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## **THE IMPACT OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS ON THE POLISH LEGAL SYSTEM**

**Abstract:** As of the year 2018, a quarter of a century had passed since Poland became a party to the European Convention on Human Rights. Therefore, this year provides a good opportunity to reflect on this Convention's impact and significance as regards the Polish legal system.

Poland's accession to the Council of Europe and the ratification of the Convention took place in a relatively short period of time. Unfortunately, it was not accompanied by any planned and systemic review of the national legislation with a view of ensuring its compatibility with the requirements of ECHR. After more than 40 years of Poland's membership in the so-called eastern block dominated by the USSR and the experience of being governed by an undemocratic political system based on the dictatorship of one party, one could hardly expect that the Polish legal system could be effectively adapted to the standards of the most advanced system of international protection of human rights ECHR in two or three years. This resulted, *inter alia*, in a relatively large number of complaints against Poland shortly after Poland recognized the competence of the Commission of Human Rights and ECtHR to receive individual complaints against Poland, as well as, in pilot judgments such as in the *Broniowski case*, in which 'widespread problems resulting from a malfunctioning of Polish legislation and administrative

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practice and which has affected and remains capable of affecting a large number of persons' was identified.

Hundreds of judgments against Poland given by the Strasbourg Court in which violations were found have revealed a variety of problems in the Polish legal system and practice. As the result of considerable efforts to address these judgments, the Polish system of law is being continuously transformed in order to ensure it is in line with ECHR's human rights standards.

The implementation of Strasbourg's judgments involves a number of general measures that need to be taken, including not only changes in the legislation, but also changes in practice, in the law's interpretation and the manner it is applied. The rising awareness of the Strasbourg standards among judges, police officers, officials, etc. is of crucial importance for ensuring the proper enactment of the Court's judgments.

Poland used to be singled out among countries in which 'major structural problems concerning cases in which extremely worrying delays in implementation have arisen'. Fortunately, in recent years some progress in the enforcement of ECtHR's judgments has been achieved, with the number of unimplemented judgments being significantly reduced. Nevertheless, given the unsystematic verification of the compatibility of the Polish legal system with the ECHR through the instrument of individual complaint, a more systemic approach to ensuring this compatibility is needed. One of such mechanisms could be the introduction of preventive control of draft laws with the Convention in the light of the case-law of the Court.

**Keywords:** European Convention on Human Rights; Poland's accession to the Council of Europe; implementation of ECHR's judgments

## 1. Introduction

The European Convention on Human Rights ('the Convention' or 'ECHR'), signed on 4.11.1950 in Rome, is undoubtedly the most important instrument among conventions adopted within the Council of Europe and the most important regional instrument in the field of human rights in Europe. The Convention, as well as the case-law of the European Court of Human Rights ('the Court' or 'the ECtHR') acting on its basis, provide the frame work of standards for the protection of these rights in 47 member states of the Council of Europe. Poland became the 25<sup>th</sup> Member State of the

Council of Europe on 26.11.1991, and on the same day signed the ECHR. The ratification document was deposited on 19.1.1993 and on this day the Convention entered into force in relation to Poland. On 1.5.1993, Poland submitted a declaration recognizing the competence of the European Commission of Human Rights and the jurisdiction of the European Court of Human Rights. From this day forward, persons under Polish jurisdiction gained the right to lodge individual applications to the Strasbourg Court.

As of 2018, a quarter of a century has passed since Poland became a party to the Convention. This date provides an excellent opportunity to reflect on the importance of the Convention for the Polish legal system and the impact it has had over it during the last 25 years on the making and application of law in Poland. In the first place, the specific situation in which Poland acceded to the ECHR should be outlined. Next, the position of the ECHR in the Polish system needs to be considered, before turning to a discussion of the main ECtHR threads woven into Polish case law, as well as the issue of the execution of ECtHR judgments by Poland. It would be impossible to discuss all the aspects of this important and complex subject within the limited framework of this article. Hence, the study undertaken in this paper is rather based on selected examples of the voluminous ECtHR case-law concerning Poland.

## **2. The Accession of Poland to the ECHR system**

The beginning of the process of adjusting Polish legislation and practice to the requirements of the ECHR is usually associated with the signing of the Convention by Poland. However, there are grounds to assume that this process was initiated earlier, when Poland applied for membership in Council of Europe.<sup>1</sup> Changes in the Polish legal system in connection with the application for membership in the Council of Europe were mentioned in

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<sup>1</sup> This was rightly pointed by J. Jaskiernia, see: J. Jaskiernia, *Wpływ orzecznictwa Europejskiego Trybunału Praw człowieka na ustawodawstwo w państwach członkowskich Rady Europy ze szczególnym uwzględnieniem Polski* (The influence of the jurisprudence of the European Court of Human Rights on the legislation in the Member States of the Council of Europe, with particular emphasis on Poland), [in:] A. Wróbel (ed.), 'Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym' (Ensuring the effectiveness of international court decisions in the Polish legal system), Warszawa 2011, s. 67-70.

the so-called Finsberg report in 1990. It eludes to, inter alia, the introduction of the principle of the separation powers, political pluralism, as well as guarantees of the independence of courts as a result of changes in the Polish Constitution of 7.4.1989, resulting from the agreements of the round table.<sup>2</sup> A number of acts were adopted, including the Act of 17.5.1989 on guarantees of freedom of conscience and religion,<sup>3</sup> the Act of 30.5.1989 amending the Press Act<sup>4</sup> and the Act of 11.4.1990 on the repeal of the Act on the control of publications and the abolition of the bodies of this control, i.e. the liquidation of censorship.<sup>5</sup>

Holding fully free parliamentary elections in October 1991 in Poland was of decisive significance as regards joining the Council of Europe. However, it should be borne in mind that the transformation of the Polish legal system to comply with European standards had already begun in 1989. As it has already been mentioned, the ratification document of the ECHR by Poland was deposited on 19.1.1993. This does not mean, however, that on this date the Polish legal system was fully in line with the Convention.

It must not be forgotten that the ratification by Poland of the ECHR took place under special circumstances. First of all, at the time when the Convention was ratified, the Polish state was only at the initial stage of a long-lasting, as it turned out, process of systemic transformation, which covered almost all spheres of social life. For over 40 years, Poland had belonged to the so-called the eastern bloc, politically dominated by the USSR, being, like other countries belonging to this bloc, a state with an undemocratic political system based on a single-party dictatorship.

As K. Drzewicki observed, the adoption of the Convention was not an easy task in countries considered to be democratic, including countries with a stable model of democracy shaped over one and more centuries, such as Italy or France. In the case of Central and Eastern European states, according to this Author's opinion, one can talk about a excessively fast or even accelerated joining into the 'world's most advanced system of human rights protection'. This was done in conditions where the group of new states parties to the Convention from Central and Eastern Europe after

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<sup>2</sup> Draft report on Poland's application for membership of the Council of Europe (Rapporteur: Sir Geoffrey Finsberg, United Kingdom, Conservative), 18.7.1990, as/Pol (42) 9, p. 3. This concerns the Act of 7.4.1989 on the change of the Constitution of the Polish People's Republic (Polish OJ 1989, no. 19, item 101).

<sup>3</sup> Polish OJ 1989, no. 29, item 155.

<sup>4</sup> Polish OJ 1989, no. 34, item 187.

<sup>5</sup> Polish OJ 1990, no. 29, item 173.

