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IV. The Dialogue between Selected CEE Courts and the ECtHR

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1. Introduction

Although the idea of 'dialogue' entails a form of reciprocal exchange of arguments between the actors,[1] in this contribution the notion of 'dialogue' ('judicial dialogue') will be construed specifically as any form of (unilateral) reference in the reasoning of domestic court to the case law of the European Court of Human Rights.[2] Therefore, not only non-mandatory references to the authority of ECtHR[3] are presented, but also the instances where national courts are obliged to refer to the Strasbourg case law and such cases, where a reference should have been made but is missing (as a negative example of lack of judicial dialogue). In other words, both dialogue as conversation (with no specific goal apart from the dialogue itself) and dialogue as deliberation (a form of dialogue

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1 See: F. Cafaggi (ed.), *Judicial interaction techniques – their potential and use in European fundamental rights adjudication. Final handbook* (Centre for Judicial Cooperation 2014), <www.nsa.gov.pl/download.php?id=165> (access: 20 February 2016) 38.

2 See e.g.: D.S. Law, W.-C. Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 Washington Law Review, p. 523.

3 On the non-mandatory references to foreign law and case law, see: M. Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013).

aimed at reaching a common agreement)[4] will be presented. In all cases the contribution will focus only on such references that concentrate on the interpretation of the ECHR.

This contribution will not add to the discussion as to the position of the judicial dialogue as a phenomenon of legal reasoning. It must be emphasised though that the author strongly believes that judicial dialogue (in its widest possible understanding which is assumed in this paper) contributes *ex definitione* towards the quality of adjudication. The dialogue extends horizons while identifying the law and fundamental values at its foundations. Still, the question whether judicial dialogue as a form of legal reasoning is indeed positive or just a silly 'sophistry' as labelled by the late Justice Antonin Scalia[5] will not be addressed here.

Apart from the abovementioned classifications of dialogue (against the criteria of mandatoriness and purpose) one may distinguish the categorisation of deliberative dialogue *vis-à-vis* the criterion of interrelatedness i.e. the relation between the referring decision[6] and decision to which the reference is made. Here one may point out at unifying (affirmative), and engaged dialogue. The latter can be either concurring or diverging (dissenting). The first type occurs when the national (referring) court simply accepts the reasoning and interpretation proposed by another court. This type of reference to case law of other court or courts can be qualified as 'judicial dialogue' only if one applies the definition of a dialogue which has been assumed in the present contribution, i.e. a very broad one (dialogue as any form of reference to reasoning of another court). The second type – engaged dialogue – is more interesting since it assumes a more active approach of a national court: Not only does it internalise and present the case law of another court, but it does so critically, either by generally departing from the interpretative standpoint underpinning the decision of another court (dissenting dialogue) or by accepting it in principle, but nuancing the details of the legal analysis (concurring dialogue). This type of dialogue, if reciprocal (i.e. dialogue *sensu stricto*), contributes substantially towards the development of a more elaborate interpretation of law.[7] In addition, the engaged

4 See: L. Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law, p. 617.

5 See: N. Dorsen, 'The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 International Journal of Constitutional Law, p. 519 and Law D.S., 'Judicial Comparativism and Judicial Diplomacy' (2015) 4 University of Pennsylvania Law Review, p. 164. D.S. Law notes that Justice Scalia, although not eager to refer to foreign precedents while interpreting American constitutional law, was at the same time a frequent visitor of foreign constitutional courts, interested in their practice.

6 I.e. the decision entering into a dialogue with another decision.

7 Let us mention in this respect the famous *Von Hannover v Germany* saga involving the dialogue between the ECtHR and the German Constitutional Court as described in e.g. B. Peters, 'The Rule of Law Dimensions of Dialogues Between National Courts and Strasbourg', [in:]

dialogue constitutes a perfect expression of constitutional pluralism building the truly common constitutional identity (resulting from genuine 'unification in diversity').[8] If it happens to be one-sided though (i.e. the 'dialogue' consisting of establishing the interpretative consensus by international court without the follow-up of implementation of the interpretative position of international court by its national counterparts), it may lead to fragmentation of 'interpretative regimes' and dysfunction of the systems aimed at enhancing the coherence (such as the ECHR).

The judicial dialogue – generally having the function of eliminating interpretative divergences between different judicial authorities and avoiding impediments to law certainty – may serve the solution to different types of conflicts: conflicts of jurisdictions,[9] conflicts of systems[10] or conflict of particular norms.[11] Therefore, one may propose the classification of judicial dialogue *vis-à-vis* the criterion of a conflict solution (the categorisation of dialogue, as generally serving the solution of different forms of conflicts, into groups distinguished by reference to the type of conflict which a given form of dialogue intends to resolve).

Finally, one may classify the judicial dialogue *vis-à-vis* the criterion of appropriateness understood as the accuracy of the referring court's reasoning seeking (or failing) to involve references to other courts' case law. From this perspective one may categorise dialogue as proper (i.e. referring to accurately collected case law of other courts and analysing it properly from methodological point of view[12]), fake or decorative (i.e. pretending to refer to the case law of other courts but in fact just decorating the reasoning by random references to inappropriately collected and inaptly analysed decisions), failed (i.e. missing the opportunity to refer to the case law of other courts at all where one should reasonably expect that such jurisprudence is presented) and other (i.e. non-classifiable to other categories, e.g. veiled[13]). This classification shall be applied in this contribution because it seems to be the most meaningful from the practical perspective. It explains

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M. Kanetake, A. Nollkaemper (eds), *The Rule of Law at the National and International Levels* (OUP 2016), p. 222.

8 Otherwise the system as a whole could be questioned.

9 Judicial dialogue as the solution to the conflicts of jurisdictions was proposed e.g. by K. Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions' (2001) 5 Max Planck UNYB 67.

10 W.W. Burke-White "points at 'interjudicial dialogue' as a method of counterbalancing the danger of fragmentation of international law" (W.W. Burke-White, 'International Legal Pluralism' (2004) 961 Faculty Scholarship 971).

11 See: F. Cafaggi (ed.), 'Judicial interaction techniques' (n. 1), pp. 13–14 and the writings referred to therein, in particular the F. Kelsen, 'Derogation', [in:] H. Klecatsky, R. Marcic, H. Schambeck (eds.), *Die Wiener Rechtstheoretische Schule* (1968).

12 This form of dialogue can be unifying, diverging or concurring.

13 A veiled (or a hidden) dialogue is a form of dialogue where a national court actually does refer to other courts' case law but does not admit it.

whether national courts actually engage in dialogue with the ECtHR, pretend, or simply fail to do so.

One cannot but note that these classifications (*vis-à-vis* the criteria of mandatoriness, purpose, interrelatedness, conflict solution and appropriateness) are to a certain extent mutually overlapping. For example, diverging dialogue can be proper (if based on thorough analysis and accurate methodology) whereas affirmative dialogue can be a fake one.

The forms of judicial dialogue were categorised in this contribution as proper (actually implementing the ECtHR case law or dissenting with the Strasbourg Court after thorough analysis of its jurisprudence), fake (Strasbourg 'precedents' employed as a mere decoration of reasoning without any attempts to establish properly the actual interpretative consensus of the Convention) and failed (where no reference was made and ECtHR case law was simply ignored). Finally, separate category will be proposed for decisions, which do not fit either of these three categories.

The first part of this work describes the normative framework of judicial dialogue, referring to the impact of the ECtHR case law on the Polish legal system in general, the issue of the duty of observance of the Strasbourg Court's case law (resulting either from explicit provisions adopted to that end or from a general normative framework as construed by supreme national judicial authorities) and the question of reopening of proceedings as a consequence of an ECtHR ruling.

The second part of this contribution is devoted to the practice of courts in CEE States in as much as they enter into a dialogue with the European Court of Human Rights. Special attention is paid to the Polish experience for obvious reasons – the author speaks Polish and the databases of jurisprudence are easily accessible to him. However, one should stress that in none of the CEE States, which will be presented in this contribution (apart from Poland, also Czech Republic, Hungary, Lithuania, Russian Federation and Ukraine) there exist accessible databases of jurisprudence translated into English. It makes the tasks of description of dialogue of CEE courts with the ECtHR particularly difficult. The second part of the contribution will thus focus on the classification of case law of domestic courts of six CEE States *vis-à-vis* the criterion of appropriateness and thus it will distinguish domestic courts' decisions according to whether they belong to a proper, fake and failed dialogue category and finally will identify and describe rulings which are not non-classifiable.

The concluding remarks will attempt to provide a general assessment of the accomplishment of the duty of the domestic courts to enter into dialogue with the ECtHR *acquis* and to explain reasons for occasional failures as well as to suggest instruments aimed at enhancing the dialogue (also the *sensu stricto* judicial dialogue i.e. reciprocal references) of national courts with the Strasbourg Court.

The methodology of this contribution consists of the desk analysis of the national legislation and case law of domestic courts (supreme courts, ordinary courts and administrative courts).[14] The references to jurisprudence of national constitutional courts will only be made exceptionally in order to depict the difference between constitutional courts *acquis,* which often evoke the Strasbourg decisions and practice of other national courts where references are sparse. References to constitutional courts' practice will appear in this contribution since a) the practice of the Polish Constitutional Court concerning the application of the ECtHR case law was already presented by the author of this contribution elsewhere[15] and because b) it is indispensable to make the reference to constitutional courts' practice of other CEE States in order to draw conclusions concerning the practice of other courts in these countries.

Pursuant to the principle of subsidiarity, States Parties to the ECHR – and their courts – are primarily responsible for an effective protection of rights and freedoms guaranteed by the Convention and its Protocols.[16] In order to fulfil this duty, national courts must develop a regular dialogue with the ECtHR in order to reflect in their decisions the evolving interpretation of the Convention. This study is focused on whether this task is effectively accomplished.

This contribution will take the normative framework as the starting point. This part of the analysis will first provide a brief overview of the impact of the ECtHR case law on the Polish legal system in order to highlight the significance of the Strasbourg jurisprudence for the Polish legislative authority. It will also present the CEE States' domestic legal provisions, guidelines or decisions adopted by supreme judicial bodies concerning the duty of observance of the ECHR and the Strasbourg Court's case law. Such presentation is necessary in order to conclude that there exist different normative (adequate provisions) or systemic (key decisions of supreme judicial authorities) instruments in all these States in order to assure effective implementation of the Convention standard. It must be noted that the case law of national courts does not always fit this general normative framework. Finally, the issue of reopening of proceedings following an adverse ruling of the ECtHR shall be discussed as an ultimate response of domestic courts to the Strasbourg decisions.

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14 The research of the databases was aimed at finding references to the ECHR and to the ECtHR case law.

15 See: M. Górski, 'Уже лучше, но все еще недостаточно хорошо: опыт применения Европейской конвенции в практике Конституционного Трибунала Республики Польша' (2013) 4 Сравнительное конституционное обозрение (Institute of Law and Public Policy), p. 84.

16 See e.g.: *Melnichuk and Others v Romania*, App. nos 35279/10 and 34782/1 (ECtHR, 5 May 2015), para. 77.

2. The Normative Framework

2.1. The Polish Example of the Influence of the ECtHR Case Law on the Domestic Legal System

The guaranteeing of the effectiveness to the Convention standard – for which the States Parties to the ECHR are primarily responsible – entails two types of obligations. The one concerns the implementation of adverse decisions against Poland (which may include individual measures such as the *restitutio in integrum* and general measures such as, in the first place, amendment of national legislation). The other entails the duty of national bodies (with the pivotal role of national courts) to 'take into account' the standard of interpretation developed by the ECtHR while adjudicating.

In case of Poland, since its accession to the Convention in 1993, the ECtHR delivered 1099 judgments including 925 finding at least one violation.[17] The biggest negative score concerned the length of proceedings (434 adverse judgments) and the right to liberty and security (299 judgments). More than 100 adverse decisions concerned the right to private and family life (107) and the right to a fair trial (106).

The case law of the ECtHR had an overwhelming impact on both Polish law and judicial practice. It is hard to find nowadays an area of the Polish public law, which has not been affected by the Strasbourg case law. The duty of legislative implementation of the ECtHR case law is also accepted by the Polish legal scholarship.[18] Only a few major changes in the Polish legal system are mentioned here as examples proving that the influence of the ECtHR jurisprudence on Polish law is indeed overwhelming and profound.

Until 2001 when the new Law on the procedure concerning petty offences[19] entered into force, the first instance bodies adjudicating in petty offences cases were the so-called magistrates' courts for petty offences (*kolegia do spraw wykroczeń*), subordinate to the executive branch of state authority (ministry) and composed of non-lawyers who were not independent and did not enjoy guarantees of independence, in particular, immunities. The 1997 Constitution abolished the magistrates' courts for petty offences and transferred their jurisdiction to ordinary courts. That change was introduced in order to ensure (among others) compatibility with Art. 6 ECHR. As noted by the Constitutional Court,[20]

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17 All statistics come from Council of Europe, 'Statistics of violations 1959–2015', <http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf> (access: 28 February 2016).

18 See: instead of many others, Biuro Analiz Sejmowych, *Wykonywanie wyroków Europejskiego Trybunału Praw Człowieka przez Sejm* (Warszawa 2012).

19 Law of 24 August 2001 on the procedure concerning petty offences, O.J. 2001 No. 106, item 1149 as amended.

20 Case K 6/94 (Polish Constitutional Court, 21 November 1994), para. 4.

> it is the very essence of the administration of justice that adjudication must be asole privilege of courts and other branches of state power must not interfere with their activities or participate in them. It is the consequence of a special role of the judiciary in the protection of rights and freedoms of individuals and it is confirmed by […] Art. 6 of [ECtHR].[21]

The Swiss experience of *Bezirksanwalten* in *Schiesser*[22] and the Dutch experience of *auditeur-militairs* in *de Jong, Baljet and van den Brink*[23] and the disqualification of the latter organs as "other officers authorised by law to exercise judicial power" in the meaning of Art. 5(3) ECHR was the major reason why the new Polish Code of Criminal Procedure assumed that prosecutors are no longer authorised by law to order pre-trial detention.[24] As a part of the executive, they did not have sufficient independence, which is required from state officers responsible for applying such form of deprivation of liberty. Moreover, they were also parties to criminal proceedings at the judicial stage of the process. The approach taken by the drafters of the new procedural regulation in criminal cases was later confirmed by the ECtHR in *Niedbała* where the Court noted that "prosecutors, in the exercise of their functions, are subject to supervision of an authority belonging to the executive branch of the Government" and "their position in the criminal proceedings as provided for by law as it stood at the material time […], must be seen as that of a party to these proceedings."[25]

Following the *Broniowski* decision,[26] the first pilot judgment of the ECtHR, Poland introduced the law on the so-called Bug River claims,[27] which was a successful implementation of the Court's ruling.[28] Those entitled to compensation from the State for the property left beyond the eastern border of Poland after the II World War (territories previously constituting a part of the Republic of Poland and now belonging to Ukraine or Belarus) may now obtain adequate sums and have their claims settled.

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21 In Polish: "do istoty wymiaru sprawiedliwości należy, by sprawowany on był wyłącznie przez sądy, a pozostałe władze nie mogły ingerować w te działania czy w nich uczestniczyć. Wynika to ze szczególnego powiązania władzy sądowniczej z ochroną praw i wolności jednostki i znajduje potwierdzenie zarówno w szczegółowych normach Konstytucji (zwłaszcza Art. 56 ust. 1 przepisów konstytucyjnych), jak i w konwencjach międzynarodowych (zwłaszcza Art. 6 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności)."

22 *Schiesser v the Netherlands*, App. no. 7710/76 (ECtHR, 4 December 1979), para. 31.

23 *De Jong, Mr. Baljet and Mr. van den Brink v the Netherlands*, App. nos 8805/79, 8806/79 and 9242/81 (ECtHR, 22 May 1984), in particular para. 49.

24 See: P. Hofmański, [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1–18* (Wydawnictwo CH Beck 2010) 201.

25 *Niedbała v Poland*, App. no. 27915/95 (ECtHR, 4 July 2000), paras 52–53.

26 *Broniowski v Poland*, App. no. 31443/96 (ECtHR, 22 June 2004).

27 Law of 8 July 2005 on the implementation of the right to compensation for property left outside of present borders of the Republic of Poland [Ustawa o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej], O.J. 2014, item 1090.

28 *E. G. v Poland and 175 other applications*, App. no. 50425/99 (ECtHR, 23 September 2008).

After another pilot judgment in the *Hutten-Czapska* case,[29] which concerned the systemic violation of the right to property by laws imposing on landlords restrictions in respect of rent increases and the termination of leases, the new scheme of subsidies was created for the restoration of private property.[30] The owners of property are eligible for the so-called 'premiums' paid from public funds that reduce the costs of renovation and investment in private property. Moreover, the Constitutional Court decided[31] that limitation of liability of the local government *vis-à-vis* private estate owners for the non-provision of social housing for persons evicted from their buildings violated the Constitution. Since then the owners of houses, from which the eviction of tenants was ordered but due to shortage of social housing the eviction was not enforced, get compensations from the local government under Art. 417 of the Polish Civil Code. Subsequently to this amendment other cases concerning the analogous problem to that of the *Hutten-Czapska* decision were struck out from the list of cases.[32]

The *Kudła* judgment[33] in which the ECtHR ruled that "the applicant had no domestic remedy whereby he could enforce his right to a 'hearing within a reasonable time' as guaranteed by Art. 6(1) of the Convention" triggered the adoption of the Law on the right to compensation for delayed court proceedings and criminal preliminary proceedings.[34] The act at stake was then subsequently amended which was a consequence of further rulings of the ECtHR[35] where the Court did not find the legislation under the said Law an effective measure.[36]

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29 *Hutten-Czapska v Poland*, App. no. 35014/97 (ECtHR, 19 June 2006).

30 Law of 21 November 2008 on supporting thermo-modernisation and renovation, O.J. 2014, item 712.

31 Case SK 51/05 (Polish Constitutional Court, 23 May 2006), see also: Case P 14/06 (Polish Constitutional Court, 11 September 2006).

32 See e.g.: *The Association of Real Property Owners in Łódź v Poland*, App. no. 3485/02 (ECtHR, decision, 8 March 2011).

33 *Kudła v Poland*, App. no. 30210/96 (ECtHR, 26 October 2000).

34 Law of 17 June 2004 on the complaint available in case of the violation of the right of the party to have the case heard in reasonable time by the prosecutor in preliminary proceedings and by the court in judicial proceedings [Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki], O.J. 2004 No. 179, item 1843 as amended.

35 See: *Tur v Poland*, App. no. 21695/05 (ECtHR, 23 October 2007) and *Zwoźniak v Poland*, App. no. 25728/05 (ECtHR, 13 November 2007).

