy non-enforcement proceedings. To remedy the cases of insufficient funds, the Law of Municipality was changed, allowing the confiscation of municipal assets to cover the debts. This measure would compel municipal authorities to administrate properly their funds and to seek their supply from the state budget.

3. Specific measures related to execution

Improvement of the IT databases and the system of evidence in execution proceedings

The *Boucke v. Montenegro*[51] judgment pertains to the failure to enforce a final domestic judgment ordering payment of child maintenance. As a matter of its execution, the Montenegrin authorities introduced a new Enforcement system with public enforcement officers, abandoning the former model of judicial enforcement[52]. Along with these overall changes, the authorities reported that they put in place a dedicated IT system in respect of the enforcement cases allowing public enforcement officers the access to the databases of the government authorities to carry out their enforcement proceedings.

In the *Khachatryan v. Armenia*[53]*,* the violation has been found in connection with the non-payment of a salary by a company whose majority shareholder was the state. One of the causes of the violation was the excessive formalities and delays by the courts in rendering enforcement writs and sending them to the bailiffs. Armenia reported that they connected judicial databases with the database of the bailiffs via a unified electronic governance system. The public bailiffs henceforth have automatic access to the copies of judgments entered into force. Therefore, the execution is expedited and simplified, since there will be no need for further formalities to get a writ of execution and lodge it with the Compulsory Enforcement Service for the execution to commence.

Determining priorities in the execution of social entitlements and debts of public entities

In this sense, the *Luntre v. Moldova*[54] group of cases is relevant. It was a complex group involving a variety of non-enforcement claims, from compensations of depreciated bank savings to payments of social benefits or state debts. Among many general measures, one aspect was crucial to move the execution forward. It was the introduction of legislative amendments to

[50] *KILIC v. Turkey*, no. 38473/02, judgment of 25 July 2006, final on 25 October 2006, latest decision: see Status of Execution

[51] *BOUCKE v. Montenegro*, no. 26945/06, judgment of 21 February 2012, final on 21 May 2012, Final Resolution CM/ResDH(2016)165

[52] *MIJANOVIC v. Montenegro*, no. 19580/06, judgment of 17 September 2013, final on 17 December 2013, Final Resolution CM/ResDH(2016)201

[53] *KHACHATRYAN v. Armenia*, no. 31761/04, judgment of 01 December 2009, final on 1 March 2010, Final Resolution CM/ResDH(2015)37

[54] *LUNTRE v. the Republic of Moldova*, no. 2916/02, judgment of 15 June 2004, final on 15 September 2004, Final Resolution CM/ResDH(2018)226

guarantee that court decisions against the state would be executed voluntarily in no less than 6 months, otherwise, a bailiff would retain the right to seize the state property to guarantee the execution. This means that bailiffs can now put injunctions to the budgetary funds, such as freezing or seizing goods of state institutions and authorities (except those part of the public domain). In addition, the law on the budgetary system was amended to grant priority to the execution of judicial decisions irrespective of whether or not specific allocations had been made in the state budget for that purpose[55].

Privatisation of socially-indebted companies

The *Kačapor* group[56] concerns, *inter alia*, the failure or delay to enforce final decisions ordering socially-owned companies to pay debts for salary arrears. These companies used to be dominant in the socialist economy and now they are gradually being privatised. The problem of the non-enforcement of court decisions concerning these companies is thus of a historic nature. The authorities initially envisaged setting up a repayment scheme for the settlement of all unenforced decisions, but subsequently, they abandoned this idea and opted to ensure enforcement through the system of effective domestic remedies.

Review of the domestic mechanisms to give factual recognition to judicial orders issued by unrecognised entities

The case of *Grudić v. Serbia*[57] is the most representative in this context. Serbia was found in breach of its international human rights obligations because of the refusal to acknowledge the legitimacy of the official acts issued by Kosovo, a breakaway entity that Serbia does not recognise as a state. In practical terms, the Serbian social security authorities since the 2000s had discretionary stopped paying pensions to the persons beneficiaries of the so-called "Kosovo pensions" on the grounds that Kosovo had been under international administration since then.

Despite the Serbian courts' decisions ordering to continue payment of pensions, the Serbian authorities suspended the proceedings for the resumption of payment until Serbia and the international administration in Kosovo would reach an agreement on the ways of co-operation and transference of social security payments. As Serbia actually broke any official relations with the administration of Kosovo, it was unclear how long the suspension would last. More than ten thousand persons found themselves in the uncertainty of payments. It was only in 2013 when the authorities introduced a mechanism to ensure payment of the pensions and arrears, basing on individual assessment of the documentation, evidence and validation of the applications brought by the persons originating from Kosovo. These proceedings were done on an individual basis; no framework legislation was adopted. The decisions of administrative authorities were subject to appeal before the administrative courts. In fact, the Serbian social security fund gradually resumed payments in most of the cases and followed the decisions of the administrative courts. The mechanism was acknowledged as effective[58], yet Serbia still *de jure* refuses the recognition of Kosovo's legitimacy.