1990 has not yet been able to adapt most of its even most obvious legislative contradictions to the standards of the Convention.<sup>6</sup>

Meeting the requirements of the most developed regional system of human rights protection proved to be difficult for both Poland and other new Central and Eastern European democracies, which began to carry out political changes after the political independence in connection with the collapse of the USSR in 1991. Unfortunately, it involved the development of a legislative program that would enable compliance of national law with the Convention standards at the stage of ratification of ECHR in a holistic and systematic manner. The haste and lack of systematic and planned adaptation to the requirements of the most advanced system of international human rights protection undoubtedly resulted in a large number of complaints that were to be later directed against Poland. It was among the Polish cases that the Court first applied the so-called 'pilot judgments' procedure. This procedure is connected with systemic dysfunctions within the state, as well as problems generated by law and the practice of its application that had affected or could have affected a significant number of people.

During the quarter century that has passed since the ratification by Poland of the ECHR, the examination of the compliance of Polish law with the standards of the Convention took place basically only in situations when individual complaints alleging the violation of rights and freedoms protected by the Convention were filed against Poland in Strasbourg. This is because the ECtHR does not have the competence to act *ex officio* and thus, it may examine the compliance of Polish law and practice with the Convention only when an individual or interstate complaint is received, with the use of the latter implementation measure being applied extremely rarely. This means that the verification of the compliance of Polish law with the Convention since its ratification has been carried *ad casum*, if there was an individual complaint alleging a specific violation.

In connection with the accession of Poland and other Central and Eastern European countries to the ECHR system, some fears were expressed regarding the reduction of the protection or application of double standards in relation to these countries. These fears were based on the assumption that, apart from the standards applicable to States Parties during the pre-enlargement period, the Court would also apply milder standards applicable to Central and Eastern European countries. The point here, in essence,

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<sup>6</sup> Ibidem.

was the alleged unequal treatment of the parties to the Convention by the Court consisting in treating post-communist in a more lenient manner in case of a violation.<sup>7</sup>

An example of one of early cases against Poland, in which there an allegation of applying double standards, is the case of *Janowski v. Poland* involving a conviction of an applicant for the use of words regarded as offensive by municipal guards. In its judgment, by a majority of 12 to 5 vote, the Court ruled that there had been no violation of Article 10 of the Convention.<sup>8</sup>

The judgment of the Court was met with criticism both in Poland and abroad. It was even described as a 'grim dictatorial verdict', and it was alleged that it threatens the use of a 'double standards', i.e. a milder requirement for former communist countries, instead of applying the same standards and principles for the whole of Europe.<sup>9</sup> On the other hand, the allegations were made that the Court did not take due account of the totalitarian past and the restrictions of freedom of speech in Poland related to that period. These came about because in the judgments there was 'no explicit mention of the political history of Eastern Europe.'<sup>10</sup> The analysis of subsequent judgments in cases against Poland regarding Article 10 of the ECHR, however, does not seem to confirm the allegation of using double standards by the Court.<sup>11</sup>

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<sup>7</sup> See, inter alia, R. Harmsen, *The European Convention on Human Rights after Enlargement*, 'International Journal of Human Rights' 2001, vol. 5, no. 4, pp. 20-21. F. Sudre, *La Communauté européenne et les droits fondamentaux après le traité d'Amsterdam : vers un nouveau système européen de protection des droits de l'homme ?*, 'La Semaine Juridique' 7.1.1998, pp. 20-21.

<sup>8</sup> *Janowski v. Poland*, Application no. 25716/94, Judgment of 21.1.1999.

<sup>9</sup> See inter alia Lord Lester's article published in 'The Guardian' of 31.5.1999, discussed extensively by M.A. Nowicki, *Podwójna miara dla wymysłów. Wyrok, który budzi emocje* (Double measure for fantasy. A judgment that evokes emotion), 'Rzeczpospolita' from 27.7.1999.

<sup>10</sup> M.B. Dembour, M. Krzyżanowska-Mierzevska, *Ten Years On: the Voluminous and Interesting Polish Case Law*, 'European Human Rights Law Journal' 2004, no. 5, p. 534.

<sup>11</sup> See A. Wiśniewski, *Orzecznictwo strasburskie wobec specyfiki procesu implementacji Europejskiej Konwencji Praw Człowieka w państwach środkowo i wschodnioeuropejskich* (The Strasbourg case law in relations to the specifics of the implementation proces of the European Convention of Human Rights in Central and Eastern European Countries), 'Polski Rocznik Praw Człowieka i Prawa Humanitarnego' 2010, no. 1, pp. 173-174.

In any case, as it was rightly pointed out by some authors, the use of double standards in the ECtHR jurisprudence should be avoided due to the risks involved for the integrity of the whole Convention system.<sup>12</sup>

### **3. The position of the ECHR in the Polish system**

The ECHR is an international agreement and therefore, in connection with its ratification, Poland was obliged, in accordance with the principle *pacta sunt servanda*, to adapt its law to the provisions of this Convention, i.e. to repeal provisions contrary to the ECHR' provisions and to change the practice of law enforcement bodies so that it is in line with the Convention. Unlike in the case of classic international treaties, obligations under the ECHR operate in two dimensions: horizontal, i.e. between states that are parties to the Convention, and vertical, i.e. between an entitled person and the state. The latter type of obligations in the case of an instrument such as the ECHR play a crucial role, being the expression of the internationalization of individual rights and of removing them from the exclusive domain of the state.<sup>13</sup> It is also important that the Convention in accordance with its Article 1 imposes the obligation to ensure rights and freedoms in the first place, in consonance with the principle of subsidiarity, within the jurisdiction of individual state parties, and only in the second place, at the international level.

The ratification of the Convention resulted in transforming it into a part of the national legal order. The ECHR has become a source of universally binding law. It can be, in accordance with Articles 89 and 91 in connection with Article 241(1) of the Constitution of the Republic of Poland, directly applicable and takes precedence over ordinary statutes and other normative acts.

The ECHR affects the process of law-making and not only on the level of ordinary statutes, but also at the constitutional level. The ECHR had a significant impact on the wording of Chapter II of the Constitution

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<sup>12</sup> P. Mahoney, *Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments*, 'European Human Rights Law Review' 1997, no. 4, p. 371.

