

Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments

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Abstract

Judicial impact is often limited by courts' reliance on other actors to implement judgments. An important question is whether and, if so, how courts can promote timely compliance. I consider recent attempts by the European Court of Human Rights (ECtHR) to promote timely compliance by indicating appropriate remedies in its rulings. Remedial indications may facilitate more effective implementation monitoring and enable pro-compliance actors to argue more forcefully that specific remedies are necessary. Using an original dataset of ECtHR judgments and their implementation by respondent states, I offer a novel empirical assessment of how judges' remedial strategy influences compliance. I show that judgments with remedial indications are implemented at a quicker rate than comparable judgments

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without such indications. Remedial indications are particularly helpful when the institutional context enables pro-compliance actors to hold governments accountable. These results highlight the role judges can play in facilitating prompt compliance with their rulings.

Introduction

Judicial power is often limited by courts' reliance on other actors to implement their rulings (Vanberg 2001; 2005, Carrubba, Gabel and Hankla 2008, Rosenberg 2008, Kapiszewski and Taylor 2013, Hall 2014, Carrubba and Gabel 2015, Johns 2015). To promote compliance, courts therefore employ strategies aimed at legitimizing their judgments (Hume 2006, Lupu and Voeten 2012, Larsson et al. 2017), at raising public awareness (Staton 2006, Krehbiel 2016), and at enabling pro-compliance constituencies to monitor implementation (Gauri, Staton and Cullell 2015, Staton and Romero forthcoming). However, few scholars have evaluated whether such strategies are effective (Keck and Strother 2016:3, but see Gauri, Staton and Cullell 2015 and Staton and Romero forthcoming). Thus, we know that courts act strategically to promote compliance, but we do not yet know the conditions under which such strategies may succeed.

I investigate judges' ability to promote compliance in the context of the European Court of Human Rights (ECtHR). Despite being considered "the most effective human rights regime in the world" (Stone Sweet and Keller 2008), the ECtHR faces significant compliance problems (Hillebrecht 2014*a;b*). While the ECtHR traditionally leaves the identification of remedies to respondent states, its compliance problems have motivated the Court to start spelling out necessary remedies in selected judgments (Keller and Marti

2015:836).¹ Such remedial indications may enable pro-compliance actors to argue more forcefully that specific remedies are necessary and to credibly call out non-compliance (Spriggs 1996:1127, Staton and Vanberg 2008).

To investigate the efficacy of the ECtHR’s new remedial approach, I employ an original dataset of ECtHR judgments and their implementation by respondent states. The dataset includes information both concerning required remedies and other judgment characteristics and concerning the length and outcome of the compliance process.² Using these data, I consider how remedial indications affect compliance by respondent states.

After conditioning on the factors that influence the ECtHR’s decision to indicate remedies, I find that judgments containing remedial indications are implemented quicker than comparable judgments without such indications. Remedial indications are particularly helpful when the institutional context enables pro-compliance actors to hold governments accountable. These findings suggest that courts can succeed in promoting quicker compliance with their judgments. Importantly, spelling out necessary remedies is a strategy that is available to a variety of courts and other actors that delegate implementation tasks.

Remedial Design and the Politics of Compliance

By flouting compliance, public authorities can undermine the impact of judicial decisions rendered against them. Also in political systems where outright defiance is relatively rare, actors responsible for implementation can often “resist and delay” compliance with judgments they dislike (Staton 2004:42, Kapiszewski and Taylor 2013, see also Gauri,

¹The Online Appendix provides further details concerning the ECtHR, its compliance problem, and the shift in remedial approach.

²More information about the dataset is available in the Online Appendix.

Staton and Cullell 2015). Although political changes or mounting public pressure may eventually lead to compliance, the resulting delays prolong the denial of justice for affected individuals and can undermine the importance of courts as vehicles for social change (Rosenberg 2008).

Vagueness concerning what a judgment requires may contribute to the lack of timely compliance (Kapiszewski and Taylor 2013:815, Staton and Vanberg 2008, Staton and Romero forthcoming). For instance, the Supreme Court of the United States held in its 1955 *Brown v. Board of Education II* ruling that school districts were to be desegregated “with all deliberate speed.” Scholars have argued that the lack of more specific directions contributed to prolonged defiance of the ruling by recalcitrant local authorities (e.g. Rosenberg 2008).