36 See: the statement of reasons presented by the Government to the Parliament while proposing the bill on the amendment of the Law on the complaint available in case of the violation of the right of the party to have the case heard in reasonable time by the prosecutor in preliminary proceedings and by the court in judicial proceedings, document of the *Sejm* of the Republic of Poland of VI Term, no. 1281 of 30 October 2008 2 where the Government noted that "Europejski Trybunał Praw Człowieka w ostatnio wydanych wyrokach w sprawach *Tur przeciwko Polsce* (wyrok z dnia 23 października 2007 r., skarga nr 21695/05) oraz *Zwoźniak przeciwko Polsce* (wyrok z dnia 13 listopada 2007 r., skarga nr 25728/05), pomimo skorzystania przez skarżących z możliwości złożenia skargi na przewlekłość postępowania, nie uznał

Unfortunately, the practice of Polish courts was rather disappointing because they did not, while applying the provisions of the Law, manage to assure that the complaint on delayed proceedings would constitute an "appropriate and sufficient redress." It resulted in the delivery of another pilot judgment in *Rutkowski and others v Poland*.[37]

The *Tysiąc* ruling[38] that concerned the lack of effective remedy for patients willing to challenge the doctor's decision concerning the diagnosis and therapy (violation of positive procedural obligation resulting from Art. 8 ECHR) resulted in the adoption of the Law on patients' rights.[39] It provides for the patient's right to file an objection against doctor's decision, which is adjudicated by special committees established by the Ombudsman for patients' rights.

The very liberal 2015 Law on Assemblies[40] was directly inspired by *Bączkowski*[41] of the ECtHR and the Constitutional Court's decision K 44/12 which was itself substantially driven by the Strasbourg case law.[42] The new Law – among others – provides for an unformalized procedure of notification concerning the intention to organise an assembly (including 'simplified procedure' where the public authority cannot ban a planned assembly) and strengthens the mechanism of judicial review of administrative decisions regarding assemblies.

2.2. The Duty of Observance of the ECtHR Case Law

If interpreted literally, Polish law does not provide for a duty to amend the law in order to bring it in line with the case law of the ECtHR (unlike in the Czech Republic or Ukraine[43]). Nor there exist any guidelines[44] adopted by e. g.

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ustawy z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki (Dz.U. Nr 179, poz. 1843) za skuteczny środek krajowy w rozumieniu Art. 13 Konwencji i stwierdził, że doszło do naruszenia wskazanego przepisu."

37 *Rutkowski and others v Poland*, App. nos 72287/10, 13927/11 and 46187/11 (ECtHR, 7 July 2015).

38 *Tysiąc v Poland*, App. no. 5410/03 (ECtHR, 20 March 2007).

39 Law of 6 November 2008 on patients' rights and Ombudsman for patients' rights [Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta], O.J. 2016, item 186.

40 Law of 24 July 2015 on Assemblies, O.J. 2015, item 1485. In the statement of reasons of the bill it was noted that "przedmiotowy projekt ustawy stanowi realizację wyroku Trybunału Konstytucyjnego z dnia 18 września 2014 r., sygn. akt K 44/12 oraz wytycznych wskazanych przez Europejski Trybunał Praw Człowieka w wyroku z dnia 3 maja 2007 r. w sprawie *Bączkowski i inni przeciwko Polsce* (skarga nr 1543/06)."

41 *Bączkowski v Poland*, App. no. 1543/06 (ECtHR, 3 May 2007).

42 Case K 44/12 (Polish Constitutional Court, 18 September 2014) where the Constitutional Court referred to the *Bączkowski* decision of the ECtHR.

43 See further remarks on the Czech and Ukrainian legislations concerning the implementation of the ECtHR case law.

44 Understood as a single document synthesising the approach of the highest judicial authorities.

the Constitutional Court or the Supreme Court encouraging courts to follow the jurisprudence of the Strasbourg Court (unlike in Russia). Of course, while interpreting the norms of Polish law systematically, one must take into consideration that pursuant to Art. 9 of the Polish Constitution of 1997 Poland observes its international obligations and according to Art. 91 of the Constitution ratified international agreement constitute part of the domestic legal order and shall be applied directly having precedence over conflicting statutes. Since the ECtHR is an authoritative interpreter of the Convention whose decisions establish the compulsory mode of understanding the scope of obligations deriving from the Convention, Polish courts are bound to observe the provisions of the Convention and its Protocols exactly as the ECtHR interprets them.

The implementation of ECHR is not limited to the consequences of Art. 46 ECHR (i.e. to abide the final judgment of the ECtHR in case to which a given State was a party) but rather it constitutes a wider problem of abiding by the Convention standard in accordance with Art. 1 ECHR. Consequently, the States Parties to the Convention are to assure effectively rights and freedoms guaranteed by the ECHR. This does not lead inextricably to the obligation to undertake a dialogue with the Strasbourg court, nonetheless it is hard to imagine 'observance' as defined above without a 'dialogue'.

Polish courts accepted their duty to take into consideration the Strasbourg case law while deciding cases. The Supreme Court ruled that

> the duty to respect the decisions of the European Court of Human Rights lays also on the courts. It is not just a question of taking the position of the ECtHR into account while interpreting the Convention and construing the domestic law in accordance with that interpretation, but equally of taking concrete steps aimed at implementing the judgment of the ECtHR.[45]

However, the quotation comes from the judgment concerning the reopening of proceedings in consequence of an adverse judgment of the ECtHR – the issue, which was later addressed differently by the Supreme Court[46] and which will be discussed later. In general, the Supreme Court already back in 1995 declared in its landmark decision that "since the accession of Poland to the Council of Europe, the jurisprudence of the European Court of Human Rights in Strasbourg may and ought to be taken into account while interpreting national law."[47] The Court

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45 Case V CSK 271/08 (Supreme Court, 28 November 2008). In Polish: "obowiązek respektowania wyroków Europejskiego Trybunału Praw Człowieka spoczywa zatem także na sądach. Chodzi tu nie tylko o uwzględnianie stanowiska Trybunału przy wykładni postanowień Konwencji i tłumaczenie przepisów prawa krajowego w zgodzie z tą wykładnią, lecz o podjęcie konkretnych działań zmierzających do zadośćuczynienia wyrokowi Trybunału."

46 Case III CZP 16/10 (Supreme Court, resolution of the panel of 7 judges, 30 November 2010).

47 Case III ARN 75/94 (Supreme Court, order, 11 January 1995). In Polish: "od momentu wstąpienia Polski do Rady Europy orzecznictwo Europejskiego Trybunału Praw

further added that the Strasbourg case law should serve as a "significant source of interpretation while interpreting provisions of Polish law." That statement was later invoked on many occasions both by the Supreme Court itself[48] and ordinary[49] and administrative courts.[50]

The duty of observance of the ECtHR case law must not be construed as meaning that domestic courts are bound to follow the Strasbourg judgments without taking into account the specific circumstances of cases pending before national courts in contrast to the ones at the base of the ECtHR decisions. This duty must be understood as the need to follow the Strasbourg standard of interpretation of the Convention and not as mechanically transcribing the ECtHR findings on – sometimes specific – circumstances of a given case decided by the national court. Guaranteeing effectiveness of the ECtHR case law must be understood as two separate obligations of national courts which one must distinguish: while national courts must assure effective implementation of an adverse Strasbourg judgment in a given case (to the greatest possible extent by the *restitutio in integrum*), in their regular practice of interpretation and application of the national law they must "take into account" the Convention standard so as to avoid violations of the ECHR.

In Czech Republic, pursuant to Art. 1.2 of the Constitution of 16 December 1992, "the Czech Republic shall observe its obligations resulting from international law." According to Art. 95.1 of the Czech Constitution, "in his/her decision-making, a judge is bound by the law and international agreements constituting part of the legal order; he/she is entitled to assess the conformity of a different legal regulation with the law or with such international agreement." Article 87.1(d) and (i) of the Czech Constitution reads that "the Constitutional Court shall rule on […] constitutional complaints filed against final decisions and other interventions by agencies of public authority, violating constitutionally guaranteed fundamental rights and freedoms" and "measures essential for the implementation of a ruling by an international court, which is binding for the Czech Republic, unless it can be implemented in a different manner."[51]

According to § 118.1 of the Constitutional Court Act,

> if an international court finds that an obligation resulting for the Czech Republic from an international treaty has been infringed by the encroachment of a public authority, especially that, due to such an encroachment, a human right or fundamental freedom of a natural or

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Człowieka w Strasburgu może i powinno być uwzględniane przy interpretacji przepisów prawa polskiego."

48 See e.g. Supreme Court cases: I BU 14/12 (3 April 2013); III UK 101/11 (22 May 2012); II KKN 295/98 (9 November 1999).

49 Cases: III AUz 476/13 (Szczecin Court of Appeal, order, 16 December 2013); III AUa 413/13 (Court of Appeal in Poznań, 1 August 2013).

50 Case I OSK 1116/07 (Supreme Administrative Court, 2 September 2008).

51 All quotations from: Office of the President of the Czech Republic, 'Constitution of the CR', <https://www.hrad.cz/en/czech-republic/constitution-of-the-cr> (access: 7 June 2016).

> legal person was infringed, and if such infringement was based on a legal enactment in force, the government shall submit to the Court a petition proposing the annulment of such legal enactment, or individual provisions thereof, if there is no other way to assure it will be repealed or amended. In such a case, § 35 para. 1 on the admissibility of petitions instituting a proceeding in matters which the Court has already decided, shall not apply.

Also, § 119 of the Constitutional Court Act provides for the possibility of rehearing the decision of the Constitutional Court,

> should the Constitutional Court have decided in a matter in which an international court found that, as the result of the encroachment of a public authority, a human right or fundamental freedom was infringed in conflict with an international treaty.[52]

In Ukraine the Supreme Court is the highest judicial body within the system of courts of general jurisdiction ensuring the uniformity of judicial practice in the procedure and manner prescribed by the procedural law.[53] Since 2010 the decisions of the Supreme Court of Ukraine in cases regarding different application of the same provision of the material law by the cassation instance are binding on all state authorities applying the law and on all courts.[54] The constitution of Ukraine provides for the supremacy of the ECHR over domestic statutory norms.[55] Pursuant to Art. 17 of the 2006 Law of Ukraine on the Enforcement of Judgments and the Application of the Case law of the European Court of Human Rights,[56] "while adjudicating cases courts shall apply the Convention and the case law of the Court as a source of law." According to the Ukrainian Constitution, "the Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it",[57] however "international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine."[58]

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52 Ibidem.

53 Source: Supreme Court of Ukraine, 'About the Supreme Court of Ukraine', <http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/(documents)/183E20947C3F5F67C2257ADB0031F80A> (access: 25 December 2015).

54 Source: Baker Mckenzie, 'Dispute Resolution Around the World, Ukraine 2011', <http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Dispute%20Resolution/Dispute%20Resolution%20Around%20the%20World/dratw_ukraine_2011.pdf> (access: 25 December 2015).

55 A. Nussberger, 'The Reception Process in Russia and Ukraine', [in:] H. Keller, A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) 630.

56 Law No. 3477-IV of 23 February 2006.

57 Art. 8 of the Ukrainian Constitution.

58 Art. 9 of the Ukrainian Constitution. It is not clear though whether the model of reception on international agreements in Ukraine is based on monism or dualism – see views quoted by I. Ilchenko, 'The implementation of the 1950 European Convention on Human Rights and the case law of the European Court of Human Rights: Ukraine's and Poland's Governments practice', [in:] M. Balcerzak et al. (eds), *Europejska Konwencja Praw Człowieka i jej system kontrolny*

In 2012, as reported by Nesterenko, "95% of ECtHR decisions against Ukraine concerning the failure to observe the Convention standards were not implemented and the Committee of Ministers' proceedings were pending and, as regards the judicial practice, national judges in their vast majority [were] not using of the ECtHR's practice because of their ignorance, or [sought] to circumvent them."[59] According to the ECtHR statistics, the Court delivered 1053 judgments in cases against Ukraine until 31 December 2015, finding at least one violation in 1036 (most of them concerned right to a fair trial – 494, protection of property – 336, length of proceedings – 303 and right to liberty and security – 235).[60]

The Russian Federation accepted the jurisdiction of the ECtHR on 5 May 1998. Since then until 31 December 2015 the Court delivered 1720 decisions in cases against Russia,[61] finding at least one violation in 1612 cases. The largest numbers of violations concerned Arts. 6, 3 and Article 1 of Protocol No. 1 to the ECHR. Article 15(4) of the Constitution of the Russian Federation reads that

> the universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.[62]

As regards the implementation of the Convention standard in cases other than the ones in which the ECtHR found a violation of the Convention, the Russian Supreme Court adopted a sort of the guidelines for general courts,[63] stating among others that:

a) the legal positions of the European Court of Human Rights contained in the final judgments of the Court delivered in respect of the Russian Federation are obligatory for the courts;[64]

(Katedra Praw Człowieka, Wydział Prawa i Administracji, Uniwersytet Mikołaja Kopernika 2011), p. 306.

59 P. Nesterenko, 'Some Issues Concerning Application of the Practice of the European Court of Human Rights in Ukraine' (2012) 6 European Integration Studies, p. 43.

60 Source: Council of Europe, 'Violations by Article and respondent State 1959–2015, <http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf> (access: 28 February 2016).

61 The statistics provided here reflect the state of 31 December 2015. Source: Council of Europe, 'Violations by Article and by State – 1959–2014', <http://www.echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf> (access: 28 February 2016).

62 See also: R. Petrov, P. Kalinichenko, 'The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russian and Ukraine' (2011) 60 International and Comparative Law Quarterly, p. 341.

63 Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 21 on Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction <http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=9155> (access: 22 March 2015).

64 However, in its ruling no. 21-P (14 July 2015), the Constitutional Court of the Russian Federation pointed out that neither the European Convention, nor the ECHR's legal position

b) in order to effectively protect human rights, the courts take into consideration the legal positions of the European Court expressed in its final judgments taken in respect of other States which are parties to the Convention. However this legal position is to be taken into consideration by court if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by the European Court.[65]

However, in December 2015 the Russian Federation adopted the new law[66] concerning the implementation of ECtHR rulings in the Russia. According to this new law the Russian Federal Constitutional Court shall be competent to hear the applications of the government or the President of the Russian Federation concerning the implementation of the ECtHR decisions. The Federal Constitutional Court then may either decide on the possibility of execution in whole or in part, in accordance with the Constitution of the Russian Federation, of the decision of "interstate body for the protection of human rights and freedoms," or on the impossibility of such execution. If the Constitutional Court adopts the latter decision any action (acts) aimed at the fulfilment of the relevant decisions of an interstate body for the protection of human rights and freedoms cannot be carried out in the Russian Federation.[67] It means that neither individual domestic redress of applicants who obtained a judgment of the ECtHR adverse to Russia nor any future application of the standard arising from such 'unenforceable' decisions are permissible. This new law has already been applied by the Russian Constitutional Court in the case following up on the ECtHR ruling *Anchugov and Gladkov*[68] in which the Strasbourg Court held that the Russian constitutional

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in specific cases based on it can override the pre-eminence of the Constitution of the Russian Federation within the Russian legal system and, therefore, will be implemented only subject to acknowledgment of the precedence of the Constitution of the Russian Federation and added that the Russian Federation may derogate from its obligations related to enforcement of a ruling of the ECHR as a contingency measure if such derogation is the only way to avoid violation of the fundamental principles and norms of the Constitution of the Russian Federation.

65 Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 21 on Application of the Convention for the Protection of Human Rights…

66 Federal Constitutional Law of 14 December 2015, N 7-FKZ, on Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation (Rus.: Федеральный конституционный закон от 14.12.2015 N. 7-ФКЗ "О внесении изменений в Федеральный конституционный закон 'О Конституционном Суде Российской Федерации'").

67 Article 104(4) of the Federal Constitutional Law on the Constitutional Court of the Russian Federation as amended on 14 December 2015 reads that "b случае, если Конституционный Суд Российской Федерации принимает постановление, предусмотренное пунктом 2 части первой настоящей статьи, какие-либо действия (акты), направленные на исполнение соответствующего решения межгосударственного органа по защите прав и свобод человека, в Российской Федерации не могут осуществляться (приниматься)."

68 *Anchugov and Gladkov v Russia*, App. nos 11157/04 and 16162/05 (ECtHR, 4 July 2013).

ban on prisoners' voting rights[69] was incompatible with Art. 3 of Protocol No. 1 to the ECHR. The ECtHR stressed that

> the Government's argument that the present case is distinguishable from *Hirst (no. 2)*, as in Russia a provision imposing a voting bar on convicted prisoners is laid down in the Constitution – the basic law of Russia adopted following a nationwide vote – rather than in an 'ordinary' legal instrument enacted by a parliament, as was the case in the United Kingdom […]. In that connection the Court reiterates that, according to its established case law, a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations […]. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a member State's 'jurisdiction' – which is often exercised in the first place through the Constitution – from scrutiny under Convention. The Court notes that this interpretation is in line with the principle set forth in Article 27 of the 1969 Vienna Convention on the Law of Treaties.[70]

The Russian Constitutional Court, at the request of the Minister of Justice, ruled that the ECtHR decision was unenforceable. It stressed that "Russia was and remains an integral part of the European legal space, which implies equal dialogue and readiness to compromise. The Constitutional Court has always played a leading role in integrating the ECHR positions in the Russian legal system."[71] However, although the "measures aimed at ensuring fairness, proportionality and auxiliary application of limits to the voting rights of convicted prisoners are possible and achievable in the Russian legislation and judicial practice in accordance with the ECtHR judgment", "the Federal legislator has the right to optimize the system of criminal sanctions."[72]

The new Russian Law on the 're-evaluation' of the ECtHR decisions was criticized by the Venice Commission[73] who stressed that declaration of the Russian Constitutional Court on the 'unenforceability' of the ECtHR ruling does not eliminate international obligations binding upon Russia and that this new

69 Article 32(3) of the Russian Constitution reads that "citizens recognized by court as legally unfit, as well as citizens kept in places of confinement by a court sentence shall be deprived of the right to elect and be elected."

70 Ibidem, para. 108.

71 Case 12-П/2016 (Constitutional Court of the Russian Federation, 19 April 2016) "по делу о разрешении вопроса о возможности исполнения в соответствии с Конституцией Российской Федерации постановления Европейского Суда по правам человека от 4 июля 2013 года по делу «Анчугов и Гладков против России» в связи с запросом Министерства юстиции Российской Федерации."