<sup>13</sup> C. Mik, *Charakter, struktura i zakres zobowiązań z Europejskiej Konwencji Praw Człowieka* (Nature, structure and scope of commitments under the European Convention on Human Rights), 'Państwo i Prawo' 1992, no. 4, p. 6.



entitled 'Freedoms, rights and obligations of man and citizen'. As L. Garlicki observed, in the manner of drafting of specific provisions of Chapter II, 'we note almost a full incorporation of substantive provisions of the ECHR'.<sup>14</sup>

The impact of the Convention on Polish legislation will be discussed at some length in the section devoted to the enforcement of ECHR judgments. At this point it should be noted that the ECHR contains general norms. Obligations following from this Convention provide only the framework, and states 'have the duty to fill this framework with their own content corresponding to the spirit of the nation'.<sup>15</sup> Nevertheless, the Convention, as already mentioned, fulfils the criteria for its direct application set out in Article 91(1) in connection with Article 241(1) of the Constitution. It is an international agreement ratified with the prior consent of the parliament (Sejm) and published in the Official Journal. Moreover, it contains norms that are suitable for direct application, as the norms protecting the rights of an individual contained in it are treated as self-executing in judicial case-law.<sup>16</sup>

In practice, the ECHR belongs to those international agreements to which Polish courts most often refer in their jurisprudence.<sup>17</sup> In the literature on the subject it is often pointed out that the most common way to apply ECHR norms by Polish courts consists in the so-called 'co-application'. This mode of application takes place when the ECHR standards, together with the relevant, analogous provisions of Polish law, form the basis for the construction of a legal norm that provides the basis for resolving an individual case. The ECHR norms may also constitute interpretative guidelines, indicating the manner of interpretation of the Polish law by a Polish court.<sup>18</sup> It is much less common to treat the ECHR norm as an

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<sup>14</sup> L. Garlicki, *Rozdział II. Wolności, prawa i obowiązki człowieka i obywatela* (Chapter II, Freedoms, rights and obligations of a human and citizen), [in:] M. Sawicka-Jezierczuk (ed.), *'Konstytucja Rzeczypospolitej Polskiej. Komentarz, T. III'* (Constitution of the Republic of Poland. Commentary. Vol. III), Wydawnictwo Sejmowe, Warszawa 2003, p. 3.

<sup>15</sup> C. Mik, *Charakter, struktura i zakres zobowiązań...*, p. 5.

<sup>16</sup> See L. Garlicki, M. Masternak-Kubiak, *Władza sądownicza RP a stosowanie prawa międzynarodowego i prawa Unii Europejskiej* (Judicial authority of the Republic of Poland and application of international law and European Union law), [in:] K. Wójtowicz (ed.), *'Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne'* (Opening of the Constitution of the Republic of Poland to international law and integration processes), Wydawnictwo Sejmowe, Warszawa 2006, p. 173.

<sup>17</sup> Ibidem, p. 175.

<sup>18</sup> Ibidem, p. 175.



autonomous and exclusive basis for resolving an individual case. This way of application would only be possible in the absence of proper regulations in the Polish law. It should be also mentioned that the Polish Constitutional Tribunal has the competence to adjudicate, in accordance with Article 188 of the Constitution, regarding the conformity of a statute and legal provisions issued by central State organs to, inter alia, the Convention. The question whether this competence is reserved only for the Constitutional Tribunal or is also enjoyed by other Polish courts is a subject of an ongoing dispute.<sup>19</sup>

In any event, the analysis of the Constitutional Tribunal's case law confirms that it takes into account ECtHR-sourced judgments concerning Poland in its assessment of the provisions of Polish law and bears them in mind when examining the constitutionality of Polish law. In fact, the Constitutional Tribunal relatively often refers to ECtHR jurisprudence when assessing the conformity of laws with the ECHR. Moreover, the Strasbourg case law is referred to by the Constitutional Tribunal to confirm its conclusions. The Constitutional Tribunal refers to the Strasbourg jurisprudence less frequently when it comes to distinguishing the case from the precedents established by the ECtHR.<sup>20</sup>

Polish courts are bound not only by the norms of the ECHR, but also by the jurisprudence of the Strasbourg Court, which fills in with rich contents general and framework-like ECHR norms. As the Supreme Court pointed out in its judgment of 1995, 'since the Polish accession to the Council of Europe, the case law of the European Court of Human Rights in Strasbourg can and should be taken into account when interpreting the provisions of Polish law.'<sup>21</sup> Similarly, in the Supreme Court judgment – the Civil Chamber of 28.11.2008, this court stated that 'in the case against the State Treasury for damages caused by limiting the right of access to court caused by refusal to exempt from court costs, the Polish court is bound by the interpretation of Article 6(1) of the Convention (...) made in the judgment of the European Court of Human Rights, finding the violation of this provision by Poland'.<sup>22</sup>

Summing up, it can be said that the human rights standards set out in the Convention and developed by the jurisprudence of the ECtHR

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<sup>19</sup> L. Garlicki, for example, asserts that this competence also belongs to other courts and not only to the Constitutional Tribunal, see *ibidem*.

<sup>20</sup> See L. Garlicki, M. Masternak-Kubiak, *Władza sądownicza...*, pp. 179-180.

<sup>21</sup> Decision of the Polish Supreme Court from 11.1.1995, III ARN 75/94.

<sup>22</sup> Judgment of the Polish Supreme Court from 28.11.2008, V CSK 271/2008.

play an important role in the application and interpretation of Polish law, especially as regards the shaping of standards for the protection of individual rights. In the further part of this study, the main threads of the Strasbourg jurisprudence as regards Polish cases will be analyzed at some length.

## **4. Overview of the Polish Case Law**

### **4.1. Introductory remarks**

During the past post-ratification 25 years, the Court has already issued 1166 judgments concerning Poland,<sup>23</sup> finding violations of the Convention in 978 cases.<sup>24</sup> The significance of particular judgments for the shape and functioning of the Polish legal order varies a great deal. On the one hand, it is possible to mention judgments that have incidental or detail nature and do not require changes in the legal system and in the practice of applying the law; on the other hand, the ECtHR has issued in cases against Poland, so-called ‘pilot judgments’, resulting from systemic problems that generate a number of similar complaints. Repeated cases, or so-called groups of cases often result from problems of a dysfunction in the legal system and concern especially the length of court proceedings in civil and criminal cases, excessive length of pre-trial detention, overcrowding in prisons or lack of adequate medical care in detention centres and prisons. The Strasbourg Court also found, *inter alia*, violations of the right-to-life in connection with the lack of an effective investigation into the circumstances of death, torture by national authorities, degrading treatment, in particular, by the police and prison guards, violation of the right to private and family life, violations of women’s reproductive rights, the right to freedom of expression and freedom of assembly, violation of property rights and the principles of a fair trial.

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<sup>23</sup> Data as of 31.12.2018. See ECHR Overview 1959-2018, [https://echr.coe.int/Documents/Overview\\_19592018\\_ENG.pdf](https://echr.coe.int/Documents/Overview_19592018_ENG.pdf), [access date: 17.10.2019], p. 9.

<sup>24</sup> Data as of 31.12.2018. See *ibidem*.

## 4.2. Pilot judgments

In the context of the accelerated process of the ratification of the Convention by Poland, as well as by other Central and Eastern European states, and an increased number of complaints especially during the first period after the ratification, it is necessary to explain the so-called 'systemic violations' and the related new category of Court-based judgments, the so-called 'pilot judgments'. In the case of *Broniowski v. Poland* of 2004 regarding the alleged violation of the right to property provided for in Article 1 of the Protocol no. 1 due to lack of compensation for the so-called for property on the Bug River, the ECtHR, for the first time, applied the pilot judgment procedure. The Court mentioned in the judgment that 'the violation of the applicant's right guaranteed by Article 1 of Protocol No. 1 originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons'.<sup>25</sup>

Finding in the pilot judgment, a systemic problem, the Court saw that this problem referred not only to the individual applicant, but also to all those in a similar situation, calling on the state to take general measures within the national legal system. These measures should take into account the situation of many people affected by the breach and remove the systemic defect that led to the violation. According to the ECtHR, the pilot judgment procedure is primarily intended to help State parties to solve problems at the national level, ensuring in a shorter period that the rights of those affected by the systemic infringement are respected, thus also freeing the Court from the resolution of a large number of similar cases.<sup>26</sup>

The pilot judgment procedure was also applied, *inter alia*, in the *Hutten-Czapska* case, in which the Court found a violation of Article 1 of Protocol No. 1 to the Convention due to existence of the rent-control scheme which entailed a disproportionate and excessive on the exercise of the applicant's right to the peaceful enjoyment of her possessions. The Court found that that:

'the rent-control scheme based on the provisions necessarily and unavoidably entailing losses for landlords had resulted in a disproportionate, unjustified and arbitrary distribution of the social

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<sup>25</sup> *Broniowski v. Poland*, Application no. 31443/96, Judgment of 22.6.2004, at para. 189.