By indicating remedies, courts can make it easier to hold responsible authorities accountable for delays or outright defiance (Staton and Vanberg 2008, Staton and Romero forthcoming). Diffuse support for the judiciary (Gibson, Caldeira and Baird 1998) or public support for specific decisions (Hall 2011) often make it costly for political actors to openly defy judgments. Such costs presupposes, however, not only that the relevant audiences are able to punish defiance, but also that they can detect recalcitrant behavior (Vanberg 2005). Compliance monitoring by the media and civil society is therefore considered important for timely compliance (Cavallaro and Brewer 2008, Krehbiel 2019). By clarifying what compliance should entail, remedial indications facilitate such compliance monitoring and enable credibly calling out attempts of evading the ruling.

Remedial indications can also provide “political cover” (Allee and Huth 2006) for actors required to implement unpopular remedies and may help prevent disagreement within a responding government concerning how to implement the judgment (Baum 1976:94,

Spriggs 1996:1124). These different mechanisms may operate either in combination or individually in different cases. In any event, remedial indications can be expected to promote timely compliance:

Hypothesis 1 *Judgments containing remedial indications are complied with at a quicker rate than comparable judgments without remedial indications*

The effectiveness of remedial indications are likely to depend on the costs of ignoring them. As argued by Staton (2010:198), the costs of openly defying judicial decisions will be greater when a critical media, an active civil society, independent national courts, and free elections enable the public to hold governments accountable. If such institutions are relatively weak, it becomes less likely that remedial indications are used to effectively hold public authorities accountable:

Hypothesis 2 *The relationship between remedial indications and quicker compliance is stronger where domestic institutions enable holding governments accountable.*

There are also disadvantages associated with remedial indications. Perhaps most importantly, responding authorities are often better situated than judges to identify appropriate remedies (Staton and Vanberg 2008, Staton and Romero forthcoming). If responding authorities act in good faith, it may therefore be beneficial to grant them some leeway over how judgments are implemented. Moreover, if remedial indications are unsuccessful in facilitating prompt compliance, the increased visibility of the compliance problem may cause additional damage to the reputation of the Court and desensitize important audiences to non-compliance (Staton and Vanberg 2008).

The provision of remedial indications may therefore – if judges are acting strategically – be limited to cases in which compliance is difficult to achieve and it is likely that they

will be helpful. When testing the above hypotheses, it is therefore crucial account for factors that influence judges' remedial approach. The remainder of this letter develops and employs such a research design to investigate whether the ECtHR has been able to promote timely compliance by selectively indicating remedies.

Research Design

The ECtHR provides a particularly useful context for assessing how remedial indications influence compliance with judicial decisions. First, in contrast to for most courts, reliable data are available concerning compliance with ECtHR judgments. Second, the transition to the new remedial approach has been relatively cautious and judges have disagreed about their legal competence to indicate remedies (see e.g. the dissenting opinions in the 2017 *Moreira Ferreira (No. 2) v. Portugal* judgment). Thus, scholars and judges have noted that there is a “haphazard” aspect to when remedial indications are provided (Donald and Speck 2019:114). Such inconsistencies facilitate comparisons between ECtHR judgments containing remedial indications and similar judgments without indications.

Compliance with ECtHR judgments

I employ an original dataset containing compliance data for all ECtHR judgments rendered by June 1 2016. Compliance is measured based on information from the Committee of Ministers (CoM), which supervises implementation of ECtHR judgments. The CoM supervision is conducted by a strong and professionalized secretariat, which contributes to its reliability (Çali and Koch 2014, see also the Online Appendix). Supervision is organized by lead cases, which are judgments revealing new issues in a respondent state.

Later judgments relating to the same issue within a particular state are monitored in conjunction with the lead case. Lead cases are therefore the appropriate units of analysis (Voeten 2014, Grewal and Voeten 2015).

When no further measures are needed, the CoM closes its supervision through a final resolution. Final resolutions thus provide a measure of compliance understood as the “full execution of the action (or complete avoidance of the action) called for (or prohibited)” (Kapiszewski and Taylor 2013:806). The duration of the compliance process is measured as the number of days between the lead case judgment and the final resolution. A censoring indicator captures whether compliance was achieved by June 1 2016, the last date of observation.

Remedial Indications

I identified 202 judgments with remedial indications rendered before June 1 2016.³ These judgments concerned 143 different lead cases. In 102 cases, remedial indications were offered already in the lead case judgment. In the remaining cases, indications were only given when the ECtHR was presented with a repetitive case. I create a time-varying dummy which takes the value of 0 until the ECtHR has indicated remedies and 1 thereafter.

Government Accountability

Hypothesis 2 anticipates that the effect of remedial indications is conditional on the ability of pro-compliance actors to hold governments accountable. To measure this ability, I use the Varieties of Democracy project’s “accountability index”. This index measures the

³The coding procedure is described in the Online Appendix.