72 Ibidem.

73 Interim opinion no. 832/2015 on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation adopted by the Venice Commission at its 106 Plenary Session, 11–12 March 2016; CDL-AD(2016)005.

law is incompatible with Russia's obligations under international law. The Venice Commission also recommended the amendments to the law governing the Constitutional Court of the Russian Federation including the removal of the provision allowing the Constitutional Court to rule on the 'enforceability' of international decisions and instead the introduction of a provision allowing this court to rule on the compatibility of a 'modality of enforcement' with the Russian Constitution (save for situations where the ECtHR specifically defined the measure of execution). Further, the Venice Commission recommended that the Russian Constitutional Court makes clear that assessment of constitutionality does not extend to individual measures of execution such as the payment of just satisfaction. Finally, where the Constitutional Court rules on the unconstitutionality of a particular measure of enforcement, executive authorities should be obliged to find alternative measures of enforcement, including amendment of legislative framework, including the Constitution of the Russian Federation.

In Lithuania, under Art. 104 of the Constitution of the Republic of Lithuania judges of the Constitutional Court should 'follow the Constitution', Art. 135(1) of the Constitution assumes the duty of observance of international law by national courts and Art. 138(3) of the Constitution makes international treaties ratified by the Seimas a constituent part of the Lithuanian legal system. The latter provision constitutes normative basis of i.a. the dialogue of the Constitutional Court with the ECtHR. The ECHR is the international treaty most frequently referred to by the Constitutional Court – mentioned around 50 times so far.[74] The Court recognised the identical nature of values forming the foundations of the Convention and the Lithuanian constitution and the identity of their goals in the area of human rights.[75]

As regards Hungary, its 2011 Constitution reads that "Hungary shall contribute to the creation of European unity"[76] and "Hungary shall ensure that Hungarian law be in conformity with international law."[77] The jurisdiction of the Constitutional Court of Hungary includes the review of "any legal regulation for conflict with any international treaties."[78]

74 National Report of Lithuania for the XVIth Congress of the Conference of European Constitutional Courts 5 and 6.

75 The Lithuanian Constitutional Court's conclusion of 24 January 1995. See also broadly in the contribution by E. Kuzborska in this book.

76 Article E.1 of the Hungarian Constitution.

77 Article Q.2 of the Hungarian Constitution.

78 Article 24.2.f of the Hungarian Constitution.

2.3. Reopening of Proceedings Following an Adverse Ruling of the ECtHR

There are, in principle, three types of consequences to States Parties after an adverse ruling from the ECtHR:

(1) to pay the awarded compensation;
(2) if necessary, to take further individual measures in favour of the applicant, that is to put a stop to a violation found by the Court and to place the applicant, as far as possible, into the situation existing before the breach (*restitutio in integrum*);[79] and
(3) to take measures of a general character in order to ensure non-repetition of similar violations in the future[80] (in case of pilot judgments or quasi-pilot judgments[81]).

Pursuant to Arts. 1 and 46 ECHR, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention and they undertake to abide by the final judgment of the Court in any case to which they are parties. It means in particular that any judgment finding the violation of the Convention should, in principle and where it is possible, lead to the *restitutio in integrum*.[82]

As a matter of principle, after an adverse judgment of the ECtHR in a case against Poland, the proceedings that resulted in stating the violation should be reopened. This is a normative framework for the most elementary foundations of the dialogue with the ECtHR. The procedural codes (Code of Criminal Procedure,

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79 *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland 2*, App. no. 32772/02 (ECtHR, 30 June 2009), *para. 89.*

80 *Broniowski v Poland*, App. no. 31443/96 (ECtHR, 22 June 2004), para. 193.

81 Quasi pilot judgments or pilot-like judgments are those where ECtHR finds a systemic violation but abstains from ordering the adoption of general measures. *Wizerkaniuk v Poland*, App. no. 18990/05 (ECtHR, 5 July 2011) can serve as example, where the Court ruled para 84 that "the Press Act was adopted in 1984, twenty-seven years ago. It was adopted before the collapse of the communist system in Poland in 1989. Under that system, all media were subjected to preventive censorship. The Press Act 1984 was extensively amended on twelve occasions (see paragraph 29 above). However, the provisions of sections 14 and 49 of that Act, on which the applicant's conviction was based, were never subject to any amendments, in spite of the profound political and legal changes occasioned by Poland's transition to democracy. It is not for the Court to speculate about the reasons why the Polish legislature has chosen not to repeal those provisions. However, the Court cannot but note that, as applied in the present case, the provisions cannot be said to be compatible with the tenets of a democratic society and with the significance that freedom of expression assumes in the context of such a society." See also: I.C. Kamiński, R. Kownacki, K. Wierczyńska, 'Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w polskim systemie prawnym', [in:] A. Wróbel (ed.), *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym* (Wolters Kluwer 2011) 101 and cases mentioned there.

82 See: O. Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge 2015), p. 2.

Code of Civil Procedure, the Law on the Procedure before Administrative Courts) regulate the problem of re-opening of proceedings differently. The Code of Criminal Procedure provides explicitly that "the proceedings shall be re-opened to the benefit of the accused where such need arises from the decision of an international body acting under international treaty ratified by the Republic of Poland."[83] Moreover, the re-opening is not limited to the accused who actually applied to the ECtHR and obtained the judgment but it is extended to "other cases where a violation of the Convention occurred in the construction of factual and legal circumstances identical to the one which was found in the judgment of the ECtHR adverse to Poland"[84] as the Supreme Court rightly held basing its argumentation on Art. 1 ECHR. However, where the accused was sentenced for sanction other than unconditional deprivation of liberty, the violation of the ECHR does not constitute sufficient grounds of admissibility of cassation complaint as the latter would be inadmissible in such circumstances if not brought by the Minister of Justice, Prosecutor General or the Ombudsman.[85]

The Law on the Procedure before Administrative Courts contains provisions similar to the Code of Criminal Procedure, although the right to plead for re-opening is open to every party to the proceedings.[86]

However, the Code of Civil Procedure does not provide for the possibility of re-opening of proceedings following the adverse judgment of the ECtHR.[87] The resolution of 7 judges of the Supreme Court[88] held that "the final judgment of the European Court of Human Rights finding the violation of the right to fair

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83 Art. 540(3) of the Code of Criminal Procedure.

84 Case 14/14 (Supreme Court, resolution of 7 judges, 26 June 2014): "potrzeba wznowienia postępowania, o której mowa w Art. 540(3) k.p.k., może dotyczyć nie tylko postępowania w sprawie, do której odnosi się rozstrzygnięcie Europejskiego Trybunału Praw Człowieka o naruszeniu Konwencji o ochronie praw człowieka i podstawowych wolności, ale także do innych postępowań karnych, w których zaistniało naruszenie postanowień Konwencji tożsame w układzie okoliczności faktyczno-prawnych do stwierdzonego w orzeczeniu tego Trybunału wydanym przeciwko Polsce."

85 See: Art. 523(2) and (4) and Art. 521(1) of the Code of Criminal Procedure. The official title of the Polish Ombudsman is "the Commissioner for Citizens' Rights" (*Rzecznik Praw Obywatelskich*), see: Sejm, 'The Constitution of the Republic of Poland', <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (access: 16 December 2016).

86 Art. 272(3) of the Law on the Procedure before Administrative Courts ("można żądać wznowienia postępowania również w przypadku, gdy potrzeba taka wynika z rozstrzygnięcia organu międzynarodowego działającego na podstawie umowy międzynarodowej ratyfikowanej przez Rzeczpospolitą Polską").

87 As rightly pointed out by P. Grzegorczyk, "The decision to allow for annulment of the final and valid judgment following the judgment of the ECtHR lays within the power of the legislature" in P. Grzegorczyk, 'Naruszenie art. 6 ust. 1 Europejskiej Konwencji o Ochronie Praw Człowieka jako podstawa wznowienia postępowania cywilnego z powodu nieważności' (2011) 3 Radca Prawny, p. 83.

88 Case III CZP 16/10 (Supreme Court, resolution of 7 judges, 30 November 2010). See the comment in A. Paprocka, 'Glosa do uchwały SN z dnia 30 listopada 2010 r., III CZP 16/10' (2011) 7 Państwo i Prawo 153.

trial before the court guaranteed by Art. 6 § 1 ECHR […] shall not constitute the ground of re-opening of the civil proceedings."[89] The Supreme Court analysed the case law of the ECtHR and found that the ECHR does not require the re-opening of proceedings in civil cases although the *restitutio in integrum* is highly desired[90] and added that the ECtHR does not tend to find violations of Art. 6(1) ECHR where legislation in a State Party does not provide for a possibility of re-opening of proceedings.[91]

Moreover, where the ECtHR finds a violation resulting from certain provisions of Polish law (normative violation), even in a pilot judgment procedure, such ECtHR judgment is not treated as a preliminary ruling opening path for claims of compensation for normative injustice (as Art. 417^1 of the Polish Civil Code requires that the plaintiff in a case concerning compensation for normative injustice constisting of the adoption of normatively defective provisionsfirst obtains a preliminary ruling finding that certain provision violated a higher-ranked norm).[92]

According to Art. 46 ECHR States are bound to abide by final judgments where the ECtHR found a violation of the Convention. It means that they are obliged to put an end to the violation immediately. This obligation may be – depending on the circumstances – binding also upon domestic courts, if national procedures allow them to put an end to the violation in their decisions. Sometimes one is not required to re-open the proceedings. This is the case, if the violation of the Convention still exists and can be remedied by *ex-post* decision of a national court.

89 Polish: "ostateczny wyrok Europejskiego Trybunału Praw Człowieka, w którym stwierdzono naruszenie prawa do sprawiedliwego rozpatrzenia sprawy przez sąd, zagwarantowanego w art. 6 ust. 1 konwencji o ochronie praw człowieka i podstawowych wolności, sporządzonej dnia 4 listopada 1950 r. w Rzymie (Dz.U. z 1993 r. Nr 61, poz. 284 ze zm.), nie stanowi podstawy wznowienia postępowania cywilnego."

90 See in this respect *Bouchan v Ukraine*, App. no. 22251/08 (ECtHR, 5 February 2015).

91 Polish: "charakterystyczne jest poza tym, że Trybunał ostrzej traktuje te państwa, które wprowadziły do swego systemu prawnego wyraźną podstawę wznowienia postępowania cywilnego w związku z jego wyrokiem. W takich wypadkach, jak to wynika z orzecznictwa Trybunału, do sankcji dochodzi ze względu na niewłaściwe zastosowanie przepisów regulujących to postępowanie, natomiast państwom, które tego nie uczyniły, nie wytyka się ponownie naruszenia art. 6 ust. 1 konwencji jedynie dlatego, że do wznowienia postępowania, mimo określonego wyroku Trybunału, nie doszło."

92 Case I CSK 577/11 (Supreme Court, 14 June 2012) where the Supreme Court ruled that "ostateczny wyrok Europejskiego Trybunału Praw Człowieka wydany w sprawie ze skargi indywidualnej przeciwko Rzeczpospolitej Polskiej, stwierdzający naruszenie przez Polskę art. 1 protokołu 1 do Konwencji o ochronie praw człowieka i podstawowych wolności (prawo do poszanowania mienia) w związku z utrzymywaniem przez polskiego ustawodawcę szeregu regulacji prawnych, które ograniczały prawo własności właścicieli nieruchomości, w tym uniemożliwiały swobodne ustalenie poziomu czynszów, nie jest tożsamy ze stwierdzeniem niezgodności aktu normatywnego z Konstytucją, ratyfikowaną umową międzynarodową lub ustawą w rozumieniu art. 417[1]§ 1 k.c." This judgment was criticised by K. Wójtowicz in 'Glosa do wyroku SN z dnia 14 czerwca 2012 r., I CSK 577/11' (2013) 1 Zeszyty Naukowe Sądownictwa Administracyjnego, p. 173.

However, one may provide example where Polish courts encountered troubles with this seemingly simple consequence of Art. 46 ECHR.

On 29 July 2008 the European Court of Human Rights delivered judgment in *Choumakov (no. 1)*[93] and found that the applicant's detention exceeded a reasonable time. The applicant's lawyer requested the Provincial Court in Elbląg to release the applicant – as detention should be waived at any time if circumstances occur justifying such waiver.[94] He invoked in this respect the decision of the ECtHR. On 5 December 2008 the Elbląg Provincial Court refused the applicant's lawyer's request. The Court considered that the grounds for the applicant's detention remained valid (thus it disregarded the findings of the ECtHR) and, therefore, the continued detention of the applicant did not violate the procedural guarantees safeguarded by Arts. 5 and 6 ECHR (contrary to the finding of the ECtHR). As regards the ECtHR judgment, the Provincial Court expressed the opinion that neither the Convention nor the Code of Criminal Procedure placed an obligation on the court to release an applicant following a judgment of the European Court of Human Rights. The Provincial Court noted that the applicant had been granted 1,500 euros (EUR), which constituted sufficient just satisfaction for the violation found. The Gdańsk Appellate Court while hearing the appeal from that decision added that the judgment of the ECtHR was of a "declaratory nature" and "did not constitute a source of law but rather an application of the law."[95] Obviously, the decision of the domestic courts should be different. Since the ECtHR found that the continued detention of the applicant violated the Convention, the only lawful decision of the domestic court should be to release the applicant immediately (provided that no new circumstances occurred – as it was in this case).

As for assuring conformity with Art. 46 ECHR, the Russian Federation encountered problems with the *restitutio in integrum*. Before 2010 in Russia although the re-opening of different types of court proceedings has certain common features, re-opening further to an ECtHR judgment is not regulated in a uniform manner. Most importantly, unlike the Commercial Procedure Code and the Criminal Procedure Code, the Civil Procedure Code does not expressly provide a ground for the re-opening a case on the basis of an ECtHR judgment. As a result, the Russian courts had been dismissing requests to re-open court proceedings, until the matter was raised by the Constitutional Court who found[96] that

93 *Choumakov v Poland*, App. no. 33868/05 (ECtHR, 29 July 2008).

94 Art. 253(1) of the Code of Criminal Procedure: "Preventive measure should be changed or waived if circumstances justifying its application cease to exist and/or if circumstances occur justifying it change or waiver."

95 See: *Choumakov v Poland*, App. no. 55777/08 (ECtHR, 1 February 2011), paras 18–21.

96 Case 4-P (Constitutional Court of the Russian Federation, 26 February 2010) in a case concerning the review of the constitutionality of Art. 392(2) of the Code of Civil Procedure in connection with complaints lodged by A.A. Doroshok, A.Ye. Kot and Ye.Yu. Fedotova.

> Russia's obligations to enforce ECtHR judgments under the Convention include the adoption of individual and general measures, where required […]. A person whose rights were found by the ECtHR to be breached should have an opportunity to have his or her case re-examined by the national courts. Therefore, the lack of a provision in the Civil Procedure Code could not justify the refusal to re-open proceedings, especially considering that the Commercial Procedure Code did provide for the possibility of such a re-opening in commercial proceedings. There is no objective reason for the discrepancies between the Commercial Procedure Code and the Civil Procedure Code in this respect. The courts of general jurisdiction should have applied relevant provisions of the Commercial Procedure Code by analogy when deciding on the issue of re-opening proceedings. Furthermore, the Constitutional Court stated that the implementation of national procedures ensuring that national judicial decisions were re-examined in view of violations of the Convention would be an appropriate general measure in this situation. Therefore, the Civil Procedure Code should be amended accordingly.[97]

In consequence of the judgment of the Constitutional Court of Russia, pursuant to the Art. 392(4)(4) of the Russian Civil Procedural Code (as amended), "effective judicial decisions may be reviewed due to newly discovered or new facts", whereas one of the new facts is "establishing by the European Court of Human Rights a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms when trying by a court the specific case in connection with whose solving the applicant has filed a petition with the European Court of Human Rights."[98] Article 392(4)(4) of the Russian Civil Procedural Code was later reviewed by the Constitutional Court, which held that

> should court of general jurisdiction come to the conclusion about impossibility of execution of the judgment of the European Court of Human Rights without recognition as not conforming to the Constitution of the Russian Federation of legislative provisions, concerning which the Constitutional Court of the Russian Federation earlier established absence of violation by them of constitutional rights of the petitioner in a concrete case, it is entitled to suspend proceeding and petition the Constitutional Court of the Russian Federation with a request to review constitutionality of these legislative provisions.[99]

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97 Both citations from M. Issaeva, I. Sergeeva, M. Suchkova, 'Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges' (2011) 15 International Journal of Human Rights, <http://www.surjournal.org/eng/conteudos/getArtigo15.php?artigo=15,artigo_04.htm> (access: 15 March 2015) 67.

98 The Russian Civil Procedural Code, 'Civil Procedural Code', <http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru081en.pdf> (access: 22 March 2015).

99 Judgment of the Constitutional Court of the Russian Federation No. 27-П of 6 December 2013, <http://www.ksrf.ru/en/Decision/Judgments/Documents/2013%20December%206%2027-P.pdf> (access: 22 March 2015) – exact quotation from the website of the Russian Constitutional Court. See also the comment in G. Vaypan, 'Acquiescence affirmed, its limits left undefined: The Markin judgment and the pragmatism of the Russian Constitutional Court vis-à-vis the European Court of Human Rights' (2014) 3 Russian Law Journal Vol. II 130.

In Hungary, the reopening of criminal proceedings after an adverse judgment of ECtHR is possible in favour of the defendant if the ECtHR found "that the conduct of the proceedings or the final decision of the court" violated the Convention.[100] The Code of Civil Procedure does not provide for the reopening of proceedings following an adverse judgment of the ECtHR.[101] In Czech Republic the retrial after the ECtHR judgment is possible in all types of cases.[102] The same applies to Ukraine where the "appeal in the light of exceptional circumstances" is provided, however, as the *Bochan (no. 2)* case[103] illustrates, one may encounter impediments while using this instrument.

3. The Forms of Judicial Dialogue of the CEE States' Courts with the ECtHR Classified *vis-à-vis* the Criterion of Appropriateness

After this short overview of national provisions and decisions of the highest national judicial authorities of the CEE States concerning the observance of the ECtHR case law, one could reasonably assume that the practice of domestic courts would smoothly implement the paradigm of judicial dialogue with the ECtHR. This section is focused on the verification of this assumption. It proves that the practice of national courts in the selected CEE States varies as regards the criterion of appropriateness of judicial dialogue. The following

100 Pursuant to para. 406.1.b of the Criminal Procedure Code of Hungary, "terhelt javára felülvizsgálatnak van helye akkor is, ha nemzetközi szerződéssel létrehozott emberi jogi szerv megállapította, hogy az eljárás lefolytatása vagy a bíróság jogerös határozata megsértette a törvényben kihirdetett nemzetközi szerződés valamely rendelkezését, feltéve, hogy a nemzetközi emberi jogi szerv joghatóságának a Magyar Köztársaság alávetette magát és a felülvizsgálattal a jogsértés orvosolható."