<sup>26</sup> *Broniowski v. Poland*, para. 35

burden involved in the housing reform and that the reform had been effected mainly at the expense of landlords’.

It was also established that the operation of this scheme may potentially affect even a larger number of individuals than in the *Broniowski* case – some 100,000 landlords and from 600,000 to 900,000 tenants.<sup>27</sup> Moreover, the Court also noted that:

‘the facts of this case reveal the existence of an underlying systemic problem, which is connected with a serious shortcoming in the domestic legal order. That shortcoming consists in the malfunctioning of Polish housing legislation in that it imposed, and continues to impose, on individual landlords, restrictions on increases in rent for their dwellings, making it impossible for them to receive rent reasonably commensurate with the general costs of property maintenance’.<sup>28</sup>

This situation changed after the adoption in 2006 of the act amending the Act on the protection of tenants’ rights, the commune-owned housing resources and the amendment of the Civil Code.<sup>29</sup>

The problem of systemic violations related to dysfunctions of national systems, which may generate a significant number of complaints to the ECHR, certainly indicates the nature of Poland’s difficulties in adapting to the Strasbourg standards. Pilot rulings have so far mainly concerned countries from Central and Eastern Europe, although it must not be forgotten that systemic violations were also found, for example, in cases against Italy.<sup>30</sup>

### **4.3. The Polish Case Law – main threads**

One of the striking features of the Polish case law is that, as it was observed by some authors, it has been dominated by cases concerning the length

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<sup>27</sup> *Hutten-Czapska v. Poland*, Application no. 35014/97, Judgment of 22.2.2005, at paras. 187-188.

<sup>28</sup> *Ibidem*, at para. 191.

<sup>29</sup> Ustawa z dnia 15 grudnia 2006 r. o zmianie ustawy o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego (Act of 15 December 2006 amending the Act on the Protection of Tenants’ Rights, Municipal Housing Resource and the Civil Code), Polish OJ 2006, no. 249, item 1833, Polish OJ 2012, item 77.

<sup>30</sup> See e.g. *Scordino v. Italy*, Application no. 36813/97, Judgment of 29.3.2006.

of judicial proceedings and those cases in which the excessive length of detention on remand was challenged.<sup>31</sup> As for the first category, one case in particular needs to be mentioned here, namely *Kudła v. Poland*, in which not only the length of judicial proceedings was alleged, but what was a novelty, a lack of an effective remedy resulted. In its judgment, the Court held that there had been a violation of Article 13 in that the applicant had no domestic remedy through which he could have enforced his right to a 'hearing within a reasonable time' as guaranteed by Article 6(1).<sup>32</sup>

The judgment in the *Kudła case* was a quasi-pilot judgment, as it was also related to systemic and structural problems, but the solution of those problems was achieved by other methods.<sup>33</sup> As the result of this judgment, a general measure was adopted by passing the Act of 17.06.2004 on the complaint on a violation of the right of a party to hear a case in preparatory proceedings conducted or supervised by a prosecutor and court proceedings without unreasonable delay.<sup>34</sup> Due to the incorrect practice as regards the application of this measure by the Polish courts, this Act was subject to subsequent amendments.

As the result of the Strasburg case law, it was also necessary to change the legislation regarding the excessive length of administrative and court-administrative proceedings, namely in the Act of 30.08.2002, the Law on proceedings before administrative courts. The amendments introduced in

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<sup>31</sup> M. Krzyżanowska-Mierzevska, *The Reception Process in Poland and Slovakia*, [in:] H. Keller, A.P. Sweet (ed.), 'A Europe of Rights: The Impact of the ECHR on National Legal Systems', Oxford University Press, Oxford 2008, p. 567.

<sup>32</sup> *Kudła v. Poland*, Application no. 30210/96, Judgment of 26.10.2000.

<sup>33</sup> The *Kudła* judgment was described by some authors as a quasi-pilot judgment, as it was also related to systemic and structural problems but the solution of those problems was achieved by other methods. See, inter alia P. Leach, H. Hardman, P. Stephenson, B.K. Blitz, *Responding to Systemic Human Rights Violation. An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Antwerp–Oxford–Portland 2010, p. 15 et seq.; J. Czepek, *Problem systemowy i strukturalny w orzecznictwie Europejskiego Trybunału Praw Człowieka* (The systemic and structural problem in the case law of the European Court of Human Rights), 'Państwo i Prawo' 2015, no. 5, p. 82.

<sup>34</sup> See P. Hofmański, P. Zabłocki, *Wpływ Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności na rozwój polskiego procesu karnego* (The influence of the European Convention on Human Rights and Fundamental Freedoms on the development of the Polish penal process), [in:] H. Machińska (ed.), 'Polska w Radzie Europy, 10 lat członkostwa. Wybrane zagadnienia' (Poland in the Council of Europe, 10 years of membership. Selected issues), Ośrodek Informacji Rady Europy, Warszawa 2002, pp. 124-153.

2015 expanded the competence of an administrative court to rule in cases of an inactivity of administrative organ.<sup>35</sup>

As for the second category of the dominant group of cases, i.e. connected with the excessive length of detention on remand, it is true to say, that among the branches of the Polish law on which the ECHR exerts the largest impact, penal procedural law takes precedence. In one of the first important cases in this field, namely *Belziuk v. Poland*, the ECtHR ruled that the respect for the principle of equality of arms and the right to adversarial proceedings following from Article 6(1) taken in conjunction with Article 6(3)(c) of the Convention, required that the applicant be allowed to attend the appellate hearing and to contest the submissions of the public prosecutor.<sup>36</sup> As the result of this judgment, the wording of Article 461 of the Code of Penal Procedure concerning the principles regarding the attendance of the accused in an appellate hearing was amended in 2000 and 2003. The outcome is that the attendance of an accused at the appellate hearing is a rule and the refusal of such attendance – an exception. Moreover, the interpretation by the Supreme Court was changed in order to accommodate the Strasbourg judgment in this case, as well as other similar judgments.<sup>37</sup>

The Strasbourg case law also has had a considerable impact on Polish regulations concerning detention on remand. It should be mentioned here that one of the important changes in the Polish legal system made at the stage of the ECHR's ratification was to ensure compliance with Article 5(3) of the Convention so that an arrested person can be brought promptly before a judge. In its judgment in the case *Niedbała v. Poland*, the Strasbourg court found that Polish prosecutors, in the exercise of their functions, are subject to supervision of an authority belonging to the executive branch of the Government' and, therefore, do not meet the requirement

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<sup>35</sup> The Act of 9.4.2015 on the amendment of the Law on proceedings before administrative courts, Polish OJ 2015, item 215.

<sup>36</sup> *Belziuk v. Poland*, Application no. 45/1997/829/1035, Judgment of 25.3.1998, at paras. 39 and 40.