“ability of a state’s population to hold its government accountable through elections”, through “checks and balances between institutions”, and through “oversight by civil society organizations and media activity” (Coppedge et al. 2018). These different subtypes of accountability institutions are likely to work in conjunction to hold governments accountable for their compliance performance. My preferred approach to testing Hypothesis 2 is therefore to use this combined accountability index. In the Online Appendix, I consider additional models using each of the main subcomponents of the index.⁴

Conditioning on Case and Country Characteristics

To compare judgments containing remedial indications to similar judgments without such indications, I condition on case and country characteristics that may influence both the provision of remedial indications and subsequent compliance. Relevant case characteristics include the types of remedies needed for compliance, the complexity and character of the identified human rights violation(s), and when the judgment was rendered. Country-level confounders include the bureaucratic capacity of the respondent state, domestic veto players, the degree of democratic consolidation, the proximity to an election, and the extent to which domestic institutions help hold governments accountable. These variables are discussed further in the Online Appendix.

I first pre-process the data using genetic matching (Sekhon 2011, Diamond and Sekhon 2013). Matching adjusts for the differences between those judgments containing remedial indications and those without by identifying “control cases” as similar as possible to

⁴These additional models address the potential concern that the coding of “checks and balances” is based in part on compliance with (domestic) court decisions. They also assess whether certain types of government accountability are particularly important. The results show that while vertical accountability and “oversight by civil society organizations and media activity” moderate the effect of remedial indications, the effect of remedial indications is not moderated by the level of horizontal checks and balances.

the “treatment cases” on confounding variables. This procedure also reduces model dependence by avoiding extreme counterfactuals concerning cases that are very different (Ho et al. 2007). The matched dataset contains a total of 252 unique cases. Of these, 134 cases contain remedial indications⁵, while 118 do not. Although these cases are few compared to the overall ECtHR caseload, they are the most informative cases concerning the effectiveness of the ECtHR’s remedial indications.

The matching procedure and the resulting improvement in covariate balance is illustrated in Figure 1, which displays differences in means on the included covariates before and after matching. If treated and untreated cases are comparable, differences should be close to 0. The figure shows that remedial indications tend to be offered in cases involving multiple violations and requiring challenging remedies from states with relatively weak bureaucratic capacity and accountability institutions. After matching, these differences are greatly reduced.

The matching procedure does not produce perfect balance and multivariate modelling is therefore needed to further adjust for confounding variables (Ho et al. 2007:201). The multivariate models also account for developments in variables that change during the course of the implementation process, such as election proximity.

Conditioning can only adjust for observable differences between judgments. This strategy does, however, result in balance on the variables that influence both the ECtHR’s decision to indicate remedies and subsequent compliance. Because the ECtHR’s shift in remedial approach has been inconsistent and comparisons are made between very similar cases, it is credible that differences in time until compliance are attributable to the remedial indications.

⁵9 “treated cases” were omitted due to missing values on the country-level covariates included in the analysis.