101 See: Arts. 270–275 of the Hungarian Code of Civil Procedure.

102 See: I. Pospíšil, *Comments on Reopening Proceedings in the Civil Matters after the ECtHR Judgments before the Constitutional Court of the Czech Republic* (Strasbourg 2015) available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805921c9> (access: 24 April 2016).

103 *Bochan v Ukraine*, App. no. 22251/08 (ECtHR, 5 February 2015). In this case, following the ECtHR judgment adverse to Ukraine, the applicant lodged with the Supreme Court an "appeal in the light of exceptional circumstances" pursuant in particular to Articles 353–355 of the Code of Civil Procedure of 2004. She asked the Supreme Court to quash the courts' decisions in her case and to adopt a new judgment allowing her claims in full. She joined to her appeal copies of the Court's judgment and of the domestic decisions. However, the Supreme Court in dismissed the applicant's motion holding in particular that the European Court of Human Rights had concluded that the [domestic] courts' decisions were lawful and well-founded.

subsections present examples of proper, fake and failed dialogue as well as such decisions of domestic courts, which are non-classifiable in view of the preconceived criterion.

3.1. The Proper Dialogue: Implementing the ECHR Standard by Domestic Courts or Consciously Questioning it after Thorough Analysis

Proper judicial dialogue exists when national courts either follow the interpretative standard of the Convention by actually implementing the ECtHR case law or when they dissent or concur with the Strasbourg Court after thorough analysis of the jurisprudence of the latter. Several examples of such practice will be mentioned below.

For obvious linguistic reasons Polish score of successful dialogue may appear to be the highest, however this impression results only from poor opportunities of accessing the databases of judgments in other CEE States. The same caveat shall apply to other types of dialogue classified in this chapter.

3.1.1. Poland

Trifling cases and the access to justice

In Poland the Supreme Administrative Court decided[104] to refer to the extended panel of 7 judges of the Supreme Administrative Court[105] in order to obtain resolution on whether an administrative court may dismiss the case as inadmissible when it constitutes an abuse of a right of access to the court because it concerns a matter which is transparently and flagrantly trifling (trivial). The Supreme Administrative Court referred quite extensively to the case law of the ECtHR developed under Art. 6 ECHR, quoting the ECtHR decision in *Korolev*[106] and the judgment in *Gagliano Giorgi*.[107]

The case in which the Supreme Administrative Court requested the resolution of the panel of 7 judges arose in the circumstances where the applicant disputed the obligation to pay 0.42 PLN for the copy of documents whereas only the costs of legal aid (paid by the State Treasury) amounted to 516.60 PLN and they would have increased were the new proceedings to commence. In spite of all doubts as

104 Case I OSK 1992/14 (Supreme Administrative Court, order, 16 October 2015).

105 Art. 187(1) of the Law on the Procedure before Administrative Courts allows the panel hearing a case to refer to the extended panel of 7 judges of the SAC in order to obtain a resolution on a legal issue raising difficulties in the case law.

106 *Korolev v Russia*, App. no. 25551/05 (ECtHR, decision as to the admissibility, 1 July 2010). The decision was delivered right after the entry into force of Protocol No. 14, which amended Art. 35 ECHR by adding that the case shall be declared inadmissible if the applicant has not suffered a significant disadvantage. The Court explained that in accordance with the principle *de minimis non curat pretor* an application must concern circumstances which show a "minimum level of severity to warrant consideration by an international court."

107 *Gagliano Giorgi v Italy*, App. no. 23563/07 (ECtHR, 5 March 2012), paras 51–66.

to whether the standard developed by the ECtHR in relation to assessment of admissibility of applications brought under Art. 35 ECHR can be directly applied to cases before national courts, one must note that the reference of the Court to the ECtHR jurisprudence was extensive and accurate. The Supreme Administrative Court highlighted the need of adjudication without an unnecessary delay, invoking in this respect *Philis (No. 2)*[108] and insisted that Art. 6 ECHR "imposes on Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time" and considered that adjudicating in trifling cases creates a workload which compromises the possibility of promptness of proceedings. The Court referred to the ECtHR judgments concerning the delayed proceedings in Poland (*Kudła*,[109] *Beller*[110] and *Rutkowski*[111]) and considered that the standard of the Convention allows for drawing negative consequences from the abuse of the right of access to the court, quoting in this respect *Winer*,[112] *W. v Germany*[113] and *Stewart-Brady*[114] and finally *Bock*[115] which was discussed in greater details. Unfortunately the panel of seven judges refused to adopt a resolution[116] for formal reasons. Namely, the issue of admissibility of the application in the material case was already reviewed by the Court *ex officio* since the case at hand had already been decided by the same Court in 2013.[117] If the Supreme Administrative Court decided in 2013 that the case was admissible, this conclusion binds itself and the Regional Administrative Court.[118] However, engagement with the jurisprudence of the ECtHR by the Court when requesting for the resolution of the panel of 7 judges was rather impressive. Its reasoning attempted to transfer the France-rooted concept of *pas d'intérêt, pas d'action*, which was integrated in the Convention practice by the ECtHR, to the framework of the Polish administrative courts' procedure.

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108 *Philis v Greece*, App. no. 19773/92 (ECtHR, 27 June 1997).

109 *Kudła v Poland*, App. no. 30210/96 (ECtHR, 26 October 2000).

110 *Beller v Poland*, App. no. 51837/99 (ECtHR, 1 February 2005).

111 *Rutkowski and others v Poland*, App. nos 72287/10, 13927/11 and 46187/11 (ECtHR, 7 July 2015).

112 *Winer v United Kingdom*, App. no. 10871/84 (ECtHR 10 July 1986).

113 *W. v Federal Republic of Germany*, App. no. 11564/85 (European Commission of Human Rights, decision, 4 December 1985).

114 *Stewart-Brady v United Kingdom*, App. no. 28406/95 (European Commission of Human Rights, decision, 2 July 1997). The name of the applicant was misspelled by the SAC ("Steward" instead of "Stewart").

115 *Bock v Germany*, App. no. 22051/07 (ECtHR, admissibility decision, 19 January 2010).

116 Case I OPS 3/15 (Supreme Administrative Court, order, 21 March 2016).

117 Case I OSK 2139/13 (Supreme Administrative Court, 1 October 2013).

118 By virtue of Art. 170 of Law on Procedure before Administrative Courts, the final decision of the court is binding upon this court and other courts and bodies of the State.

Freedom of assembly

The Polish Law on Assemblies was recently amended[119] resulting most probably in one of the most liberal regulations on the continent. Before it happened Poland had encountered turbulences in the area protected by Art. 11 ECHR.[120] It is a well-settled case law of the ECtHR that a State is the ultimate guarantor of the principle of political pluralism. The genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere. A purely negative conception would not be compatible with the purpose of Art. 11 ECHR, nor with that of the Convention in general. There exists, thus, a positive obligation to secure the effective enjoyment of these freedoms.[121] Therefore, a risk of disorder or threat to public safety is not, as such, an ultimate justification for any interference with the freedom of assembly.[122] The Supreme Administrative Court[123] properly construed provisions of the (at that time in force) Law of Assembly of 1990 and invoked the *Fáber* decision of the ECtHR,[124] and stated that "organs of the state are obliged to assess the risks to safety and risk of interference and then to apply appropriate measures determined by that assessment. These measures must be the least restrictive and – as a matter of principle – enable to organise the assembly."[125] The case law of the Strasbourg Court was invoked properly in order to establish

119 Law on Assembly adopted on 24 July 2015, O.J. 2015, item 1485. However, the Law was amended yet again in 2016, which resulted in substantial departure from the Convention standard.

120 See: *Bączkowski v Poland*, App. no. 1543/06 (ECtHR, 3 May 2007).

121 Ibidem, para. 64.

122 See also: Case K 21/05 (Polish Constitutional Court, 18 January 2006).

123 Case I OSK 2538/13 (Supreme Administrative Court, 10 January 2014).

124 *Fáber v Hungary*, App. no. 40721/08 (ECtHR, 24 July 2012). The case concerned the violation of Art. 10 read in the light of Art. 11 ECHR. Mr. Fáber was held for 6 hours in custody and fined some 200 EUR for disobedience since he protested against the adjacent manifestation of the Hungarian Socialist Party and while doing so he was holding the Árpád-striped flag. The ECtHR concluded that although the police's endeavour to prevent any clashes between the participants in the two assemblies falls within the authorities' margin of appreciation granted in the prevention of violence and in the protection of demonstrators against fear of violence, nevertheless, the freedom to take part in a peaceful assembly is of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act on such an occasion and "in the absence of additional elements, the Court, even accepting the provocative nature of the display of the flag, which remains prima facie an act of freedom of expression, cannot see the reasons for the intervention against the applicant." According to the ECtHR, "where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance" (para. 47 of the judgment).

125 In Polish: "organy zobligowane są do dokonania oceny zagrożenia dla bezpieczeństwa oraz ryzyka zakłóceń, a następnie zastosowania odpowiednich środków dyktowanych przez ocenę takiego ryzyka. Środki te – jak podkreślił Trybunał – powinny być najmniej ograniczające i – co do zasady – umożliwiać przeprowadzenie demonstracji."

the interpretative consensus concerning Art. 11 ECHR and thus the Supreme Administrative Court properly 'took into account' the ECtHR jurisprudence while interpreting domestic law. It was, therefore, a good example of a proper judicial dialogue: not only did the Court properly identify the relevant case law of the ECtHR but also it did manage to apply the relevant jurisprudence in the case at hand.

The duty of authorisation of statements made in interviews

In *Wizerkaniuk* case,[126] concerning the journalists' duty of authorisation of statements made in interviews before they are published, the ECtHR explained that "an obligation to verify, before publication, whether a text based on statements made in the context of an interview and quoted verbatim is accurate can be said to amount, for the printed media, to a normal obligation of professional diligence"[127] and found that the criminal conviction of the journalist "without any regard being had to the accuracy and subject matter of the published text and notwithstanding his unquestioned diligence in ensuring that the text of the published interview corresponded to the actual statements […], was disproportionate in the circumstances."[128] The Provincial Court in Sieradz referred to this ruling in a case of journalist who was convicted by the first instance court for disregarding the request of the interviewee who insisted on authorisation of the interview. The Provincial Court emphasised that although the law (imposing the authorisation duty) was formally breached, yet, the proceedings should be discontinued because "even though the accused formally violated Art. 14.2 of the Press Law,[129] nevertheless the level of social noxiousness was insignificant"[130] as the journalist quoted the statements made by the interviewee verbatim. The Provincial Court properly noted and drew conclusions from the factual similarities of the case at hand and the circumstances, which appeared crucial for the *Wizerkaniuk* ruling of the ECtHR. It emphasized the key similarities of the case at hand and the *Wizerkaniuk* case stressing that "statements made by the injured party by e-mail were quoted in the disputed press material without any shortcuts or deformations. The accused in no way manipulated these statements."[131] Thus the Provincial Court managed to reflect the essential elements of the ECtHR reasoning in the circumstances of the case decided. The crucial element identified and transposed by the Provincial Court from the Strasbourg *acquis*

126 *Wizerkaniuk v Poland*, App. no. 18990/05 (ECtHR, 5 July 2011).

127 Ibidem, para. 66.

128 Ibidem, para. 87.

129 This provision introduces the duty of authorisation.

130 Case II Ka 71/15 (Provincial Court in Sieradz, 22 April 2015).

131 In Polish: "wypowiedzi udzielone drogą mailową przez oskarżycielkę posiłkową zostały zacytowane w opublikowanym artykule bez żadnych skrótów i zniekształceń. Oskarżona w żaden sposób nie manipulowała tymi wypowiedziami."

was the issue of imposition of a sanction in case of a purely formal breach of the authorisation duty. This judgment serves, therefore, as a good example of a proper judicial dialogue.

Eviction

In cases concerning eviction the defendants quite frequently invoke Art. 8 ECHR claiming that the right to inviolability of the home was infringed. The ECtHR in its case law[132] accepted that eviction, which "benefits the economic well-being of the country" may be regarded as serving the 'legitimate aim' which is required in case of interference with the right to inviolability of the home. The Provincial Court of Gliwice[133] invoked the *Kryvitska* ruling and certain other decisions of the ECtHR *proprio motu* while assessing the legality of eviction ordered by the first instance court. It is noteworthy that the appellants did not raise pleas in law alleging the violation of Art. 8 ECHR. However, the Provincial Court found it appropriate to evaluate the decision of the lower court against the background of the provision of the ECHR. This form of reference to the case law of the ECtHR is particularly valuable since it shows that the court was aware of its role of guarantor of effectiveness of the Convention and knew that it ought to evaluate the compatibility of domestic provisions with the Convention standard even in the absence of invitation to do so from the parties to the proceedings.

3.1.2. Other CEE States

The Czech Constitutional Court frequently refers to the case law of the ECtHR, thus implementing the relevant standards of protection. One can point out at several examples.

In the judgment 2005/03/15 – I. ÚS 367/03 resulting from the constitutional complaint of Mr. J.R., the Czech Constitutional Court decided that "the 25 July 2002 judgment of the High Court in Prague, no. 1 Co 106/2002–69, and the 24 April 2003 judgment of the Supreme Court of the Czech Republic, no. 28 Cdo 2194/2002-89, resulted in a violation of the complainant's fundamental rights and basic freedoms flowing from Art. 17(2) of the Charter of Fundamental Rights and Basic Freedoms and from Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms" and they were therefore quashed. The complainant, in an interview for the daily newspaper, *Lidové noviny*, expressed an opinion, which is based on the fact that in the 70's and 80's of the previous century, the field of popular music was restricted politically (and he employed for this purpose, and with a certain degree of exaggeration, the term 'mafia'). The clue of the case was to decide on the degree to which public figures

132 *Kryvitska and Kryvitskyy v Ukraine*, App. No. 30856/03 (ECtHR, 2 December 2010), para. 46.
133 Case III Ca 727/14 (Provincial Court in Gliwice, 1 October 2014).

must bear criticism. The Constitutional Court recalled the jurisprudence of the ECtHR stating among others that

> where some statement constitutes a value judgment, the appropriateness of the interference with the rights of personhood can depend upon whether there exists a sufficient factual basis for the contested statement, since even a value judgment can be excessive, if it lacks any factual basis whatsoever [compare the decisions of the European Court of Human Rights in the matter, *De Haes a Gijsels v Belgium* (1997) and *Oberschlick v Austria (No. 2)* (1997)].[134]

It further explained that

> the Constitutional Court concurs with the jurisprudence of the European Court of Human Rights according to which the freedom of expression represents one of the most important foundations of democratic society and one of the main conditions of the advancement and development of each individual. As such the freedom of expression relates not only to 'information' or 'ideas' that are favourably received or considered as innocuous or insignificant, but even those which injure, shock, or disturb: such is required for pluralism, tolerance, and a spirit of openness, without which there would be no democratic society. Compare, for example, the decision, *Fuentes Bobo v Spain* (2000).[135]

The Court concluded that "persons who are active in the public, politicians, public officials, media stars etc., must bear a greater degree of criticism than other citizens. The jurisprudence of the European Court of Human Rights is also built upon this principle [in greater detail, for example, in the matter of *Lingens v Austria* (1986)]." If one keeps in mind the *Oberschlick (No. 2)* standard ('idiot') and compares it to the circumstance of this case ('mafia'), then one has to conclude that the Constitutional Court managed to guarantee the sufficient level of protection of the freedom of expression.

In the judgment 2008/10/14 – Pl. ÚS 40/06 concerning the obligatory membership in Czech Medical Chamber the Constitutional Court developed thorough analysis of the ECtHR case law concerning the negative aspect of the right

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134 Case I. ÚS 367/03 (Czech Constitutional Court, 15 March 2005) 5. In Czech: "Tam, kde je nějaké prohlášení hodnotovým soudem, může přiměřenost zásahu do osobnostních práv záviset na tom, zda existuje dostatečný faktický podklad pro napadené prohlášení, protože i hodnotový soud, bez jakéhokoli faktického podkladu, může být přehnaný [srov. rozhodnutí Evropského soudu pro lidská práva ve věcech *De Haes a Gijsels proti Belgii* (1997) a *Oberschlick proti Rakousku (č. 2)* (1997)]."

135 Ibidem, 6. In Czech: "Ústavní soud se ztotožňuje s judikaturou Evropského soudu pro lidská práva, podle níž svoboda projevu představuje jeden z nejdůležitějších základů demokratické společnosti a jednu z hlavních podmínek pokroku a rozvoje každého jednotlivce. Jako taková se svoboda projevu vztahuje nejen na 'informace' nebo 'myšlenky' příznivě přijímané či považované za neškodné či bezvýznamné, ale i na ty, které zraňují, šokují nebo znepokojují: tak tomu chtějí pluralita, tolerance a duch otevřenosti, bez nichž není demokratické společnosti. Srov. např. rozhodnutí *Fuentes Bobo proti Španělsku* (2000)."

of association (Art. 11 ECHR). The petitioners in this case expressed their awareness of the ECtHR decision holding that compulsory membership in professional associations, guaranteed by public law, was not to be considered through the prism of Art. 11 ECHR.[136] Nevertheless the petitioners claimed that these decisions were not applicable to the issue of obligatory membership in the Czech Medical Chamber since the latter "at present effectively resembles a trade union or an association of private law." Their petition was ultimately denied. After a thorough analysis of both the case law of the ECtHR and the legal characteristics of the Czech Medical Chamber, the Constitutional Court concluded that the outcome of the analysis

> affirms the opinion that it is an institution identifiable with those treated by the bodies of the Convention as public law corporations (see clauses 69 to 79 above), whilst it differentiates from associations as assessed by the European Court of Human Rights in the judgment [*Chassagnou*].[137]

The Constitutional Court disqualified the petitioners' pleas based on the Convention but before doing so it analysed the Convention standard and the relevant ECtHR case law.

As for the practice of ordinary courts in Czech Republic, the attempts to refer to the ECtHR case law diverge as regards their quality. However, in the case which concerned the delayed judicial proceedings, the Provincial Court in Hradec Králové[138] properly (although not too extensively) referred to the case law of the ECtHR concerning the damages in similar cases[139] and ruled that the compensation granted by national court for delayed proceedings can be regarded satisfactory only if it corresponds to sums granted by ECtHR in similar cases.[140] One cannot but conclude that this assessment reflects properly the Convention standard.[141] Similarly, in another case, which concerned arrest warrant, the District

136 See e.g.: ECtHR cases: *Le Compte, Van Leuven and De Meyere v Belgium* (23 June 1981); *Albert and Le Compte v Belgium* (decision on admissibility, 10 February 1983); *Popov and others, Vakarelova, Markov and Bankov v Bulgaria*, App. nos 48047/99, 48961/99, 50786/99, and 50792/99 (6 November 2003); *Simón v Spain*, App. no. 16685/90 (decision on admissibility, 8 July 1992); *Bota v Romania*, App. no. 24057/03 (decision on admissibility, 12 October 2004).