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[55] Committee of Ministers, DECISION 1318th meeting (June 2018) (DH) - H46-14, *Luntre and Others group v. Republic of Moldova* (Application No. 2916/02); NOTES 1318th meeting (June 2018) (DH) - H46-14 *Luntre and Others group v. Republic of Moldova* (Application No. 2916/02)

[56] *R. KACAPOR v. Serbia*, no. 2269/06, judgment of 15 Janyary 2008, final on 7 July 2008, latest decision CM/Del/Dec(2020)1377/H46-35

[57] *GRUDIĆ v. Serbia,* no. 31925/08, judgment 17 April 2012, final on 24 September 2012, Final Resolution CM/ResDH(2017)427

[58] Committee of Ministers, Notes 1302nd meeting (December 2017) (DH) - H46-27, *Grudić v. Serbia* (Application No. 31925/08); Committee of Ministers, *GRUDIĆ* CM/ResDH(2017)427

Improvement of domestic remedies

Yet this is the last example of the specific actions aiming at securing execution. The case of *Angelov v. Bulgaria*[59] concerns the impossibility to obtain enforcement of state debts. The Bulgarian authorities reported that administrative courts have modified the domestic case law since 2012. The courts started to decide on the merits of the complaints about delayed enforcement of the state debts. However, these questions mostly reflect the improvement of domestic remedies rather than erasing the roots of the non-enforcement problem.

[59] *ANGELOV v. Bulgaria*, no. 44076/98, judgment of 22 April 2004, final on 22 July 2004, Final Resolution CM/ResDH(2018)196

CONCLUSIONS AND RECOMMENDATIONS

When the authorities consider implementing new social security policies, they should undertake a thorough expertise to assess their compliance with the requirements of both the Charter and the Convention. These treaties do not guarantee the right to a particular type of social benefit or to an amount of payment as they only impose minimum requirements, mostly concerning the manner of the implementation of social security rights. Thus, the member states of the CoE retain much **wider discretion** on how to develop their social policies and what amounts of benefits they decide to grant. However, irrespective of this freedom of choices, the State social policies should be implemented without discrimination or, otherwise, undue disregard of the interests of the minority groups requiring affirmative action to bridge inequalities and to promote diversity.

Moreover, the amendments of social legislation and improvements to social security systems are allowed providing that they pursue the general public interest and proportional to the pursued scopes. In other terms, the pensions, salaries, wages, or other social benefits, in order to be enforceable must be regulated by law, and only then they might raise legitimate expectations of enforceability. They are, however, not untouchable. The **payments already in the place are not absolute** and they could be decreased or withdrawn in view of new circumstances. Such measures must have a clear legal basis, i.e. be provided by law, and be justified by pressing general interest, i.e. an economic interest or country development, including justice sector interests or law-enforcement.

In the latter sense, the interest to resolve the systemic problem of non-enforcement in Ukraine in the context of the execution of the *Burmych* group of cases could be regarded as a valid justification to change the Ukrainian social policies. It is definitely in the general interest of Ukraine **to improve its judicial system** by raising up the credibility through appropriate enforcement of the courts' decisions. Moreover, it is a pressing social need to improve the accountability of the Ukrainian authorities and to exclude their virtual immunity from enforcement debts.

The analysis of practices of certain CoE member states revealed that they retained a large margin of appreciation concerning their social policies. They, however, were under the international obligation to execute judgments of the ECtHR and **to resolve serious structural deficiencies in their legal systems.** The experience of these countries shows that there are many ways to deal with the social legislation that lies at the heart of a systemic problem.

The social legislation, uncovered financially and opportunistic in character, could be repealed or changed to fit the above-mentioned general interests. Neither the Convention nor the Charter prohibits such a measure providing that it is non-discriminatory and pursues the declared scopes. On the contrary, in some cases, the review of the social security system from the scratch is required by implication (e.g. Bosnia and Herzegovina). In other cases, when the problem could be confined by other means, the states have chosen to keep the legislation in place and provide remedies instead (e.g. Island, Serbia) even as a temporary solution until the changes in legislation (e.g. the United Kingdom). Some states chose to keep the benefits in full but to rebuild their administrative mechanisms for enforcement that required serious financial investments and budgetary funding (e.g. Russia). At last, some countries chose to reappeal all social benefits to stop the non-enforcement from raising and thus to confine the problem (e.g. Moldova).

Now it remains for the Ukrainian authorities to choose one of these policies or a mixture of them. It did so in the *Velikoda* case that proved to be a successful experience. The social benefits were amended by the legislation decreasing the amount of payments but not their very existence. These measures resemble the policies implemented in the *Ásmundsson* case, where the authorities changed the way of calculation of the pension resulting in a decrease of payments.

Still, the right pension itself was left untouched, but for a short period of time while the authorities implemented the new system of calculation. In the *Velikoda*, the very core of the right to receive pension was not affected, even if the new legislation changed the way of calculation established previously by the Ukrainian courts. Moreover, the calculation operated for the future payments and, accordingly, the interference was considered proportional as the State is entitled to change its social security policies on the basis of the general interests and pressing need. However, any change of legislation, including the social one, should pay due regard to the principle of legal certainty, as explained above.