<sup>37</sup> See, inter alia, *Strzałkowski v. Poland*, Application no. 31509/02, Judgment of 9.6.2009, *Sieliwiak v. Poland*, Application no. 3818/04, Judgment of 21.7.2009, *Sobolewski v. Poland*, Application no. 19847/07, Judgment of 9.6.2009, *Raport z wykonywania wyroków Europejskiego Trybunału Praw Człowieka przez Polskę z 2013 r.* (Report from the implementation of the judgments of the European Court of Human Rights for 2013), [http://www.adwokatura.pl/admin/wgrane\\_pliki/adwokatura-tresc-5317.pdf](http://www.adwokatura.pl/admin/wgrane_pliki/adwokatura-tresc-5317.pdf), [access date: 19.1.2019], p. 22.



of being independent of the executive and of the parties following from the article.<sup>38</sup> As the result, the code of penal procedure was amended in 1996 and considerable amounts were provided in the budget to finance jobs for several hundred judges to deal with cases concerning the detention on remand in lieu of prosecutors. Following these changes, the use of pre-trial detention in Poland decreased significantly.<sup>39</sup>

The Polish procedure concerning the application of detention on remand was undoubtedly shaped to a large extent under the influence of Strasbourg-sourced judgments. As the result of these judgments, amendments in the Polish Code of Penal Procedure were introduced in order to ensure the contradictory nature of the proceedings concerning the extension of detention on remand or ensuring the arrested or detained person or his or her lawyer has access to documents in the case-file.<sup>40</sup> One of the most important problems connected with detention on remand in Poland remains the excessive length of detention. In its judgment in the case *Kauczor v. Poland*, the Court noted ‘a considerable number of judgments against Poland in which a violation of Article 5(3) on account of the excessive length of detention was found’, observing the ‘existence of a structural problem related to the excessive length of pre-trial detention’.<sup>41</sup> One of the aims of the amendment of the Polish Code of Penal Procedure by the Act of 2013 was to deal with this problem.<sup>42</sup>

A number of cases against Poland revealed the problem of inadequate conditions in Polish detention facilities, and in particular overcrowding. In judgments issued in cases *Orchowski and Sikorski*, the Court pointed out ‘the seriousness and the structural nature of the overcrowding in Polish

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<sup>38</sup> *Niedbała v. Poland*, Application no. 27915/95, Judgment of 4.7.2000, at paras. 49-57.

<sup>39</sup> See, *inter alia*, *Przestępczość i polityka karna w Polsce na tle innych krajów Unii Europejskiej* (Criminality and Criminal Policy in Poland against the background of other EU countries), the document available at the web page of the Ministry of Justice, [https://www.ms.gov.pl/Data/Files/\\_public/broszury-i-publikacje/przestepczosc\\_i\\_polityka\\_karna\\_w\\_polsce\\_na\\_tle\\_innych\\_krajow\\_unii\\_europejskiej.pdf](https://www.ms.gov.pl/Data/Files/_public/broszury-i-publikacje/przestepczosc_i_polityka_karna_w_polsce_na_tle_innych_krajow_unii_europejskiej.pdf), [access date: 19.1.2019], p. 20.

<sup>40</sup> See for example *Chróściński v. Poland*, Application 22755/04, Judgment of 6.11.2007.

<sup>41</sup> *Kauczor v. Poland*, Application no. 45219/06, Judgment of 3.2.2009, at para. 56.

<sup>42</sup> Ustawa z dnia 6 grudnia 2013 r. o zmianie ustawy – Kodeks postępowania karnego (Act of 6 December 2013 amending the Act – The Code of Penal Procedure), Polish OJ 2014, item 85.



detention facilities'.<sup>43</sup> Hence, the relevant penal and penitentiary provisions affecting the overcrowding in detention facilities were amended, alongside organizational steps taken by the authorities. Other frequently raised violations were connected with the censorship of prisoners' correspondence by prison authorities, resulting in the Court finding a violation of Article 8 of the ECHR.<sup>44</sup>

It is noteworthy that the Polish Supreme Court in its judgment of 28.2.2007, and in subsequent judgments, confirmed that a detainee might, under Article 24 read in conjunction with Article 448 of the Civil Code, lodge a civil claim against the State Treasury and seek compensation for infringement of personal rights, in particular, the right to dignity and private space, on account of overcrowding and inadequate living and sanitary conditions in a detention establishment.<sup>45</sup>

In cases drawn from the so-called *Dzwonkowski* Group,<sup>46</sup> the Strasbourg Court found a violation of Article 3 of the Convention on account of the use of force by the police which had as a consequence, injuries causing 'serious suffering to the applicant of a nature amounting to inhuman treatment'.<sup>47</sup> Article 3 was also found to be violated because of the lack of a 'thorough and effective investigation into the applicant's arguable claim that he had been beaten by police officers'.<sup>48</sup> Analogous violations due to the use of force by the police that were found not proportionate to the aim pursued, resulting in the victim's death were found in cases such as *Wasilewska and Kałucka v. Poland* and *Przemyk v. Poland*.<sup>49</sup> In these cases, the Court also

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<sup>43</sup> See *Orchowski v Poland*, Application no. 17885/04, Judgment of 22.10.2009, at para. 147, *Sikorski v. Poland*, Judgment of 22.10.2009, Application no. 17599/05 at para. 121.

<sup>44</sup> See for example *Friedensberg v. Poland*, Application no. 44025/08, Judgment of 27.4.2010, *Hinczewski v. Poland*, Application no. 34907/05, Judgment 5.1.2011.

<sup>45</sup> Judgment of the Supreme Court of 28.2.2007, V CSK 431/06. See, *inter alia*, *Rafał Łatak v. Poland*, pilot-judgment procedure as to the admissibility of Application no. 52070/08, Decision of 12.10.2010.

<sup>46</sup> The name of the group derives from the oldest case *Dzwonkowski v. Poland*, Application no. 46702/99, Judgment of 12.4.2007.

<sup>47</sup> *Dzwonkowski v. Poland*, at paras. 57 and 58.

<sup>48</sup> *Ibidem*, at para. 67.

<sup>49</sup> *Wasilewska and Kałucka v. Poland*, Application nos. 28975/04 and 33406/04, Judgment of 23.2.2010 and *Przemyk v. Poland*, Application no. 22426/11, Judgment of 17.9.2013.

found the violation of the procedural limb of Article 2 because of ‘the lack of a thorough and effective investigation into the death’ of a victim.<sup>50</sup>

In the *Przemyk* case concerning criminal proceedings against former police officers (*Milicja Obywatelska*) who faced charges in connection with the assassination, in May 1983, of Grzegorz Przemyk, the Court shared the opinion of the Supreme Court that the way in which this case had been dealt with by the domestic courts amounted to ‘a failure of the criminal justice system’.<sup>51</sup>

The Court also dealt with cases against Poland in which the access to abortion was denied. In the case *Tysic v. Poland*, the ECtHR found that Article 8 of the Convention was breached on account of failure of the Polish State to establish effective mechanisms for ensuring that a woman have access to legal abortion.<sup>52</sup> Article 8 was also found to be violated in the judgment *Pawlik v. Poland* (the so called *Pawlik* Group), in which the failure by Polish authorities to take effective steps to enforce the applicant’s right to contact with his son was found to breach of his right to respect for his family life under Article 8.<sup>53</sup> In the *Rozanski* case regarded as leading, in which the applicant alleged the violation of his ‘private and family life’ on account of being prevented from recognizing a child of whom he was the biological father, the Court found that Article 8 of the Convention was violated, due to ‘the lack of any directly accessible procedure by which the applicant could claim to have his legal paternity established’.<sup>54</sup> The implementation of judgments given in these cases required the amendments of the Code of Civil Procedure in order to ensure the effective execution of the court’s decision concerning the contact of a parent with a child.<sup>55</sup>

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<sup>50</sup> Wasilewska and Kaucka, at para. 63.