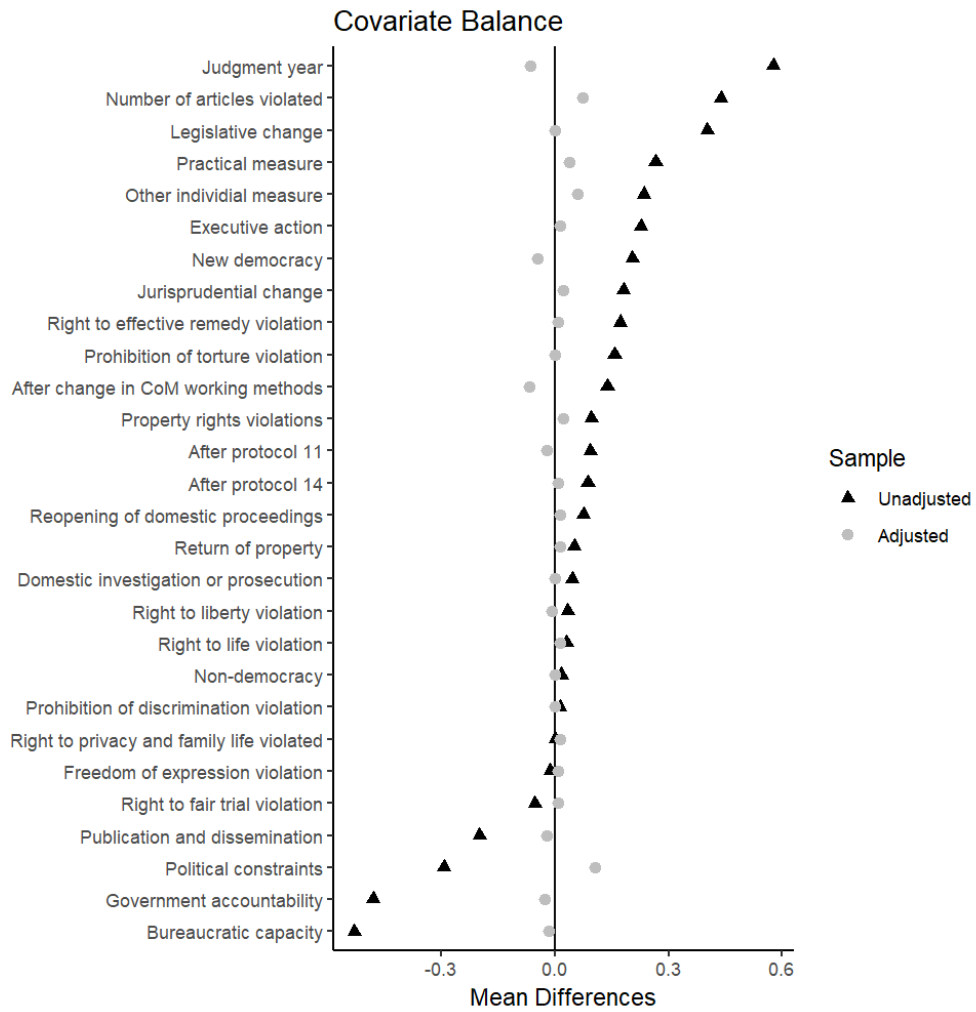


Figure 1: Covariate balance before and after matching

Estimation

I use the Cox model,⁶ which avoids making assumptions concerning how the likelihood of compliance varies depending on the time since the judgment and allows for time-varying covariates (Box-Steffensmeier and Jones 2004). Formally, I estimate variations of the following model:

$$h_i(t) = h_0(t) \exp(\beta_1 \text{Indications}_i(t) + \mathbf{Controls}_i(\mathbf{t})\gamma),$$

where t is the number of days since the judgment, $h_i(t)$ is the probability that judgment i will be complied with at time t conditional on the judgment remaining unimplemented at that time and $h_0(t)$ is the (unspecified) baseline hazard of compliance. $\text{Indications}_i(t)$ is a dummy variable that takes on 1 if the ECtHR has provided remedial indications for judgment i at time t and 0 otherwise. $\mathbf{Controls}_i(\mathbf{t})$ is the vector of control variables, some of which are time-varying.

The model estimated to evaluate hypothesis 2 also includes a multiplicative interaction between $\text{Indications}_i(t)$ and the respondent state's level of government accountability.

Because the same states are subject to multiple judgments, I cluster the standard errors on states.

Results

Figure 2 displays average marginal differences in time until compliance associated with remedial indications, calculated using the method proposed by Kropko and Harden (2017).

The error bars indicate 95% confidence intervals. The full Cox models are reported in

⁶The Grambsch and Therneau (1994) test does not indicate violations of the proportional hazards assumption.