137 *Chassagnou and others v France*, App. nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999).

138 Case 18 Co 420/2010 (*Krajský soud v Hradci Králové*, 20 September 2010).

139 It invoked judgments of ECtHR of 17 May 2005 in *H v Slovakia* and an undefined case *I v Italy* of unspecified date.

140 In Czech: "podle judikatury Evropského soudu pro lidská práva lze kompenzační prostředek nápravy nepřiměřené délky řízení považovat za účinný pouze za podmínky, že výše přiznaného zadostiučinění je v rozumném poměru k částkám, které v obdobných případech Evropský soud pro lidská práva sám přiznává (např. rozsudek ESLP ve věci *H proti Slovensku* ze dne 17.5.2005)".

141 See e.g.: *M.C. v Poland*, App. no. 23692/09 (ECtHR, 3 March 2015), para. 93 and authorities referred to therein.

Court in České Budějovice[142] invoked the ECtHR case law[143] and ruled that pursuant to Art. 5 ECHR isolative measures (arrest warrant) must not be imposed where more meditative measures are sufficient to assure the proper conduct of proceedings.[144]

The practice of Hungarian courts (like in Czech Republic, Lithuania or Poland) is composed of – on one hand – positive experience of the Constitutional Court, which seems to be open to the dialogue with the ECtHR, and rather saddening examples from the practice of ordinary courts. The situation in Hungary thus resembles the *status quo* in Poland where the Constitutional Court developed an extensive practice of references to the Strasbourg jurisprudence, whereas regular and administrative courts seem to encounter obstacles in entering into dialogue with the ECtHR. As noted by Chronowski and Csatlós, "ordinary courts frequently cite international courts decisions and mainly those of the ECtHR, but they rarely use the reasoning and the fundamental legal statements directly in the argumentation in their own cases."[145]

Again, the practice of the Constitutional Court appears encouraging though. On 3 March 2014, the Constitutional Court of Hungary delivered a ruling on the constitutionality of the provision of the Civil Code (Section 2:44 of the Act V on the Civil Code) providing – as the petitioner pointed out – that:

> public figures can only be made subject to heavy criticism in the interest of enforcing the fundamental rights guaranteeing the debating of public affairs, in particular the freedom of opinion and the freedom of the press with the fulfilment of three conjunctive conditions: (1) if the criticism does not violate the human dignity of the person concerned, (2) if its extent is necessary and proportionate, and (3) if the existence of 'acknowledgeable public interest' can be verified.[146]

The Court found the passage concerning the 'acknowledgeable public interest' requirement unconstitutional. It stressed that "the Constitutional Court applies

142 Case 3 To 12/2004 (*Krajský soud v Českých Budějovicích*, 9 January 2004).

143 The Czech court invoked *Wemhoff v Germany*, App. no. 2122/64 (ECtHR, 27 June 1968).

144 In Czech: "Je pochopitelné, že nebezpečí např. útěku nebo podobného maření trestního řízení může být tak vysoké, že žádná záruka nemůže vazbu nahradit. Není to však případ obžalovaného při jeho dosavadních zkušenostech s vazbou a s přístupem soudu prvního stupně k tomuto problému. Evropský soud pro lidská práva zmíněný čl. 5 odst. 3 Úmluvy vykládá dále, než naznačuje jeho slovní znění. Podle Soudu jde nikoli o možnost, ale o povinnost státu nahradit vazbu zárukou, jestliže přítomnost obžalovaného při hlavním líčení lze zajistit jiným, mírnějším způsobem, než je vazba, pokud nejde o ony extrémní případy. Jako jeden z celé řady příkladů je uváděn rozsudek *Wemhoff versus Německo*."

145 N. Chronowski, E. Csatlós, 'Judicial Dialogue or National Monologue? The International Law and Hungarian Courts' (2013) 1 ELTE Law Journal, p. 27.

146 Case 7/2014 (Constitutional Court of Hungary, 3 March 2014). Available at: MKAB, 'Judgement', <http://www.mkab.hu/letoltesek/en_0007_2014.pdf> (access: 18 July 2016) 1, para. I of the judgment.

as the minimum requirements of protecting rights in the course of elaborating the Hungarian constitutional standards the aspects found in the judicial practice of ECHR on the interpretation of the Convention" and found that

> the special protection of the freedom of political speech is a requirement in the judicial practice of ECHR penetrating the whole of the legal system, and it needs to be applied – by taking other aspects into account as well – in each case when the challenged expression is voiced in questions affecting the community in the course of debating public affairs.[147]

It is interesting that the Constitutional Court not only referred broadly to the practice of the ECtHR, but to the case law of the US Supreme Court as well, quoting i.a. the decision in the *New York Times v Sullivan* case.[148]

Positive examples of a proper dialogue could also be found in the practice of courts of Lithuania. In the 2011 judgment[149] the Supreme Court of Lithuania analysed the significance of Art. 6 ECHR in the area of enforcement proceedings. It studied/examined thoroughly the case law of ECtHR[150] and held that:

> the ECtHR has consistently held in its practice that enforcement is an integral part of 'hearing' (Eng. 'trial') and it shall, subject to Art. 6 (right to a fair trial) serve its goals. The ECtHR found that it would be incomprehensible if Art. 6 of the Convention defined in detail the procedural guarantees i.e. the right to a fair and public hearing within a reasonable time, failing to protect the same in case of enforcement process. The right to justice is not merely a theoretical right to a final court decision, but it also includes the legitimate expectation flowing from this judgment. Effective legal protection and duty to restore legality presuppose an obligation of public authorities to comply with a binding decision (see. *H. v Greece*, Judgment of 19 March 1997, Reports 1997-II, p. 510, para. 40). The European Court of Human Rights confirmed that the final decision of the court cannot be prevented from execution, nor can

147 Ibidem, 9, para. III of the judgment.

148 *New York Times v Sullivan* 376 U.S. 254 (US Supreme Court, 1966). The case concerned a lawsuit between the editor of the *New York Times* newspaper and the Montgomery Public Safety Commissioner Mr. Sullivan. The *New York Times* published a full-page advertisement soliciting funds to defend Mr. Martin Luther King Jr. The article was critical against the police forces and included some minor discrepancies. The case became a landmark one since the Supreme Court developed the so-called actual malice test according to which public figures may only protect themselves against criticism from the press if the latter published critical information knowingly involving false facts or where they acted with 'reckless disregard' of whether information was false or not (which does not include mere neglect in following professional standards of fact checking).

149 Case 2 SA-137-262/2011 (Supreme Court of Lithuania, 9 September 2011). Similarly, in Supreme Court of Lithuania cases: 3 K-7-90/2009 (23 April 2009) and 2 SA-209-623/2010 (20 September 2010).

150 However, the mode of quotation of Strasbourg judgments is somewhat strange since, like in Poland, the Supreme Court decided to anonymize the surnames of applicants (e.g. *H. v Greece*, p. 510–511, para. 40; *B. v. Russia*, no. 59498/00, para. 34; *J. v Lithuania*, no. 41510/98).

it be invalidated or its execution could be unduly delayed (see. *Hornsby v Greece*, p. 510–511, para. 40; *Burdov v Russia*, no. 59498/00, para. 34; *Jasiūnienė v Lithuania*, no. 41510/98, Judgment of 6 March 2003, para. 27).[151]

Further passages of this judgment also contain extensive references to the ECtHR decisions. It is difficult to assess why in one case the dialogue with the ECtHR was possible whereas in another case, where applicant also pleaded infringement of the Convention, the Supreme Court of Lithuania limited itself to a brief remark that "the provision was not breached."[152] Perhaps the reason lied in different composition of judicial panels in both cases.

151 In Lithuanian: "Europos Žmogaus Teisių Teismas savo praktikoje yra ne kartą nurodęs, kad teismo sprendimo vykdymas yra sudėtinė 'bylos nagrinėjimo' (angl. 'trial') dalis, atsižvelgiant į Konvencijos 6 straipsnio (teisė į teisingą bylos nagrinėjimą) tikslus. Europos Žmogaus Teisių Teismo jurisprudencijoje nustatyta, jog būtų nesuvokiama, jei Konvencijos 6 straipsnis detaliai apibrėžtų procesines bylinėjimosi šalių garantijas, t.y. teisę į teisingą, viešą bylos nagrinėjimą per įmanomai trumpiausią laiką, neapsaugodamas sprendimų vykdymo proceso. Teisė į teismą nėra vien teorinė teisė galutiniu teismo sprendimu užsitikrinti atitinkamos teisės pripažinimą, bet taip pat ji apima teisėtą lūkestį šį sprendimą įvykdyti. Veiksminga bylinėjimosi šalių apsauga ir teisėtumo atkūrimas suponuoja valstybinės valdžios institucijų pareigą įvykdyti privalomą sprendimą (žr. *H. v Greece*, judgment of 19 March 1997, *Reports* 1997-II, p. 510, para. 40). Europos Žmogaus Teisių Teismo praktika patvirtina, kad galutiniam teismo sprendimui įgyvendinti negali būti užkirstas kelias, jis negali būti pripažintas negaliojančiu ar nepagrįstai uždelstas jo vykdymas (žr. cituotą *H. v Greece*, p. 510–511, para. 40; *B. v Russia*, no. 59498/00, para. 34; *J. v Lithuania*, no. 41510/98, judgment of 6 March 2003, para. 27)."

152 Case 3 K-3-358/2009 (Supreme Court of Lithuania, 29 September 2009). It is worth noting that the Supreme Court found no violation of Article 6 in the situation where the defendant raised that the adjudicating judge previously had worked for five years in the same law firm as the legal representative of the claimant. The Supreme Court briefly noted that this situation did not amount to the violation of the right to fair trial in the meaning of Art. 6 ECHR (in Lithuanian: "Kasatoriai savo teiginį, kad buvo pažeista jų teisė į nešališką teismą, motyvuoja tuo, kad pirmosios instancijos teisme bylą nagrinėjusi teisėja Ona Valentukevičiūtė ir ieškovų atstovas advokatas Aidas Venckus apie penkerius metus (iki 2005 metų) dirbo toje pačioje Kauno advokatų kontoroje. Ši aplinkybė, kasatorių teigimu, yra pagrindas svarstyti objektyviojo teisėjo nešališkumo kriterijaus klausimą. […] Aidas Venckus bei Ona Valentukevičiūtė Kauno advokatų kontoroje dirbo individualiai, juos vienijo advokatų kontora kaip teisinė advokatų veiklos forma, kurios pagrindinė paskirtis – užtikrinti tinkamas advokatų darbo vietos sąlygas. Esant šioms aplinkybėms bei įvertinus tai, kad nuo teisėjos darbo Kauno advokatų kontoroje pabaigos (2005 metų sausis) iki bylos nagrinėjimo pradžios (2008 m. balandis) praėjo daugiau kaip treji metai, nenustatyta kitų faktinių aplinkybių, leidžiančių abejoti teisėjos nešališkumu, teisėjų kolegija konstatuoja, kad kasatorių teisė į nešališką teismą nebuvo pažeista, Konvencijos 6 straipsnio 1 dalis)."

3.2. The Fake Dialogue: Decorating the Reasoning Instead of Reading the Case Law and Cases of Abusive Interpretation

It is a regular practice of Polish courts to pretend dialoguing with the ECtHR instead of really doing so. The manifestation of such practice appears when a court – instead of finding a proper case law and drawing conclusions from it – decorates the reasoning by random references to some accidentally chosen decisions of the ECtHR. The Supreme Administrative Court in the case[153] concerning the decision of one of regional administrative courts imposing an obligation to pay the court fee (of 1000 PLN) quoted the ECtHR decision in *Airey*[154] of 1979, without even noting the available recent case law, e.g. the *McKee* case.[155] The Supreme Administrative Court did not go into details of the issue of court fees, which were discussed by the ECtHR on many occasions[156] and did not assess whether the obligation to pay the court fee for initiating the proceedings did not constitute an 'excessive burden' unjustifiably restricting the applicant's access to a court. Instead, it just somewhat bluntly and superficially noted that the ECtHR jurisprudence (represented by the abovementioned *Airey* judgment) accepted limitation of access to a court resulting from imposition of court fees. As a matter of fact though, the Convention standard is a bit more nuanced. In the circumstances of the case pending before the Supreme Administrative Court the finding that the Convention was not violated seemed to be correct especially since the applicant did not even request for exemption from duty to pay the court fee. However, this does not mean, as the Court's order suggests, that the ECtHR approves 'any' dismissal of the case motivated by failure to pay the court fee. Normally, it takes into account the circumstances of the case, the situation of the party to the proceedings, the nature of the proceedings (the ECtHR does not accept automatic dismissal of applications for exemptions from court fees in case of commercial companies), information presented by the interested party and the quality of reasoning of the domestic court.[157]

Some courts decide to abuse the ECtHR case law by a 'cherry-picking' tactics i.e. invoking only such judgments that fit the assumption already made by the court. A good example of this approach is the ruling of the Supreme Administrative

153 Case I GSK 2071/15 (Supreme Administrative Court, order, 20 November 2015).

154 *Airey v Ireland*, App. no. 6289/73 (ECtHR, 9 October 1979).

155 *McKee v Hungary*, App. no. 22840/07 (ECtHR, 3 June 2014).

156 *Scordino v Italy*, App. no. 36813/97 (ECtHR, 29 March 2006), para. 201 and a whole series of other similar Italian cases, or *Apostol v Greece*, App. no. 40765/02 (ECtHR, 28 November 2006) which was devoted entirely to the question of court fees imposed on parties initiating judicial proceedings.

157 See: P. Hofmański, A. Wróbel, 'Komentarz do art. 6 EKPC', [in:] Wróbel A. (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz. Tom I* (Wydawnictwo CH Beck 2010), p. 298 and the case law of the ECtHR referred to therein.

Court[158] rejecting the transcription of a foreign civil status act following the request of a homosexual couple desiring to register a British birth certificate of their daughter in the Polish birth register. The case was brought as a cassation complaint of the applicants from the judgment of the Łódź Administrative Court.[159] The applicants pleaded that the disputed judgment of the Court violated Art. 14 and 8 ECHR. The Łódź Administrative Court invoked the ECtHR judgment in *Gas and Dubois*[160] in which the Court found no violation of Art. 14 in conjunction with Art. 8 ECHR in a case concerning the ban of second-parent adoption for same-sex couples. However, the Strasbourg ruling was delivered by 6 votes to one. Three of the prominent judges (Costa, Spielmann and Berro-Lefèvre) presented concurring opinions in which they stressed that they hoped that "the French legislature will not merely be satisfied with the finding of no violation and will decide […] to review this issue."[161] In these circumstances a national court should be careful before deciding to follow the stance taken in such judgment, especially when it was delivered in the area where fast developments of interpretation and evolution of interpretative consensus take place. The Supreme Administrative Court decided the case in December 2014, i.e. almost two years after the *X v Austria*.[162] In the latter ruling the Strasbourg Court found violation of Art. 14 taken in conjunction with Art. 8 ECHR in a case concerning Austrian ban of second-parent adoption for same-sex couples. The Supreme Administrative Court disregarded these developments and instead abused the ECtHR ruling in *Schalk and Kopf* by limiting its reference to this case (in which the ECtHR for the first time decided that State Parties are obliged to introduce some type of formalisation for same-sex couples cohabitation[163]) to the finding that "states are free to limit the access to marriage

158 Case II OSK 1298/13 (Supreme Administrative Court, 17 December 2014).

159 Case III SA/Łd 1100/12 (Regional Administrative Court in Łódź, 14 February 2013).

160 *Gas and Dubois v France*, App. no. 25951/07 (ECtHR, 15 June 2012).

161 Concurring opinion of judge Costa joined by judge Spielmann in *Gas and Dubois*. The second concurring opinion was concluded with the following statement: "I echo Judge Costa's call for the legislature to revisit the issue by bringing the wording of Art. 365 of the Civil Code into line with contemporary social reality."

162 *X and Others v Austria*, App. no. 19010/07 (ECtHR, 19 February 2013).

163 *Schalk and Kopf v Austria*, App. no. 30141/04 (ECtHR, 22 November 2010). In this case the Court ruled (para. 105) that "the area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes" and (para. 106) "the Austrian Registered Partnership Act, which came into force on 1 January 2010, reflects the evolution described above and is thus part of the emerging European consensus. Though not in the vanguard, the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act any earlier." Clearly, the reasons why the Court found 'no violation' was that the legislative changes actually were introduced and whilst the State Parties enjoy margin of appreciation as regards the timing this is not the case for the decision to introduce recognition. This understanding of the Court's stance was later confirmed in *Vallianatos and others v Greece*, App. nos 29381/09 and 32684/09 (ECtHR, 7 November 2013) and *Oliari and Others v Italy*, App. nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).

to same-sex couples."[164] Transparently, the Supreme Administrative Court picked the ECtHR decisions to legitimize its own assessment, while at the same time abusing the actual standing accepted in the ECtHR case law. The Supreme Administrative Court even went on to disregard the well-settled case law of Polish courts concerning the duty to interpret domestic laws in accordance with the case law of the ECtHR and the Convention. The Court reproached the applicant for expecting it to construe Art. 47 of the Constitution (guaranteeing the respect for privacy and self-determination) in accordance with Art. 14 in conjunction with Art. 8 ECHR.[165] This case provided the opportunity to enter into dialogue with the ECtHR, which was not taken by the SAC. The domestic court actually failed to explore the standard developed by the Strasbourg Court and thus, instead of delivering a judgment encompassing a concurring or dissenting dialogue, it abused the ECtHR interpretation to enhance the persuasive power of its own judgment.

Finally, another well-settled practice of courts is to refer to ECtHR rulings through quotations from descriptive material (legal writings) instead of quotations made directly from the ECtHR decisions. A series of rulings of Supreme Administrative Court delivered in May 2015 provide a good example.[166] The Supreme Administrative Court cited a work published in one of on-line sources,[167] which referred to some ECtHR decisions,[168] however, no references were made in the Court's reasoning to the decisions of the ECtHR themselves. The court did not actually read the relevant decisions of the ECtHR but limited itself to quoting the work evoking them.

In Lithuania one may trace the symptoms of a regular dialogue between domestic courts and the ECtHR. Certain (positive or negative) examples can be found in this contribution. As in the Czech Republic or Hungary, in Lithuania the Constitutional Court makes extensive references to the case law of the ECtHR.

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164 In Polish: "w orzecznictwie ETPCz przyjmuje się, że państwom wciąż wolno ograniczać dostęp do związków małżeńskich parom osób tej samej płci (wyrok ETPCz z 24 czerwca 2010 r. w sprawie *Schalk i Kopf przeciwko Austrii*). Odnosi się to również do związków partnerskich."