<sup>51</sup> *Przemyk v. Poland*, at para. 74.

<sup>52</sup> *Tysic v. Poland*, Application no. 5410/03, Judgment of 20.3.2007, at paras. 124-130. A similar case was that of *R.R. v. Poland*, in which ECtHR found violation of Article 3 of the Convention on the account that a woman was denied access to genetic prenatal examinations which would have enabled her to decide whether or not to seek a legal abortion in Poland. *R.R. v. Poland*, Application no. 27617/04, Judgment of 2.5.2011.

<sup>53</sup> *Pawlik v. Poland*, Application no. 11638/02, Judgment of 19.6.2007, at paras. 51-55.

<sup>54</sup> *Rozanski v. Poland*, Application no. 55339/00, Judgment of 18.5.2006, at paras. 78-80.

<sup>55</sup> E.H. Morawska classified both cases *Rozanski* and *Pawlik* as leading cases involving the violation of the right to respect family life under Article 8 of the Convention. See E.H. Morawska, *Wprowadzenie* (Introduction), [in:] E.H. Morawska (ed.), ‘Polska przed Europejskim Trybunaem Praw Czowieka. Sprawy wiodace: sprawa Kuda przeciwko

In a number of cases, the Court found violation of the right of access to court protected under Article 6 of ECHR. In the case *Kreuz v. Poland* the Court criticizing the approach of Polish courts to the possibility of the exemption of an applicant from payment of court fees, found that there was a breach of Article 6(1) of the Convention because the imposition of the court fees on the applicant constituted a disproportionate restriction on his right of access to a court.<sup>56</sup>

In a group of cases, applicants alleged that the lawyer appointed under applicable legal aid had refused to bring the cassation appeal to the Supreme Court against a judgment of the appellate court that resulted in the denial of the effective access to the Supreme Court. The Strasbourg Court found that there was a breach of Article 6(1) of the Convention in the situation when the refusal of a legal aid lawyer to prepare a cassation appeal took place in three days before the time-limit for lodging of a cassation appeal, making it impossible for the applicant to find a new lawyer under the legal-aid scheme.<sup>57</sup> In the case *Staroszczyk v. Poland* it was found that ‘the lack of the written form of refusal left the applicants without necessary information as to their legal situation and, in particular, the chances of their cassation appeal to be accepted by the Supreme Court.’<sup>58</sup> As the result of these cases, changes in the Code of Civil Procedure were introduced which consisted in, inter alia, imposing obligations on an advocate or legal adviser as regards the time-limit and form in the case of refusal to lodge a cassation appeal. Similar changes were also introduced in the Act on the proceedings before administrative courts, whereas in the case of penal procedure, the same effect was achieved by proper interpretation of the Supreme Court.

A separate group is the cases involved appeals against decisions of ZUS (the Social Insurance Institution) regarding, in particular, a withdrawal of social insurance benefits. In the case of *Moskal v. Poland*, ZUS re-opened the social security proceedings concerning the applicant’s right to an early-retirement pension based on its own error. This resulted in the quashing of the final decision granting a right to a pension. The Strasbourg Court

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Polsce z 2000 r.’ (Poland before the European Court of Human Rights. Lead cases: Kudła v. Poland in 2000), C.H. Beck, Warszawa 2019, p. 11.

<sup>56</sup> *Kreuz v. Poland*, Application no. 28249/95, Judgment of 19.6.2001, at paras. 64-67.

<sup>57</sup> *Siałkowska v. Poland*, Application no. 89832/05, Judgment of 22.3.2007, at paras. 114-117.

<sup>58</sup> *Staroszczyk v. Poland*, Application no. 59519/00, Judgment of 22.3.2007, at paras. 136-139.

found that there has been a violation of Article 1 of Protocol No. 1 to the Convention, observing that the applicant was faced, practically from one day to the next, with the total loss of her early-retirement pension, which constituted her sole source of income.<sup>59</sup> In a number of similar cases involving ZUS rescinding its earlier decision on an early-retirement pension granted for persons bringing up children requiring constant care, the ECtHR also found violation of Article 1 of Protocol No. 1. Finally, as a result of the Constitutional Tribunal ruling of 28.2.2011, the objectionable Article 114(1a) of the Act of 17.12.1998 on pensions and disability benefits from the Social Insurance Fund was repealed.<sup>60</sup>

In the case *Litwa v. Poland* concerning the applicant being held in a 'sobering up centre' by police for six and a half hours, the Strasbourg court had an opportunity to assess the status of 'sobering up centres' in the light of the Convention. The Court found that there was a breach of Article 5(1) (e) of the Convention, as due to the failure by the police to consider other less severe courses of action available to them under law than detention in the institution of a sobering-up centre was found to be in line with the ECHR.<sup>61</sup>

As it was already mentioned, the limited scope of this study makes it impossible to present all relevant and important cases against Poland. Nevertheless, even the limited survey of the Polish law presented above allows an illustration of the immense impact of Strasbourg case law on various areas of the Polish legal system. This impact is strictly connected with the implantation of Strasbourg judgments.

## **5. The implementation of ECtHR-sourced judgments in Poland**

The proper implementation of ECtHR-sourced judgments is of key importance for the effectiveness of the ECHR system of the protection of rights. In accordance with Article 46(1) and (2) of ECHR, the Strasbourg Court's judgments are binding on the states concerned and they are

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<sup>59</sup> Moskal v. Poland, Application no. 10373/05, Judgment of 15.9.2009, at paras. 67-76.

<sup>60</sup> Judgment of the Constitutional Tribunal of 28.2.2011, ref. no. K 5/11.

<sup>61</sup> *Litwa v. Poland*, Application no. 26629/95, Judgment of 4.4.2000.

forwarded to the Committee of Ministers, which supervises their execution based on of information provided by the national authorities concerned, as well as by applicants, NGOs and other interested parties. By ratifying the Convention, Poland undertook to perform in good faith, the obligations following from the Convention, as well as the judgments of the Strasbourg Court.

The implementation of ECtHR-based judgments requires taking, in the first place, measures of an individual nature, and if they prove insufficient, also general measures consisting in the removal of the reasons for the violation of the Convention, e.g. by changing the legislation or practice in a given field, changing the interpretation of binding provisions of law, correcting the practice of state authorities, raising awareness of human standards following from ECHR practice among officials, etc. Regarding individual measures, as provided by Article 41 of the Convention, in case of a violation of the ECHR, the Court may afford just satisfaction to the injured party. This is, however, possible if the internal law of a given state-party to the Convention ‘allows only partial reparation to be made’.