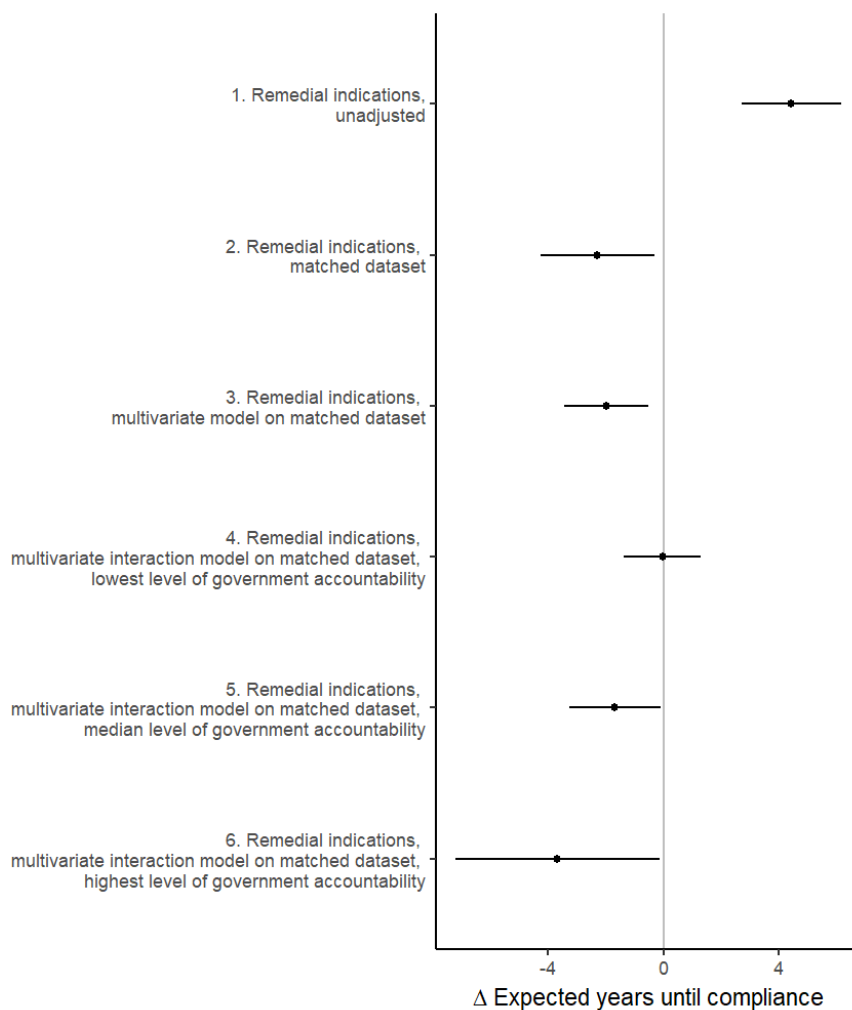


Figure 2: Marginal differences in years until compliance associated with remedial indications. Error bars indicate 95% confidence intervals.

the Online Appendix.

To show how conditioning on case and country characteristics influences the results, marginal difference # 1 is based on a model estimated on the full dataset before conditioning on control variables. This model suggests that judgments containing remedial indications are on average implemented 4.4 years later than other judgments. This difference is considerable as the median time until compliance is less than 3 years. This bivariate relationship is explained by remedial indications being offered in challenging judgments. The remaining marginal differences are based on models that condition on potential confounders.

Marginal difference # 2 is based on a bivariate model estimated on the matched dataset. This model suggests that judgments containing remedial indications are on average complied with 2.3 years before comparable judgments without such indications. The relationship between remedial indications and a quicker compliance holds also in the multivariate model, which accounts for remaining differences between the cases containing remedial indications and those that do not. Based on this model, marginal difference # 3 suggests an approximately 2 years average reduction in time until compliance if remedial indications were provided. In line with Hypothesis 1, there is thus evidence that remedial indications are associated with quicker compliance.

In the Online Appendix, I show that this finding holds also in other model specifications, including a model based only on within-state variation and a multivariate model estimated on the full data (without matching).

Hypothesis 2 anticipates that the effect of remedial indications is conditional on the strength of accountability institutions. To investigate this hypothesis, the remaining marginal differences are calculated based on a model that interacts remedial indications with the level of government accountability.

Marginal difference # 4 is the conditional effect of remedial indications when government accountability is at the lowest level observed in the matched dataset (Azerbaijan in 2016). The difference in time until compliance is approximately 0, suggesting that remedial indications do not promote quicker compliance if pro-compliance constituencies have very few means of holding governments accountable for non-compliance.

At the median level of government accountability (Turkey in 2004), the conditional effect of remedial indications increases to a 1.7 years reduction in time until compliance (Marginal difference # 5). For the highest observed level of government accountability

(United Kingdom in 2012), marginal difference # 6 suggests a reduction in time until compliance of approximately 3.7 years, although this estimate is associated with considerable uncertainty because the states with the strongest accountability institutions receive remedial indications less frequently.⁷

These results show that the efficacy of remedial indications hinges on there being at least a minimum level of government accountability. However, the substantially and statistically significant difference for respondent states with the median level of government accountability shows that remedial indications help extract timely compliance from some of the ECtHR's notoriously recalcitrant respondents. In theoretical terms, the interaction effect provides further evidence that remedial indications promote timely compliance by enabling pro-compliance actors to hold responding authorities accountable.

Conclusion

Courts act strategically to promote timely compliance with their judgments, but few scholars have investigated whether their strategies are effective. I demonstrate that the ECtHR has been able to promote quicker compliance by indicating appropriate remedies. Importantly, remedial indications is a strategy that is available to a variety of courts. Future research may benefit from investigating the effectiveness of other judicial strategies, such as citation practices aimed at legitimizing judgments (Lupu and Voeten 2012, Larsson et al. 2017) and strategies aimed at generating public awareness (Staton 2006, Krehbiel 2016).

⁷The less frequent use of remedial indications for this group of states may be explained by how they are also high-capacity states with relatively good compliance records. In the Online Appendix, I show that the results hold also when excluding observations with the lowest and highest accountability and when omitting highly influential observations.

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