165 In Polish: "tego warunku nie spełnia powołanie się w uzasadnieniu skargi kasacyjnej […] na enigmatyczną konieczność wykładni art. 47 Konstytucji w szczególności rozpatrywanym łącznie z art. 8 oraz art. 14 Konwencji […]."

166 Cases: I OZ 419/15, I OZ 420/15 and I OZ 421/15 (Supreme Administrative Court, decisions, 6 May 2015).

167 M. Stępień, 'Nadużycie prawa do sądu – czy sądy są bezsilne względem pieniaczy sądowych?', [in:] M. Balcerzak, T. Jasudowicz, J. Kapelańska-Pręgowska (eds), *Europejska Konwencja Praw Człowieka i jej system kontrolny – perspektywa systemowa i orzecznicza* (Katedra Praw Człowieka, Wydział Prawa i Administracji, Uniwersytet Mikołaja Kopernika 2011), see in particular, p. 441.

168 ECtHR cases: *Winer v United Kingdom*, App. no. 10871/84 (10 July 1986); *W. v Germany*, App. no. 11564/85 (4 December 1985); *Steward-Brady v United Kingdom*, App. no. 27436/95 (2 July 1997).

In the judgment of 28 September 2011[169] the Court analysed whether the Resolution of the *Seimas* of the Republic of Lithuania No. X-1569:

> "On the Approval of the State Family Policy Concept" of 3 June 2008, is not in conflict with Paragraph 1 of Art. 6, Paragraph 1 of Art. 7, Paragraph 1 of Art. 38 of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law.[170] The disputed Resolution consolidated the definitions of the notions of family (Item 1.6.9), harmonious family (Item 1.6.2), extended family (Item 1.6.4) and incomplete family (Item 1.6.6). In part III of the judgment the CC found that: "The constitutional concept of family must also be construed by taking account of the international commitments of the State of Lithuania that were undertaken after it had ratified the Convention for the Protection of Human Rights and Fundamental Freedoms […]. Art. 8 of the Convention guarantees the right to respect for family life. The European Court of Human Rights […] in its jurisprudence, which is important for the construction of Lithuanian law as a source of construction of law, has more than once analysed the concept of family. In the case *Marckx v Belgium* the ECHR held that the concept of family life is not confined to families formed on the basis of marriage and that it may cover other *de facto* relationships. The support and encouragement of the traditional family is in itself legitimate

169 Case 21/2008 (Lithuanian Constitutional Court, 28 September 2011).

170 See also another example of extensive reference to the ECtHR practice by the Lithuanian Constitutional Court in Judgment of the Lithuanian Constitutional Court of 12 April 2013 on the duty to provide the information about a person to whom a vehicle was entrusted, case no. 8/2010–132/2010, § 11, where it held that the right to remain silent and the privilege against self-incrimination are not absolute (the judgment of 8 July 2004 in *Weh v Austria* (App. no. 38544/98); it does not follow that any direct compulsion will automatically result in a violation; although the right to a fair trial under Art. 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. In order to determine whether the essence of the right to remain silent and privilege against self-incrimination was infringed, a court must take into account the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put (the judgment of 29 June 2007 in the case of *O'Halloran and Francis v the United Kingdom* (App. nos 15809/02 and 25624/02). The ECtHR has also noted that the obligation to inform the authorities is a common feature of the Contracting States' legal orders and that it may concern a wide range of issues (e.g., the obligation to reveal one's identity to the police in certain situations) (the judgment of 8 July 2004 in the case of *Weh v Austria* (App. no. 38544/98)). The ECtHR, when considering the cases concerning the liability of owners (holders) of vehicles for non-compliance or improper compliance with the obligation to indicate the identity of the driver, held that an impending sanction for refusal to disclose the identity of the driver or an inaccurate disclosure of the information does not violate the right to remain silent (Art. 6 of the Convention) (the judgment of 8 July 2004 in the case of *Weh v Austria* (App. no. 38544/98); the judgment of 29 June 2007 in the case of *O'Halloran and Francis v the United Kingdom* (App. nos 15809/02 and 25624/02)). It is merely the obligation of a person who is the registered car owner to give information as to who was driving the car; a simple fact – namely who was the driver of the car – is not in itself incriminating (the judgment of 8 July 2004 in the case of *Weh v Austria* (App. no. 38544/98)).

> or even praiseworthy, however, in the achievement of this end recourse must not be had to measures whose object or result is to prejudice the natural family, since the members of such a family enjoy the guarantees of Art. 8 of the Convention (which regulates *inter alia* the right to respect for family life) on an equal footing with the members of the traditional family […]. The right to family life not merely implies a duty for the states to abstain from unlawful interference with a person's family life, but there may be also positive obligations necessary to ensure effective protection of this right of the person […]. When establishing what relationships are encompassed by the notion 'family life', a great number of factors might be taken into consideration, e.g., the living together, permanence of the relationship, character of the demonstrated mutual obligations, etc. In the opinion of the ECHR, the notion 'respect for family life' means that biological and social reality prevail over a legal presumption, which flies in the face of established facts (judgment of 27 October 1994 in the case *Kroon and others v The Netherlands*, Application no. 18535/91). Family life may be established even if the relationship between persons has ended. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down (judgement of 26 May 1994 in the case *Keegan v Ireland*, Application no. 16969/90). Construing the concept of family life, the ECHR has been gradually broadening it and has held that the concept of family life encompasses the relationships of not only parents (married or unmarried) with their children, but also interrelationships between other persons, *inter alia* ties between near relatives. In the aforementioned case *Marckx v Belgium* it was held that family life includes at least the ties between near relatives (for instance those between grandparents and grandchildren), since such relatives may play a considerable part in family life (judgement of 13 June 1979 in the case *Marckx v Belgium*, Application no. 6833/74). In other case, into the concept of family life, the ECHR also included the 'family life' of brothers and sisters (judgement of 26 September 1997 in the case *El Boujaïdi v France*, Application no. 25613/94) […].[171]

Although the deliberations on the 'concept of family life' in the ECtHR case law are quite elaborate, one may be struck by the lack of reference to the more recent practice of the ECtHR concerning the topical issue, such as *S.H.*[172] (family life-related problems of artificial fertilization), *Schalk and Kopff* (right of same-sex couples to respect of family life[173]) or *Elsholz*[174] (family life of 'parties living together out of wedlock'). Therefore, it seems appropriate to qualify this judgment to the category of a 'fake dialogue' simply because a proper dialogue assumes some regularity and reflecting of the current scene of interpretation of the Convention. When the judgment lacks these features, it can hardly be deemed as belonging to a 'proper dialogue' with the ECtHR.

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171 Case 21/2008 (Lithuanian Constitutional Court, 28 September 2011) 22, paras III.1–III.1.3.

172 *S.H. and others v Austria*, App. no. 57813/00 (ECtHR, 1 April 2010) subsequently referred to the Grand Chamber (judgment of 3 November 2011).

173 Referred to above.

174 *Elsholz v Germany*, App. no. 25735/94 (ECtHR, 13 July 2000).

3.3. The Failed (Non-attempted) Dialogue: Cases of Non-implementation of the ECHR Standard

3.3.1. Poland

The practice of Polish courts provides for examples of non-implementation of the standard resulting from ECtHR decisions. It appears where courts simply ignore the duty of 'taking into account' the case law of Strasbourg.

The European Court of Human Rights on several occasions dealt with the status of 'assesors' (junior judges) in the Polish criminal proceedings. In the leading case *Henryk Urban and Ryszard Urban v Poland*[175] and subsequently in the case *Mirosław Garlicki v Poland*[176] the ECtHR formulated the twofold test applicable in cases concerning the alleged violation of Art. 6 or Art. 5(3) ECHR where assessors decided on the application of a temporary arrest warrant. The first element of this test concerns the institutional deficiency of an assessor who can be removed from his or her judicial office at any time by the Minister of Justice (a political officer and member of the government). The assessors do not enjoy, therefore, a sufficient independence *vis-à-vis* the executive. The second element of the ECtHR test is whether the circumstances of a particular case could give rise to a legitimate suspicion that the Minister of Justice took an interest in the proceedings. However, even in the absence of the second element, the standards stemming from the aforementioned provisions of the Convention fail to be met. One has to note that the deficient status of assessors in criminal proceedings had been – prior to the date of each of the ECtHR's rulings – subject to constitutionality review held by the Polish Constitutional Court. It found[177] that Polish law making it possible for the assessors to perform judicial functions and – *inter alia* – decide on the application of temporary arrest warrants (Art. 135(1) of the Act on the Organisation of Courts) is incompatible with Art. 45(1)(1) of the Constitution – a provision which is essentially a corollary of the guarantee afforded by Art. 6 ECHR. The Constitutional Court invoked Art. 6 ECHR[178] and held that "the principal argument indicative of the unconstitutionality of the vesting of judicial powers in an assessor is the admissibility of his or her dismissal, including even during the period in which an assessor exercises judicial powers." Acting under Art. 190(3) of the Constitution the Constitutional Court decided that "the provision mentioned in the first part of the operative part of the judgment (section 135(1) of the 2001 Act) will lose

175 *Henryk Urban and Ryszard Urban v Poland*, App. no. 23614/08 (ECtHR, 30 November 2010), see in particular paras 45–56.

176 *Mirosław Garlicki v Poland*, App. no. 36921/07 (ECtHR, 14 June 2011), see in particular paras 106–116.

177 Case SK 7/06 (Polish Constitutional Court, 24 October 2007).

178 Even though the case was decided as a direct constitutional complaint where the exclusive grounds of constitutionality review is the Constitution itself and not any international treaty including ECHR.

its binding force eighteen months after the promulgation of the judgment in the Journal of Laws of the Republic of Poland"[179] and "the acts of the assessors referred to in section 135(1) of the 2001 Act shall not be subject to a challenge on the basis of Art. 190(4) of the Constitution."[180] However, even though the decisions of assessors could thus not be challenged as incompatible with the Constitution, the ECHR constitutes an independent source of law and nothing prevented the courts from challenging the decisions of assessors as incompatible with the Convention. In these circumstances the Provincial Court in Opole[181] and the Wrocław Appellate Court[182] dealt with the lawsuit of J. W. who claimed compensation for unlawful custody, which was applied by the District Court where the assessor sat on the bench. The claimant invoked the ECtHR judgment in the *Garlicki* case. The courts dismissed his claims stating among others that "the decision of the ECtHR of 14 June 2011 in case [*Garlicki*] refers to particular and individually defined factual circumstances and subjects/individuals related thereto whereas it has no direct application to the situation of Mr. J. W.", "decisions of ECtHR finding violation of the Convention do not eliminate from the domestic legal system of the provisions whose application led to the infringement of norms of the Convention."[183] They added that "ordinary courts are bound by Art. 190(1) of the Constitution and they apply the decisions of the Constitutional Court having general applicability and thus the acts of the assessor taken when the provision granting him or her judicial function remained in force were taken within statutory competence."[184] In other words, the courts found the decision of the assessor depriving the applicant of his liberty 'compatible with law' even though it was clear according to the ECHR standard that it was not the case. The courts disqualified both the normative effect of the Convention and the binding force of the ECtHR decisions and disregarded their duty resulting from Art. 1 ECHR.

The *Garlicki* case had yet another interesting consequence in the Polish judicial practice concerning the presumption of innocence. One of the reasons why Garlicki claimed violation of certain provisions of ECHR was the fact that on the day

179 Case SK 7/06 (Polish Constitutional Court, 24 October 2007), para. II.1 of the operative part of the judgment.

180 Ibidem, para. II.2 of the operative part of the judgment.

181 Case III Ko 337/11 (Provincial Court in Opole, 16 September 2011).

182 Case II Aka 17/12 (Court of Appeal in Wrocław, 16 February 2012).

183 Case II Aka 17/12 (Court of Appeal in Wrocław, 16 February 2012), para. 2 of the conclusions (in Polish: "orzeczenia ETPCz stwierdzające naruszenie przepisów Konwencji o ochronie wolności i podstawowych praw nie eliminuje z wewnętrznego porządku prawnego przepisu, którego zastosowanie doprowadziło do naruszenia norm konwencyjnych").

184 Ibidem, para. 3 of the conclusions (in Polish: "sądy powszechne zobowiązane treścią art. 190 ust. 1 Konstytucji stosują orzeczenia Trybunału Konstytucyjnego, które mają moc powszechnie obowiązującą, tym samym czynności asesora sądowego podjęte w czasie obowiązywania przepisu nadającego mu uprawnienia sądzenia podjęte zostały w ramach ustawowych kompetencji").

following the applicant's arrest, the Minister of Justice, at that time acting also as the Prosecutor General, organised a press conference during which he stated when referring to Garlicki that "the information gathered and the evidence obtained mean that today we can tell you clearly: Doctor G., acting the part of a virtuoso of Polish cardiac surgery, is a ruthless and cynical bribe-taker. We have knowledge of several dozen bribes accepted by this doctor" and added that "no-one else will ever again be deprived of life by this man."[185] The Minister's media show was fiercely criticised by human rights' bodies and organisations. The ECtHR assessed in this context that

> it is the duty of the highest-ranking State officials, in particular those with responsibility for the prosecution authorities and administration of justice, to respect the presumption of innocence, one of the fundamental principles of the legal order, and to exercise particular caution when formulating any statements in relation to on-going criminal proceedings. The Court considers that any statement of a high-ranking State official disregarding the principle of presumption of innocence is even more objectionable as it may be seen as a direction addressed to subordinate officials.[186]

After the delivery of the ECtHR judgment in *Garlicki* case, the Provincial Court in Gliwice[187] and the Court of Appeal in Katowice[188] dismissed the lawsuit of some Mr. M. C. against the State Treasury – the President of the District Court in X. Mr. M. C. claimed compensation from the State Treasury for the defamation allegedly caused by the President of the Criminal Division of the District Court in X who requested the Prosecution to commence criminal proceedings against M. C. in the letter whose title was "notification of the crime committed" (Pol. *zawiadomienie o popełnieniu przestępstwa*) instead of "notification of the suspected crime" (Pol. *zawiadomienie o podejrzeniu popełnienia przestępstwa*). Polish courts found that the somewhat ultimate formulation of the title of the letter sent by the judge was 'oversight or inaccuracy' and the real intention of that letter was to notify about the suspicion that the crime had been committed. One may argue though that especially a highly qualified lawyer and an impactful member of the administration of criminal justice such as the President of the Criminal Division of the Court must be expected to observe the principle of presumption of innocence with particular caution, as held by the ECtHR in the *Garlicki* case. The Appellate Court, while referring to the *Garlicki* case, held that "it does not constitute a precedent for the present case" since the *Garlicki* case "concerned the statement of the state official" (apparently judges do not seem to be 'state officials' in the perception of the Katowice Appellate Court) and in the *Garlicki* case the impugned statement was "the opinion that the [applicant]

185 Both citations are taken verbatim from the ECtHR judgment.
186 *Mirosław Garlicki v Poland*, *op. cit*. (n. 176) para. 133.
187 Case XII C 242/11 (Provincial Court in Gliwice, 29 March 2012).
188 Case V ACa 535/12 (Court of Appeal in Katowice, 13 February 2014).

was guilty" whereas in the present case the opinion concerned the 'state of suspicion' only.[189] Nevertheless it appears that the *Garlicki* standard was clearly disregarded in the present case.

It is a well-settled jurisprudence of the ECtHR that

> the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.[190]

This is why one is allowed in a democratic society to refer to a politician as a "dictator",[191] a "neo-Nazi organisations' cover provider",[192] a "typical cerebral bankrupt who is lucky to be living in a country with such a limited pool of human resources that a person of his characteristics can even end up in Parliament",[193] "[the King of Spain] who is in charge of the torturers, who defends torture and imposes his monarchical regime on our people through torture and violence"[194] or simply "an idiot".[195] The intensity of criticism and the choice of means of expressing this criticism is subject to a greater level of tolerance in particular when a politician "clearly intended to be provocative and consequently to arouse strong reactions."[196]

Against this background certain Polish courts dealt with the case of football fans accused of "ostentatiously and publicly expressing defiance of the constitutional bodies of the Republic of Poland"[197] by shouting during a clearly political manifestation "Donald, you chump, your government will be overthrown

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189 *In extenso*: "W żadnym przeto wypadku wyrok Europejskiego Trybunału Praw Człowieka z 14 czerwca 2011 roku – sprawa M. G. przeciwko Polsce, skarga nr […] nie mógł mieć precedensowego charakteru w niniejszej sprawie, gdy zarzut naruszenia art. 6 ust. 2 podniesiony został z powodu wypowiedzi wygłoszonej przez urzędnika państwowego. Trybunał uznał za celowe przypomnienie że zasada domniemania niewinności zostaje naruszona w sytuacji, jeżeli postanowienie sądowe lub wypowiedź urzędnika państwowego dotyczące osoby oskarżonej o popełnienie czynu zagrożonego karą zawiera opinię, że osoba ta jest winna zanim jeszcze wina została jej udowodniona zgodnie z prawem. Należy jednakowoż odróżnić stwierdzenia wyrażające opinię, że dana osoba jest winna od stwierdzeń opiniujących jedynie 'stan podejrzenia'. Te pierwsze naruszają bowiem zasadę domniemania niewinności, podczas gdy te drugie uznane zostały za niekwestionowalne w różnych sytuacjach badanych przez Trybunał."

190 See e.g. instead of many other similar: *Cojocaru v Romania*, App. no. 32104/06 (ECtHR, 10 February 2015), para. 25.

191 *Cojocaru v Romania*, App. no. 32104/06 (ECtHR, 10 February 2015), para. 7.

192 *Brosa v Germany*, App. no. 5709/09 (ECtHR, 17 April 2014), para. 7.

193 *Mladina D.D. Ljubljana v Slovenia*, App. no. 20981/10 (ECtHR, 17 April 2014), para. 7.

194 *Otegi Mondragon v Spain*, App. no. 2034/07 (ECtHR, 15 March 2011), para. 10.

195 *Oberschlick v Austria*, App. no. 20834/92 (ECtHR, 1 July 1997), para. 9.