The aim of the setting out ECtHR-sourced judgments is to remedy violations found and to prevent new or similar ones. However, implementation is, as it was stated in the Parliamentary Assembly Resolution of 2006, ‘a complex legal and political process’ involving ‘close co-operation between domestic and other institutions, including the Assembly and the parliaments of member states’.<sup>62</sup>

In the case of Poland, the problem of acting upon Strasbourg Court-based judgments is of considerable importance. During the last 25 years, ECtHR has given more than one thousand judgments in relation to Poland, therein, finding violation of the Convention in the majority of cases. According to the data provided by the Department for The Execution of Judgments of The European Court Of Human Rights, the total number of cases against Poland forwarded for supervision since the entry into force of the Convention is 1652, while the total number of cases closed by final resolution is 1532.<sup>63</sup>

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<sup>62</sup> Parliamentary Assembly Resolution no. 1516 (2006), [http:// assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17472](http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17472), [access date: January 2019], at para. 2.

<sup>63</sup> Department for the Execution of Judgments of the European Court of Human Rights, Country Factsheet. Poland <https://rm.coe.int/168070975d> [access date: January 2019].

Poland was singled out by CE Parliamentary Assembly in, among others, its resolution of 2011 among 9 state parties to the Convention in which ‘major structural problems concerning cases in which extremely worrying delays in implementation have arisen’.<sup>64</sup> This was repeated in subsequent resolutions of the Parliamentary Assembly.<sup>65</sup> In the PE Resolution of 2015, Poland was mentioned among 9 state parties to the Convention, as ‘hav[ing] the highest number of non-implemented judgments’ still facing ‘serious structural problems that have not been solved for more than five years’.<sup>66</sup> This mention of ‘serious structural problems’ appears to correspond with the aforementioned situation in which Poland ratified the Convention with some haste, without undertaking prior planned in advance reforms of the legal system, as well as with the burden of a post-communist heritage still affecting in a negative manner, the functioning within of the legal system and the state apparatus. Nevertheless, it appears that the political will of national authorities is of crucial importance for the enabling of the judgments. In the already mentioned Resolution of 2015, the Assembly deplored ‘the delays in implementation and the lack of political will of certain States Parties to implement judgments of the Court’.<sup>67</sup>

The institutional arrangements that had been introduced in Poland in order to improve the situation in actualizing the Strasbourg Court’s judgments should be mentioned here. On 19.7.2007 the Prime Minister set up the Interministerial Committee for Matters of the European Court of Human Rights in order to improve the enforcement of ECtHR-sourced judgments. This is an opinion-making and advisory body to the Prime Minister. Among its tasks are, inter alia, monitoring the execution of judgments and decisions of the Court with respect to Poland, as well as elaborating proposals of positions on the most important problems arising from applications communicated by the ECHR in its rulings issued in cases against Poland.

According to the CoE<sup>68</sup> Parliamentary Assembly recommendations issued in November 2011, one of the guarantees for the execution of the

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<sup>64</sup> Parliamentary Assembly Resolution no. 1787 (2011), at para. 3

<sup>65</sup> Parliamentary Assembly Resolution no. 1914 (2013), at para. 4, Parliamentary Assembly Resolution no. 2075 (2015), [access date: January 2019], at para. 5.

<sup>66</sup> Parliamentary Assembly Resolution no. 2075 (2015), at para. 5.

<sup>67</sup> Ibidem, at para. 7.

<sup>68</sup> Report on the implementation of judgments of the European Court of Human Rights in Poland, Helsinki Foundation of Human Rights, Warsaw 2017, <http://www.hfhr>.



ECHR-based judgments is parliamentary supervision of the Government's activities in this regard. In February 2014, a permanent sub-commission for the execution of judgments of the ECHR was set up by the joint Commission of Justice and Human Rights, together with the Foreign Affairs Commission of the lower chamber of the Polish Parliament (Sejm). The appointment of the sub-commission was described as 'a step towards making the domestic implementation process more stable and regular'.<sup>69</sup> Unfortunately, the parliament elected in October 2015 did not restore this sub-commission.<sup>70</sup>

Generally, the realization by Poland of individual measures in the form of just satisfaction does not encounter major problems. The situation is different as regards general measures, especially of a legislative nature, as the carrying-out of such measures in some cases takes many years.<sup>71</sup> Included among the main implementation problems are 'the excessive length of procedures before courts and administrative authorities, as well as that of detention on remand'.<sup>72</sup> There are also problems concerning, *inter alia*, the resolving of judgments in which violation of Article 3 of the ECHR were found, particularly as regards the conditions of detention, overcrowding in prisons or dangerous detention regimes.<sup>73</sup> Among the main issues before the Committee of Ministers under ongoing supervision as of 4.10.2018, the following were mentioned: unlawful deprivation of liberty of a juvenile in correctional proceedings without specific court order and adequate judicial review,<sup>74</sup> inability to obtain judicial review of the lawfulness of a placement in a social care home of a person suffering from schizophrenia, deprived of legal capacity,<sup>75</sup> absence of automatic periodical examination of the placement need, inability to challenge continued institutionalization<sup>76</sup> due to deprivation of legal capacity, secret detention and ill-treatment of two

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pl/wp-content/uploads/2017/03/Raport-implementacja-ETPC-10-03-2017.pdf, (access date: 21.1.2019), pp. 4.

<sup>69</sup> Ibidem, p. 3-4.

<sup>70</sup> Ibidem.

<sup>71</sup> Ibidem, pp. 3-4.

<sup>72</sup> Parliamentary Assembly Resolution no. 1787 (2011), at para. 7.5.

<sup>73</sup> Report on the implementation of judgments..., Helsinki Foundation, p. 3.

<sup>74</sup> Grabowski v. Poland, Application no. 57722/12, Judgment of 30.6.2015, see: Department for the Execution..., p.1.

<sup>75</sup> The so called Kędzior Group, see Department for the Execution of Judgments..., p. 1.

<sup>76</sup> See Rutkowski and others v. Poland, Applications nos. 72287/10, 13927/11 and 46187/11, Judgment of 7.7.2015.



persons in a CIA facility under US authority in Poland,<sup>77</sup> excessive length of civil and criminal proceedings and lack of an effective remedy, principally on account of the domestic courts' failure to take into account the entirety of proceedings when evaluating their duration, and disproportionately low amounts of compensation awarded by domestic courts.<sup>78</sup>

However, according to the Report on the implementation of judgments of the European Court of Human Rights published by the Polish Ministry of Foreign Affairs, the year 2017 was another year in which the number of judgments issued against Poland, the invoking of which is supervised by the Committee of Ministers, diminished. In 2017, this number dropped to 124 (102 judgments and 23 decisions approving settlements) making it a record low number.<sup>79</sup> This is a positive sign signalling that some progress in the resolution of ECtHR-sourced judgments is being achieved in Poland at last, after this country's high number of unimplemented judgments had been pinpointed for a number of consecutive years.<sup>80</sup>

The limited editorial framework of this study does not allow for a comprehensive survey of general measures taken in order to put in place all the Strasbourg Court-based judgments in cases against Poland in which violations were found. Therefore, some selected examples of such measures undertaken in the process of implementation are mentioned below.

As for measures to comply with judgments concerning excessive length of detention on remand in the *Trzaska v. Poland* group of cases, it should be reminded first, that since 2000 in at least 170 cases, the European Court found that Polish authorities violated the right under Article 5(3) of the Convention to a reasonable length of detention on remand. The first

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<sup>77</sup> And their transfer from Poland to the USA despite the risk of a denial of justice before US military commissions using evidence obtained under torture and the risk of death penalty, see *ibidem*.