Turning to the scope of the present analysis, the whole conclusion applicable to the execution of the *Burmych* case appears to be clear. Given the scales of the systemic problem of non-enforcement and the greatest number of social security judicial decisions to be executed, **the better way for the Ukrainian authorities is to isolate the problem and prevent it from recurring** (e.g. the tactic taken by the Moldovan authorities in its *Olaru and others* pilot-judgment execution when they abolished for a while the housing rights). It means that all social benefits causing continuous flaws of litigations and non-enforced decisions should be repealed in full. It will be an unpopular policy that will be met by the strongest social and political resistance. Still, the interest of confining the systemic non-enforcement and strengthening the Ukrainian judicial sector merits the effort.

In any case, such a measure could be seen as temporary, i.e. while the Ukrainian authorities review the whole social security system. Indeed, the experience of the above-mentioned states showed that **repealing social legislation is usually a short time measure until the adoption of new updated and modern legislation**. For example, in Moldova, after repealing the old Soviet-type housing legislation, the authorities adopted a new modern housing code abolishing the right to acquire for free the propriety of the state-owned flats.

The same approach could be taken by the Ukrainian authorities. Some of the redundant and financially uncovered benefits could be repealed in full rather than upgraded or adjusted to new methods of calculations. **A new calculation of the social benefits would not solve the situation, as they nevertheless would not be applicable to the already passed judicial decisions**. While it is true that the calculations would be applicable to some judicial decisions (by the *Velikoda* model), they will affect only future calculations and would not erase the historic debts. Moreover, there always will be a temptation to apply new legislation in the retrospective, thus in breach of the legal certainty principle. None of the above-mentioned countries applied such amendments to past judicial decisions.

In addition, the changes of the social legislation should not be viewed as the only panacea from the problem of systemic non-enforcement. Along with the amendments to legislation, some other measures could be relevant. To sustain the reform of the non-execution system and in particular the erasure of the root-causes of the systemic problem, the Ukrainian authorities might envisage **measures in other collateral fields to the social security area.** For example, the **improvement of the data collection systems** and merging a variety of digital or paper-based registries into one comprehensive system of evidence of all social benefits. Such a database might include a special tab designed to record judicial decisions in respect of social benefits payable to a person, that could be linked electronically with the Unified Register of Enforcement Titles or the Bailiff database (e.g. Armenia, Montenegro).

Moreover, the system of enforcement will be inefficient if the State authorities and their owned enterprises cannot be in principle compelled to execute on account of their **immunity**. The state budget should be protected but not from the judicial orders of the State itself. Moreover, a system of administrative court review on the spending budgetary funds for enforcement purposes could be put in place, either by the Court of Accounts or administrative tribunals (e.g. Turkey, when the

central government was lifted of its immunity from the disputes with the local authorities that were incapable to seek funds for execution of judicial titles). This latter solution is discretionary but in the case of the Ukrainian long-lasting problem of non-enforcement and widespread moratoria, it might be considered as an option to strengthen the State authorities' accountability by the "check and balances" principle.

Summarising the analysis and its conclusions the following recommendations can be proposed to erase the root-causes of the systemic non-enforcement in the context of the *Burmych* execution:

1. The Ukrainian authorities should undertake **a comprehensive compatibility analysis** of all social benefits causing non-enforcement or delayed payments.

   Indeed, such a preliminary overview was made already by national experts during the expert discussions organised by the Project. It remains to be officialised and drafted as an amendment law.

2. These social benefits should be **classified by feasibility and priority**, regardless of the law and the category of the persons whom they concerned.

   The primary criterion for such a classification would be the possibility to secure payments by the State budget.

3. **Unfeasible social benefits** that are hardly justifiable from economic and financial perspective **should be lifted without delay.**

   Other benefits that are necessary to guarantee the core social security rights (e.g. pensions, wages, etc.) should be rationalised in view of the availability of the budgetary funds and the austerity of the current economic situation. This means that they can be recalculated and reduced but only for the future.

4. The lifting of unfeasible social benefits **should not be discriminatory**.

   This means that the measure to lift benefits cannot be selective or implemented randomly on the basis of one privileged category of persons against another (for example, public servants and high-ranking officials tend to keep their privileged social benefits intact)

5. The laws abolishing social benefits should **undergo thorough expertise** so as they would not interfere with the **legal certainty principle** and would **not be applied retroactively**.

   The authorities might get inspiration from good practices in drafting social legislation from the countries that changed their old-established and populistic social benefits or undertook systemic reforms in the social security.

6. New system of social security could be conceived in **parallel to general social reforms**.

   This initiative would alleviate the social and political resistance to the abolishment of social benefits.

7. The changes in legislation and lifting redundant social benefits shall be **motivated primarily by the interest to confine the systemic non-enforcement,** that is to avoid new Burmych type-judgments.

   It is necessary to pay historical debts and to reform enforcement and social security systems, along with building confidence in the judiciary. This motivation would burst the political will and justify the drastic measures of lifting social benefits for the sake of general public interest.