196 Ibidem, para. 31.

197 Art. 49 of the Code of Petty Crimes.

by hooligans!"[198] which was a rather explicit expression of discontent regarding the policy of the Donald Tusk cabinet. The Courts of both instances,[199] even though only the first instance court found the accused guilty and the second instance court discontinued the proceedings (due to expiration), did not doubt that "although the case law, including in particular the ECtHR jurisprudence, accepts that the limits of criticism (assessment) towards public figures are by all means more flexible than in case of 'regular citizens' […], nevertheless these assessments must be expressed in such a way as not to infringe the dignity and reputation of the criticised figure, including a politician."[200] The Strasbourg nod as good as a wink to a blind Polish horse. This case deserves further comment. One would accept the stance taken by domestic courts had they explained why they departed from the ECtHR standard of interpretation of Art. 10 ECHR in cases concerning criticism towards prominent politicians. In fact, there could be a reason to do so. Poland is facing an unprecedented deluge of hatred towards politicians, including regular verbal lynching. This hatred is spread by politicians (and their paid 'Internet trollers'[201]) but also by regular citizens, especially on-line. Perhaps it would be wise and desirable to reconsider the limits of criticism towards politicians since one may fear that this flood of hatred threatens the foundations of democratic debate which in contemporary Poland does not even pretend to concern the exchange of rational arguments in order to protect the common good but rather turns into a sort of verbal wrestling. However, in the case at stake the Białystok Provincial Court did not attempt to discuss the case law of the ECtHR critically, but chose to disregard it and make a disappointedly obscure statement that criticism towards politicians must not compromise their reputation. What a lost opportunity.

In the *Potomska and Potomski* case[202] the ECtHR dealt with the problem of immovables constituting historic monuments. Their owners cannot trigger the expropriation by the State. Pursuant to Art. 50 of the 2003 Protection and Conservation of Monuments Act[203] it is only the public authorities who can initiate the expropriation proceedings concerning real property amounting to historic monuments (immovable monuments may be expropriated at the re-

198 In Polish: *Donald, matole, twój rząd obalą kibole!*

199 Case XIII W 1838/12 (Białystok District Court, 14 March 2013) and Case VIII Ka 499/13 (Białystok Provincial Court, 3 October 2013).

200 Case VIII Ka 499/13 (Provincial Court in Białystok, 3 October 2013): "choć w orzecznictwie, także europejskim, zwłaszcza ETPCz, ugruntował się pogląd, że granice krytyki (oceny) osób publicznych są dalece bardziej elastyczne niż w stosunku do 'zwykłych obywateli' […], tym niemniej jednak oceny owe winny być wyrażane w sposób nienaruszający czci i dobrego imienia krytykowanego (także polityka)."

201 I take this term from J. Bishop, 'The effect of de-individuation of the Internet Troller on Criminal Procedure implementation: An interview with a Hater' (2013) 7 International Journal of Cyber Criminology 28.

202 *Potomska and Potomski v Poland*, App. no. 33949/05 (ECtHR, 29 March 2011).

203 Act of 23 July 2003 on the protection and conservation of monuments (O.J. 2014, item 1446).

quest of a regional inspector only where there is a risk of irreversible damage to the monument). The owner himself is not legally entitled to institute such proceedings. The Potomskis were interested in being expropriated since they had purchased a plot of land which was subsequently found an immovable monument (Jewish cemetery) and thus became useless for the Potomskis' intended economic purposes as nothing could be constructed on the site. The ECtHR found that "the domestic law did not provide a procedure by which the applicants could assert before a judicial body their claim for expropriation and require the authorities to purchase their property." According to the Committee of Ministers' information on the execution of *Potomski* judgment, the government intended to propose a bill allowing property owners to institute proceedings aimed at expropriation.[204] However, no progress was achieved to date. Quite on the contrary, the Ministry of Culture claimed that no legislative intervention is necessary since ECtHR had not pointed out at the indispensability of legislative amendments. The implementation of the judgment could well be assured by a proper interpretation of Art. 50 of the Protection and Conservation of Monuments Act, including some form of indirect effect of Art. 1 of Protocol 1 ECHR. The regional inspector can construe the provision of Polish law by 'taking into account' the Strasbourg case law and decide that a risk of irreversible damage to a monument occurs also where the owner declares his/her *désintéressement* in maintaining the proper condition of a monument. Until appropriate legislative changes are introduced, domestic courts should be invited to consider whether the entry of an immovable to the register of monuments, which imminently leads to the restriction of the right to property is compatible with the Convention where no sufficient scheme of compensation is provided for by the legislation. Instead, Polish courts make the ECtHR judgment shallow by stating simply that it concerned the impossibility of instituting the expropriation by the owner concerned and did not refer to the issue of entering the monument to the register.[205] Perhaps a more principled approach of administrative courts would encourage the government to implement the *Potomski* ruling in a prompter manner.

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204 Source: Council of Europe, 'Reports', <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Potomski&StateCode=&SectionCode=> (access: 28 February 2016).

205 See e.g.: Case II OSK 1512/11 (Supreme Administrative Court, 14 December 2012) where the Court held that "zarówno w powołanym wyżej wyroku Europejskiego Trybunału Praw Człowieka, jak i w wystąpieniu Rzecznika Praw Obywatelskich problem dotyczy nie samego wpisu do rejestru zabytków, jak ma to miejsce w niniejszej sprawie, a kwestii związanych ze sposobem rekompensaty Państwa z tytułu ograniczenia prawa własności. Trybunał nie negował konieczności ochrony zabytków. Krytycznie odniósł się natomiast do braku skutecznego działania Państwa w celu zapewnienia skarżącym sprawiedliwego odszkodowania z tytułu wpisu do rejestru zabytków."

The ECtHR ruled in the case *Bugajny v Poland*[206] concerning expropriation that in the situation where the plot of land is divided by means of administrative decision into smaller plots and some of them are designated to be public roads, the refusal to grant compensation from public funds for such limitation of use of the plots constitutes the disproportionate interference with the right guaranteed by Art. 1 of Protocol No. 1 ECHR. Some of the administrative courts in Poland took the way paved by the ECtHR.[207] However, the Warsaw Administrative Court[208] ruled that were the administrative decision on the division of plot was conditional upon the establishment of the land easements or the transfer of co-ownership, the right to peaceful enjoyment of property is not interfered. The *Bugajny* judgment was found to be irrelevant in the circumstances of the case.[209] One can hardly accept this stance. In the end of the day the previous owner's rights are limited as he cannot enjoy the object of his right as he had before and this constitutes an obvious interference with the right to a peaceful enjoyment of property.

3.3.2. Other CEE States

Examples of failed (unattempted) dialogue may be found in the practice of ordinary courts in Czech Republic. The references to the case law of the ECtHR are sometimes superficial and not in-depth. For instance, in a case concerning the Police provocation consisting of instigation to a crime (i.e. the type of provocation where the accused did not have the intention of committing a crime and he eventually gained such intent after being instigated to do so by the Police) the High Court in Olomouc[210] only remarked that "the case law of the ECtHR leads to the conclusion that public authorities must prove that the intention to commit a crime, manifested by fulfilment of its features, existed even without the action of the Police."[211] No decision of the ECtHR was quoted, in spite

206 *Bugajny v Poland*, App. no. 22531/05 (ECtHR, 6 November 2007), paras 67–75.

207 See e.g.: Case II SA/Sz 241/14 (Szczecin Administrative Court, 3 July 2014) or Case II SA/Wr 311/14 (Wrocław Administrative Court, 23 July 2014).

208 Case I SA/Wa 1745/14 (Warsaw Administrative Court in Warsaw, 1 August 2014).

209 In Polish: "brak jest podstaw do przyznania odszkodowania w sytuacji, gdy wydzielone działki gruntu nie przeszły z mocy prawa na Skarb Państwa, czy gminę, albowiem nie zostały wydzielone pod drogi publiczne, a właściciel ma możliwość w ramach dostępnych mu instrumentów prawnych skutecznie sprzeciwić się korzystaniu z drogi, albo gdy korzystanie z drogi wewnętrznej przez innych właścicieli działek powstałych w wyniku podziału nieruchomości odbywa się w ramach służebności gruntowej […]. W niniejszej sprawie z taką sytuacją mamy do czynienia. Z decyzji podziałowej wynika, że warunkiem podziału było ustanowienie służebności drogowych lub sprzedaż udziałów w drodze wewnętrznej (art. 99 u.g.n.). Tym samym, w ocenie Sądu, wyrok Europejskiego Trybunał Praw Człowieka z dnia 6 listopada 2007 r. w sprawie [*Bugajny*] nie znajduje odniesienia do niniejszej sprawy."

210 Case 1 To 35/2011 (Vrchní soud v Olomouci, 18 August 2011).

211 In Czech: "Evropský soud pro lidská práva ve své judikatuře zdůrazňuje, že státní orgány musí prokázat, že by čin – a to určitý, zcela konkrétní čin naplňující znaky skutkové podstaty některého trestného činu – byl spáchán i bez podnětu ze strany Policie."

of a rather generous record of jurisprudence concerning the topical issue.[212] Similarly, in another case concerning the delayed proceedings (alleged violation of Art. 6 ECHR) the Provincial Court in Plzeň[213] briefly noted the interpretative standard of Art. 6 ECHR without quoting any ECtHR decisions to prove the existence of such standard.[214]

Two important cases in recent years, illustrating the practice of application of ECHR standards and dialogue between the Strasbourg Court and courts of Ukraine, were *Timoshenko* and *Volkov*, both of significant political flavour. Both cases concerned important public figures (a famous politician and a prominent member of the highest judicial authority) and in both cases it took a political turmoil rather than abnormal process of implementation of the judgment to accomplish the task of fulfilling the requirements stemming from the Convention.

The first case concerned the unlawful detention of the former Ukrainian Prime Minister Yuliya Tymoshenko.[215] The ECtHR described the continuing detention of Tymoshenko as "arbitrary and unlawful" and explained that "it transpires from the detention order, as well as the prosecutor's application for this measure and its factual context, the main justification for the applicant's detention was her supposed hindering of the proceedings and contemptuous behaviour. This reason is not among those, which would justify deprivation of liberty under Art. 5(1)(c) ECHR. Moreover, it remains unclear for the Court how the replacement of the applicant's obligation not to leave town by her detention was a more appropriate preventive measure in the circumstances."[216] It further observed "on the whole the domestic law does not provide for the procedure of review of the lawfulness of continued detention after the completion of pre-trial investigations satisfying the requirements of Art. 5(4) of the Convention",[217] neither the "procedure in Ukrainian law for bringing proceedings to seek compensation for a deprivation of liberty found to be in breach of one of the other paragraphs of Art. 5 by this Court."[218] Despite the gravity of these findings and the binding effect of Art. 1 and 46 of the Convention, it took further 8 months to release Tymoshenko, however, the reason for freeing her was not the obligation to implement the ECtHR's decision, but the revolution in the streets of Ukrainian cities and the change of the ruling political forces.

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212 See e.g.: the jurisprudence quoted in *Veselov and Others v Russia*, App. nos 23200/10, 24009/07 and 556/10 (ECtHR, 2 October 2012).

213 Case 8 To 163/2004 (Krajský soud v Plzni, 17 May 2004).

214 In Czech: "Nápravu porušení práva na projednání věci v přiměřené lhůtě ve smyslu citovaného článku 6 odst. 1 Úmluvy zajišťuje v podobných případech Evropský soud pro lidská práva přiznáním zadostiučinění obviněné osobě. Akceptuje ovšem i ty případy, kdy přímo státní orgán (soud) poskytne náhradu ve formě zmírnění trestu."

215 *Tymoshenko v Ukraine*, App. no 49872/11 (ECtHR, 30 April 2013).

216 Ibidem, paras 270 and 271.

217 Ibidem, para. 281.

218 Ibidem, para. 286.

The *Volkov* case[219] concerned the former judge and President of the Military Chamber of the Ukrainian Supreme Court. In 2007 he was elected by the Assembly of Judges of Ukraine to the post of a member of the High Council of Justice (the body responsible i.a. for advising on the appointment or discharging of judges), however, it required from the applicant to take the oath before the Parliament. The Parliamentary Committee objected while suggesting that the issue of the decision concerning the applicant's predecessor whose term of office was terminated by the Assembly of Judges had to be examined first. Also, some members of the Parliament lodged requests with the High Council of Justice, asking that it carries out preliminary inquiries into possible professional misconduct by the applicant. In 2010 the Parliament voted for the dismissal of the applicant from the post of a judge for 'breach of an oath' (what is noteworthy – he has never taken the oath) and adopted a resolution to that effect. The decision of the Parliament was taken after the High Council of Justice took the decision on making the submission to the Parliament. The applicant challenged those decisions before the 'special chamber' of the Higher Administrative Court, to no effect though. As for the Higher Administrative Court the Venice Commission found that "the composition of the […] highly influential so-called 'fifth chamber' of the [Higher] Administrative Court should be precisely determined by the law in order to comply with the requirements of the fundamental right of access to a court pre-established by the law", whereas in reference to the High Council of Justice it stated that "the composition of the High Council of Justice of Ukraine still does not correspond to European standards."[220] The applicant brought a complaint to the ECtHR which declared that Art. 6(1) ECHR was violated in respect of the applicant in four aspects, namely "as regards the principles of an independent and impartial tribunal", "as regards the principle of legal certainty and the absence of a limitation period for the proceedings against the applicant", "as regards the principle of legal certainty and the dismissal of the applicant at the plenary meeting of Parliament" and "as regards the principle of a tribunal established by law." The Court also found that "there has been a violation of Art. 8 of the Convention." The ECtHR ruled that "Ukraine shall secure the applicant's reinstatement to the post of judge of the Supreme Court at the earliest possible date." The 'earliest possible date' turned out to be 2 February

219 *Volkov v Ukraine*, App. no. 21722/11 (ECtHR, 9 January 2013).

220 Ibidem, para. 79. See also: Buquicchio G., Dürr S.R., '*Volkov v Ukraine* and the Venice Commission's Approach to Structural Independence of the Judiciary', <http://www.venice.coe.int/CoCentre/Buquicchio_Durr_Volkov.pdf> (access: 28 February 2016), where the Venice Commission concluded i.a. that "The judgment of *Volkov v Ukraine* by the European Court of Human Rights confirms that the right to a fair trial under Art. 6 of the Convention not only depends on the circumstances of the individual case, but also on whether there are sufficient guarantees for structural independence of the judiciary. Only when such guarantees are in place, a fair trial can take place in an individual case."

2015,[221] in spite of several earlier occasions where vacancies appeared allowing to reinstate Mr. Volkov.[222] It took 2 years, the Euromaidan revolution and the collapse of the Yanukovych government for the judgment to be implemented. This was not exactly the success story of the ECHR effective and not illusory implementation.

One may conclude, taking these examples into account, that the Convention standards failed to be effectively implemented by the Ukrainian judiciary. In none of these two cases the judicial system worked as the effective tool to implement rights and freedoms guaranteed by the Convention. The happy endings in both cases resulted from major political upheavals and not from the dialogue between the Ukrainian judiciary and the ECtHR.

In spite of the legislative framework and the promising directives coming from the Supreme Court, the analysis shows that Russian judges are generally unwilling to follow the standard resulting from the Convention.[223]

Burkov[224] reminds that Russian accession to the Convention was – if viewed from a legal perspective – premature and guided by political motivations. He notes that the implementation of the Convention in a day-to-day practice of Russian courts is unsatisfactory and a substantial imbalance appears between normative provisions and a judicial practice. In his opinion, the optimistic perspective that one may take on the basis of the documents mentioned above is spoiled by the fact that even the Supreme Court and the Supreme Arbitrazh Court of Russia do not follow their own 'guidelines' regarding the implementation of the ECHR. The research of Burkov shows that e.g. between 5 May 1998 and 1 August 2004 only 8 out of 3911 scrutinized decisions of the Supreme Court attempted to assess the compliance with the Convention. None of these decisions contained reference to the case law of the ECtHR. In case of Arbitrazh courts[225] only 23 decisions mentioned the Convention at all (out of 38,068 decisions), out of which 8 referred to

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221 See: Supreme Court of Ukraine, 'Mr Oleksandr Volkov Was Reinstated to his Post of a Judge of the Supreme Court of Ukraine', <http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/(documents)/40758947BA3FE9EAC2257DE00054D6B5?OpenDocument&year=2015&month=02&> (access: 1 January 2016).

222 See e.g.: The Foundation Judges for Judges, Letter of 29 August 2013 pointing out that the vacancies were available in order to implement the ECtHR judgment already in July 2013, <http://www.mdx.ac.uk/__data/assets/pdf_file/0019/58240/brief-case-Volkov.COM-290813def.doc.pdf> (access: 1 January 2016).

223 See broadly e.g., [in:] A. Trochev, 'All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia' (2009) 2 Demokratizatsiya, p. 145; A.L. Burkov, *The Impact of the European Convention on Human Rights on Russian Law. Legislation and Application in 1996–2006* (ibidem-Verlag 2007).

224 Extensive reference to: A.L. Burkov, 'Implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts' (2006) 1 Russian Law: Theory and Practice, p. 68. See also: idem, 'Применение Европейской конвенции о защите прав человека в судах России' (2006) 6 Международная защита прав человека.

225 Arbitrazh courts are part of regular Russian judiciary adjudicating in commercial disputes and those involving business entities – see: *Handbook on commercial dispute resolution in the*

a specific provision of the Convention. Not a single reference to the case law was traced. Burkov proves that invoking the Convention without referring to the case law leads to confusions and misinterpretations: in one of the cases[226] the Supreme Court found that reassignment of police officers to a different place of service violates Art. 4 ECHR (prohibition of forced labour), which has never been construed from this provision by the ECtHR, whereas in another case[227] the Supreme Court applied Art. 14 ECHR as a free-standing standard. The experience of human rights watchdogs, presented by Burkov, is that not in a single case judges of Russian courts invoke the Convention (let alone the case law) of their own initiative. Positive examples are extremely rare and these are the solicitors that inalienably provoke them.[228]

In Lithuania, like in Hungary, Czech Republic or Poland, the practice of ordinary courts is divergent and sometimes it is far from the proper dialogue with the ECtHR described above. References are sometimes superficial and not in-depth, whereas sometimes the dialogue consists of proper analysis of the Strasbourg *acquis*. For instance, in one of the cases the Supreme Court of Lithuania, confronted with a plea alleging the breach of Art. 6(2) ECHR by violating the principle of presumption of innocence,[229] only briefly noted that the said principle is guaranteed by Art. 31 of the Constitution of the Republic and it had not been violated.[230] No references to ECtHR case law were made in spite of the existence of the variety of relevant ECtHR jurisprudence.[231] It is striking that the Convention background was not discussed taking into consideration that the applicant invoked Art. 6 ECHR.

Russian Federation, <http://www.ita.doc.gov/goodgovernance/adobe/Chapter%201/1-A%20Arbitrazh%20Courts.pdf> (access: 5 February 2016).

226 *Appeal of the Trade Union of Personnel of the Militia of the City of Moscow v Ministry of Internal Affairs* (Supreme Court of the Russian Federation, 16 November 2000).

227 *Kolotkov v Government of the Russian Federation* (Supreme Court of the Russian Federation, 13 March 2003).

228 Burkov invokes in this respect the decision of the Presidium of the Sverdlovsk Region Court of 13 July 2005 which applied Art. 6 ECHR and extensively quoted *Posokhov v Russia*, App. no. 63486/00 (ECtHR, 4 March 2003). A.L. Burkov, 'Implementation of the Convention…' (n. 224), p. 75.

229 Case 2 K-123/2010 (Supreme Court of Lithuania, 30 March 2010).

230 In Lithuanian: "Kasatorių argumentai dėl BPK 44 straipsnio 6 dalies ir EŽTK 6 straipsnio 2 dalies nuostatų pažeidimų yra nepagrįsti ir teisės taikymo aspektu nepriimtini. BPK 44 straipsnio 6 dalyje ir EŽTK 6 straipsnio 2 dalyje yra įtvirtintas nekaltumo prezumpcijos principas. Toks principas įtvirtintas Lietuvos Respublikos Konstitucijos 31 straipsnio 1 dalyje. Nekaltumo prezumpcijos principo esmė – kaltu asmuo gali būti pripažintas tik įstatymo nustatyta tvarka vykusiame procese ir to proceso metu buvo laikomasi visų baudžiamojo proceso reikalavimų."

231 See e.g.: ECtHR rulings, [in:] *O'Halloran and Francis v United Kindgom*, App. nos 15809/02 and 25624/02 (29 June 2007); *Kyprianou v Cyprus*, App. no. 73797/01 (15 December 2005) or *Ringvold v Norway*, App. no. 34964/97 (11 February 2003).

3.4. Non-classifiable Decisions: Problems with Identification of the Convention's Status or the Role of National Organs in the Convention System

Sometimes, the courts do not even attempt to construe the Convention standard and ignore the Convention as a directly applicable source of law and disregard its consequences. For example, the Supreme Administrative Court in Poland did not manage to avoid error concerning the very legal status of the Convention. In judgment of 1 June 2015[232] it held that:

> the applicant invoked Art. 6.1 ECHR in conjunction with Art. 6.3 of the Treaty (on the EU) and thus exclusively as the provision of the Union law. The European Union acceded to the ECHR, however it did so under the condition that the accession would not infringe the Union's competence as defined in the Treaties. Fundamental rights guaranteed by the Convention constitute part of the Union law being the general principles of law. Therefore, just like in case of principles enshrined in the Charter (of Fundamental Rights), being the Union law they can be violated by national court only when it adjudicates in the 'Union law-related case'. In its ruling C-571/10 Servet Kamberaj […] the Court of Justice also held that in case of incompatibility of national norm with the ECHR, the reference to the ECHR included in Art. 6 of the Treaty [on the EU] does not oblige the national court to apply the Convention directly and to abstain from application of national norm incompatible with the Convention. The provision of the Treaty reflects general principle that fundamental rights are integral part of general principles of law the observance of which is supervised by the Court [of Justice]. Nonetheless the aforementioned provision does not regulate relations between the Convention and national legal systems of the [EU] Member States and does not specify the consequences which should be drawn by national court in case of lack of conformity of national provisions with the rights guaranteed by the Convention.[233]

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232 Case II FNP 1/14 (Polish Supreme Administrative Court, 1 June 2015), para. 5.4.

233 In Polish: "Art. 6 ust. 1 Konwencji strona skarżąca powołała w powiązaniu z art. 6 ust. 3 Traktatu, a więc wyłącznie jako przepis prawa unijnego. Unia Europejska przystąpiła do europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności, jednakże z zastrzeżeniem, że przystąpienie to nie narusza kompetencji Unii określonych w Traktatach. Prawa podstawowe, zagwarantowane w tej Konwencji, stanowią część praw Unii jako zasady ogólne prawa. Z tego względu, tak jak zasady określone w Karcie, mogą zostać naruszone jako prawo unijne przez sąd krajowy wyłącznie wówczas, gdy będzie on rozpoznawał sprawę unijną. W wyroku z dnia 24 kwietnia 2012 r., w sprawie C-571/10 *Servet Kamberaj przeciwko Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano* (IPES) i inni (niepubl. w Zbiorze) Trybunał Sprawiedliwości stwierdził ponadto, że w przypadku sprzeczności pomiędzy normą prawa krajowego a europejską konwencją praw człowieka, dokonane w art. 6 Traktatu odesłanie do konwencji nie wymaga od sądu krajowego zastosowania bezpośrednio postanowień tej konwencji i odstąpienia od stosowania niezgodnej z nią normy prawa krajowego. Postanowienie Traktatu stanowi odbicie zasady, zgodnie z którą prawa podstawowe stanowią integralną część ogólnych zasad prawa, których przestrzeganie zapewnia Trybunał. Jednakże wspomniany artykuł nie reguluje stosunków między europejską konwencją praw człowieka a porządkami prawnymi państw członkowskich i nie określa konsekwencji, jakie powinien

Obviously, it was the applicant who caused this misunderstanding as he pleaded the violation of Art. 6(1) of the Convention "in conjunction with Art. 6(1) and (2) TEU." But it was exactly the role of the Supreme Administrative Court to remediate this misunderstanding and hold that Art. 6 ECHR is applicable regardless of whether EU law does apply or not. The Court should have distinguished between the application of EU law (which did not apply in this case since the facts of the case occurred before the date of accession of Poland to the European Union[234]) and application of the Convention (which did apply). Instead the Supreme Administrative Court went on to use the CJEU's *Kamberaj* decision in order to prove that the Convention does not apply.

In this ruling the Supreme Administrative Court managed to confuse and misinterpret the legal character of the Convention and its status in the EU law. The Convention is obviously not 'the Union law' regardless of how the applicant qualified ECHR in its pleas. The Union is not a party to the Convention and the Court had apparently missed the CJEU opinion 2/13.[235] For unknown reasons the Supreme Administrative Court applied the *Wachauf*[236] doctrine to the ECHR, which must be evaluated as a flagrant violation of Art. 1 of the Convention. The ECHR is applicable internally regardless of whether EU law is applied or not. By referring to *Servet Kamberaj* the Supreme Administrative Court tried to prove that ECHR is not directly applicable in Poland whereas the CJEU only ruled that the reference in Art. 6 TEU must not be interpreted as meaning that the ECHR is directly applicable in the Member States by operation of EU law.[237] At the same time the Court ignored the status of the Convention. Despite possible substantive violation of the Convention, it is highly disturbing that the Supreme Administrative Court paid no attention to the domestic provisions regulating the status of the Convention[238] neither to the ECtHR case law

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wyciągnąć sąd krajowy w razie sprzeczności między prawami gwarantowanymi w tej konwencji a normą prawa krajowego."

234 Case C-168/06 *Ceramika Paradyż* (CJEU, 6 March 2007).

235 Opinion 2/13 on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (CJEU, 18 December 2014).

236 Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* (CJEU, 13 July 1989), para. 19.

237 Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano* (CJEU, 24 April 2012), paras 59–63 where the Court ruled that "Art. 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law."

238 E.g.: Art. 91(1) and (2) of the 1997 Constitution of the Republic of Poland declaring the duty of all Polish authorities to apply self-executing norms of treaties.

concerning the domestic effect of the Convention[239] nor to the extensive legal literature concerning that issue.[240]

The case law of Hungarian ordinary courts – just like e.g. in Czech Republic or Poland – seems to be encountering similar problems concerning the identification of the position of the Convention in the legal system applicable in the State or the role of national courts *vis-à-vis* the Convention. Let us take the example of the Hungarian '*Vajnai* saga'. Mr. Attila Vajnai, the Vice President of the Hungarian Workers' Party, held a speech while wearing a five-pointed red star symbol. He was later prosecuted for doing so under the Hungarian Criminal Code, which penalised the exhibition of the red star symbol, and was subsequently convicted. The ECtHR in response to the Vajnai's application claiming the violation of Art. 10 ECHR, stressed that "when freedom of expression is exercised as political speech – as in the present case – limitations are justified only in so far as there exists a clear, pressing and specific social need" and "the ban in question is too broad in view of the multiple meanings of the red star. The ban can encompass activities and ideas, which clearly belong to those protected by Art. 10, and there is no satisfactory way to sever the different meanings of the incriminated symbol. Indeed, the relevant Hungarian law does not attempt to do so. Moreover, even if such distinctions had existed, uncertainties might have arisen entailing a chilling effect on freedom of expression and self-censorship" and consequently found Hungary to be in breach of its obligations arising under Art. 10 ECHR.[241] However, six months after the ECtHR judgment was delivered Vajnai again participated in the demonstration wearing the same symbol and again he was prosecuted by the Police for doing so. It is important to note that the ECtHR decision assessed in fact the provision of the Criminal Code itself as being incompatible with the ECHR and not just the practice of law-applying organs. Mr. Vajnai complained to the Independent Police Complaints Board, however the latter found the Police action consistent with the fundamental right of the complainant. Mr. Vajnai appealed to the court, which in the first instance held that the policemen were not entitled to

239 E.g.: *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland*, App. no. 32772/02 (ECtHR, 30 June 2009) where the ECtHR held in § 84 that "one of the most significant features of the Convention system is that it includes a mechanism for reviewing compliance with the provisions of the Convention. Thus, the Convention does not only require the States Parties to observe the rights and obligations deriving from it, but also establishes a judicial body, the Court, which is empowered to find violations of the Convention in final judgments by which the States Parties have undertaken to abide (Art. 19, in conjunction with Art. 46(1)). In addition, it sets up a mechanism for supervising the execution of judgments, under the Committee of Ministers' responsibility (Art. 46(2) of the Convention). Such a mechanism demonstrates the importance of effective implementation of judgments."

240 See e.g.: G. Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 2 European Journal of International Law, p. 401 or D. Shelton, *Remedies in International Human Rights Law* (OUP 2015).

241 *Vajnai v Hungary*, App. no. 33629/06 (ECtHR, 8 July 2008).

take the inconsistency of the legislation in force and the ECHR into account, and in the revision proceedings before the Supreme Court it was held that the policemen should not be held responsible for not knowing the ECtHR's *Vajnai v Hungary* judgment.[242] The Hungarian courts made it clear that despite the duty of the State – therefore, all its organs, not just the legislative or the central government – to assure effective protection and observance of rights and freedoms guaranteed by the Convention (Art. 1 ECHR) – some state organs are quite surprisingly exempted from this obligation.[243]

Although the *Vajnai* decision can be found already quite disappointing, in the *Horváth* case[244] national courts went on further to decide to almost decline their jurisdiction in favour of the ECtHR. The case concerned two Hungarian nationals of Roma origin who

> alleged under Art. 2 of Protocol No. 1 read in conjunction with Art. 14 of the Convention that their education in a remedial school amounted to direct and/or indirect discrimination in the enjoyment of their right to education, on the basis of their Roma origin, in that their schooling assessments had been paper-based and culturally biased, their parents could not exercise their participatory rights, they had been placed in schools designed for the mentally disabled whose curriculum had been limited, and they had been stigmatised in consequence.[245]

The applicant claimed damages before national courts and the Supreme Court of Hungary held that

> the systemic errors of the diagnostic system leading to misdiagnosis – regardless of its impact on the applicants – could not establish the respondents' liability […]. The creation of an appropriate professional protocol which considers the special disadvantaged situation of Roma children and alleviates the systemic errors of the diagnostic system is the duty of the State

whereas

> the failure of the State to create such a professional protocol and [an eventual] violation of the applicants' human rights as a result of these systemic errors exceed the competence

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242 See for more details and comments in E. Csatlós, 'The Red Star Story and the ECtHR in the Hungarian Legal Practice', <http://jesz.ajk.elte.hu/2014_4.pdf> (access: 15 December 2016) 2.

243 See also the follow-up of the *Vajnai* case in *Fratanoló v Hungary*, App. no. 29459/10 (ECtHR, 3 November 2011) and the resolution of the Hungarian Parliament of 2012 in which it expressed its 'disagreement' with the Strasbourg decision (see also: The Steering Committee for Human Rights, *National implementation of the Interlaken Declaration*, 23 October 2012, DH-GDR(2012)009, 9).

244 *Horváth and Kiss v Hungary*, App. no. 11146/11 (ECtHR, 29 January 2013). See further comments in K.S. Akoglu, 'Removing Arbitrary Handicaps: Protecting the Right to Education in *Horváth and Kiss v Hungary*' (2014) 37 Boston College International and Comparative Law Review, Art. 2 1–15.

245 *Horváth and Kiss v Hungary*, App. no. 11146/11 (ECtHR, 29 January 2013), para. 3.

> of the Supreme Court […] the applicants may seek to have a violation of their human rights established before the European Court of Human Rights. Therefore the Supreme Court has not decided on the merit of this issue.[246]

The Hungarian judicial system failed as a guarantor of rights stemming from the Convention. It is unimaginable that national courts who were requested to order compensation for the undisputed violation of human rights confirm that such infringement did exist but they cease their jurisdiction and guide the party to apply to the ECtHR. However, the *Potomski* follow-up in Polish administrative courts proves that Hungarian courts are not isolated in such practice.

4. Concluding Remarks

Courts of all CEE States engage in dialogue with the ECtHR, aware of the duty to 'take into account' the case law of the Court. In Ukraine it is statutorily guaranteed that courts are obliged to treat "the case law of the [ECtHR] as a source of law." In Russian Federation the Supreme Court went on to declare in the general guidelines addressed to Russian courts that the adverse decisions of the ECtHR delivered in cases against Russia are to be 'obligatorily' followed by Russian courts. In case of legal positions taken in cases against other State Parties they are to be 'taken into consideration' by courts if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by the ECtHR. However, the recent developments in Russia spoiled this idyllic picture. In Poland the Supreme Court developed the doctrine of the duty to 'take into account' case law of the ECtHR. Similar approach, i.e. the absence of explicitly provided statutory 'duty of obedience' and, at the same time, a well-established practice of the highest judicial authorities confirming such a duty, seems to be adopted in Czech Republic, Hungary and Lithuania.

The references of domestic courts to the case law of the Strasbourg Court are of different conceptual value. Generally in Czech Republic, Hungary, Lithuania and Poland the constitutional courts set the hurdles high when it comes to referring to and making use of the ECtHR case law. The situation is not so optimistic though in ordinary or administrative courts. One may conclude that the practice of Czech ordinary courts is divergent and encompasses both the instances of proper judicial dialogue with ECtHR and those where courts only superficially declare that certain interpretative standard of the Convention exists, without a thorough analysis of the ECtHR's case law. The same is true about Hungarian, Lithuanian

246 Ibidem, paras 52 and 53. Verbatim quotations.

or Polish ordinary and administrative courts. In spite of some very positive examples, sometimes these courts briefly note the jurisprudence of the ECtHR without drawing any conclusions therefrom. In-depth analyses are scarcer, although still traceable. Instances of conscious departing from the standard of interpretation of the Convention through elaborate analysis of differences of circumstances are unique. Very rarely national courts simply confuse and misunderstand the status of the Convention (see the Polish example referred to above)[247] and their own role and role of other State's bodies resulting from Art. 1 ECHR (let us mention the Hungarian *Vajnai* and *Horváth* examples).

An interesting feature of these six jurisdictions (Czech Republic, Hungary, Lithuania, Poland, Russian Federation and Ukraine) is that in the four former States, members of the EU with a relatively long record of participation in the Convention system, there are no normative provisions or guidelines adopted by the supreme judicial authorities imposing a duty to observe or take into account the case law of the ECtHR. In the two latter jurisdictions there are either explicit statutory norms providing for such duty (Ukraine) or at least general guidelines adopted by the Supreme Court putting it in bold terms that there exists such obligation. Therefore it appears that the stronger the regulation obligating to reflect the case law of the ECtHR by domestic courts is, the more is the practical outcome disappointing. It does not seem convincing that there is such an inverse proportion. Perhaps the reasons lay in other factors such as:

a) the political environment, which is generally favourable to the impact of the ECHR and the Strasbourg case law in the already quite well-settled democracies in the Czech Republic, Hungary, Lithuania and Poland and somewhat discouraging in Russian Federation and Ukraine,
b) the membership in the EU resulting, through the practice of regular dialogue with the CJEU under the Art. 267 TFEU preliminary reference procedure, in the accustoming to 'take into account' the positions taken by international courts,
c) the duration of membership in the Convention system: the longer it is, the more it allows the national courts to learn that violating the Convention does not pay.

In order to strengthen the openness of national courts to dialoguing with the ECtHR it would be desirable to consider certain amendments in the Convention system. Definitely national judges may have linguistic problems and it would probably trigger more interest in the ECtHR case law if all decisions of the Strasbourg Court were officially translated into the languages of all State Parties to the Convention. It works with Luxembourg, why shouldn't it work with Strasbourg? From the legal practitioner's point of view one may add that judges

247 See: Case II FNP 1/14 (Polish Supreme Administrative Court, 1 June 2015) (n. 232), paras 51–52.

are tempted by the possibilities of transferring the responsibility for decisions to other courts – they are likely to use the procedures allowing them to present legal questions to national supreme or constitutional courts in order to receive decision providing grounds for some more daring and courageous interpretations of law. The new Protocol No. 16 to the ECHR providing for the advisory opinions procedure seems to be the tool instigating national courts to cooperate interpretatively with the ECtHR. Especially if national procedures allow domestic courts to present questions 'via' supreme courts it would probably lead to a more regular dialogue with the ECtHR.

The dialogue in its full form, including references of the ECtHR to the case law of domestic courts, could and ought to be strengthened. It would inalienably contribute towards the greater legitimacy of the ECtHR *acquis* and its better acceptance and internalisation by domestic authorities. Also, national courts would thus contribute to the development of international law and international rule of law. However, two basic requirements need to be met if this was to happen.

First of all national courts' decisions must be more elaborate in terms of references to international and foreign jurisprudence. Unfortunately the quality of reasoning supporting the decisions of domestic courts seems to be rather disappointing. Domestic courts must become aware that their influence on international law and its development occurs only through the door called 'judicial dialogue'. National courts do not have political power and their impact on international law requires and results from the high quality of reasoning.

Secondly, national courts' decisions must be translated into internationally spoken languages – above all: English. Even the wisest judgments of national courts will have no influence on the development of e.g. human rights law if nobody knows them except for some domestic lawyers. If national authorities have ambitions of exporting the domestic views on international law or humans rights law on international scale, they should spend relatively small amounts on establishing institution responsible for bidirectional judicial dialogue. Its first task would be to select, translate, comment on and distribute decisions of foreign and international courts among Polish authorities (not only the judiciary), its second aim would be to select, translate (into English and preferably some other languages), comment on and distribute Polish judgments concerning international law, European Union law and human rights law. One can be sure that very soon foreign and international courts would refer to the case law of Polish domestic courts, if it were easily accessible and clearly explained.

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