<sup>78</sup> The so called 'Majewski group'. See: *Majewski v. Poland*, Application no. 52690/99, Judgment of 11.10.2005.

<sup>79</sup> Raport z wykonywania przez Polskę wyroków Europejskiego Trybunału Praw Człowieka za 2017 r. (Report on the execution by Poland of judgments of the European Court of Human Rights for 2017), <https://bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/wykonywanie-wyrokow-europejskiego-trybunalu-praw-czlowieka/download,2230,5.html>, p. 4.

<sup>80</sup> It should be mentioned nevertheless that according, to the resolution of the Assembly of 2017, Poland is still listed as one of 10 member states having 'the highest number of non-implemented judgments and still face serious structural problems, some of which have not been resolved for over ten years.' See: Parliamentary Assembly Resolution 2178 (2017) at para. 6.

group of general measures undertaken includes changes of the law. The wording of Article 263 regulating the length of detention on remand and the grounds for extending its duration has been modified several times between 2000 and 2015.<sup>81</sup> Moreover, the Constitutional Court has also given a number of judgments on this article invoking the case law of the ECHR.<sup>82</sup>

Legal changes were not the only general measures undertaken, as the main source of the violations in these cases was found to be the practice of the domestic courts regarding detention. Therefore, some of the measures taken by national authorities focused on changing that practice so as to ensure it is in line with the ECHR's jurisprudence. In order to achieve this, there has been extensive trainings for judges and prosecutors, supported by provision of freely available publications of ECHR case-law, as well as regular updates on jurisprudence. Moreover, an intensive monitoring system was introduced to supervise court use of detention on remand proceedings.<sup>83</sup> In the Action Report on measures to comply with judgments concerning excessive length of detention, it is claimed that the overall impact of these measures was 'a very significant reduction in the use of pre-trial detention and a decrease in the number of individuals held in pre-trial detention'. Moreover, this has resulted in 'the change in the mentality of judges and prosecutors while using the detention on remand in criminal proceedings' which resulted in the number of judgments finding a violation dropping significantly.<sup>84</sup>

As for other exemplary groups of cases, following the Strasbourg Court-based judgments in the aforementioned *Dzwonkowski Group*, reforms of the legal framework governing police officer powers were carried out. A number of changes in law were enacted, including amendments in the act on measures of direct coercion and firearms. In 2013, several acts

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<sup>81</sup> Action Report, Information on measures to comply with judgments concerning excessive length of detention on remand in *Trzaska v. Poland* group of cases, 29.10.2014, <https://rm.coe.int/16804a23cc> [access date: January 2019].

<sup>82</sup> See for example the Polish Constitutional Tribunal of judgment of 20.11.2012 (SK 3/12) in which it found that that the provision of Article 263(7) of the Code of Penal Procedure is unconstitutional where it does not unequivocally specify the provisions for extending pre-trial detention following the issue of the first sentence by a court of first instance in the relevant case. In the substantiation of this judgment, the Constitutional Tribunal invoked ECHR case law.

<sup>83</sup> Action Report..., p. 2.

<sup>84</sup> *Ibidem*.

were passed, including an Ordinance on medical examinations of persons apprehended by the Police issued by the Minister of Internal Affairs in 2012, as well as Guidelines of the Prosecutor General covering the conduct of proceedings into crimes resulting in deprivation of liberty or ill-treatment caused by police officers or public officers. In addition, a special body within the Ombudsman's office competent to examine complaints on the actions of police and other services, was created. Some educational activities were also undertaken connected with promoting proper attitudes among policemen and their practice of performing official duties.<sup>85</sup>

As for the group of cases concerning conditions of detention, it should be mentioned that the scope and responsibility of competent authorities for the provision of health care in prisons was clarified in several Regulations on health care services in prisons during the period from 2010 to 2016. Moreover, infrastructure to ensure better sanitary and living conditions in prisons was improved, in particular, for special groups of inmates (e.g. disabled persons, pregnant women).<sup>86</sup> Thus, the resolution of ECHR-sourced judgments has resulted in a decrease of the occupancy rates in penitentiary institutions, reinforcement of the legal framework on the minimum accommodation area per detainee and creation of new accommodation units.<sup>87</sup>

It is noteworthy that not all general measures consisting, in particular, in amendments in the Polish legislation are regarded as sufficiently carrying-out the requirements resulting from Strasbourg-based judgments. This refers to the problem of excessive length of criminal and civil proceedings and lack of an effective remedy in the context of the afore-mentioned Act of 17.6.2004 on a complaint concerning the violation of a party's right to

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<sup>85</sup> See Resolution CM/ResDH(2016)148 Execution of the judgments of the European Court of Human Rights Eight cases against Poland, [https://hudoc.echr.coe.int/eng#{'itemid':\['001-164163'\]}](https://hudoc.echr.coe.int/eng#{'itemid':['001-164163']}), [access date: January 2019].

<sup>86</sup> See Final Resolution CM/ResDH(2016)278 Execution of the judgments of the European Court. The scope and responsibility of competent authorities for the provision of health care in prisons was clarified in several Regulations on health care services in prisons (2010-2016). Infrastructure to ensure better sanitary and living conditions in prisons was improved, in particular for special groups of inmates (e.g. disabled persons, pregnant women...). Court of Human Rights Eight cases against Poland, Department for the Execution..., p. 1.

<sup>87</sup> Resolution CM/ResDH(2016)254 Execution of the judgments of the European Court of Human Rights Seven cases against Poland, [https://hudoc.echr.coe.int/eng#{'itemid':\['001-167361'\]}](https://hudoc.echr.coe.int/eng#{'itemid':['001-167361']})(access date: 21.1.2019).

hear a case in preparatory proceedings conducted or supervised by a public prosecutor and court proceedings without unreasonable delay. Despite the changes in this Act made by the amending the Act of 30.11.2016, in its decisions from 7.12.2017, the Committee of Ministers supervising the execution of ECHR-sourced judgments observed in such cases<sup>88</sup> that:

the situation concerning the length of proceedings remains mixed and invited the authorities to provide to the Committee their analysis of the reasons for this situation and for the difficulties observed in 2016 in respect of some categories of cases, and, if relevant, measures to address these difficulties.<sup>89</sup>

According to the Polish Helsinki Foundation of Human Rights, it is necessary to further amend the provisions of the Act of 17.6.2004 increasing the amount of compensation awarded to the victims of the violations.<sup>90</sup> Obviously, however, even the introduction of such changes aimed at increasing the amount of compensation would not lead to the elimination of the structural problem of the Polish system of justice consisting in the excessive length of judicial proceedings.

Another example is found in the enactment of ECHR-based judgments that noted violation of Articles 8 and 3 in connection with the denied access to genetic prenatal examinations.<sup>91</sup> Herein, they underlined the lack of a clear legal framework to ensure effective access to legal abortion in the case of a 14-year-old minor who had become pregnant as the result of an alleged rape.<sup>92</sup> In order to activate these and other judgments, the Act on the rights of a patient and the Spokesmen of the Patient's Rights was adopted on 6.11.2008. This legislation enables a patient to lodge an objection in case of an opinion or a judgment affecting patient's rights or obligations following from the provisions of law. This new regulation has,

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<sup>88</sup> In H46-21 Bąk group, Application no. 7870/04, Majewski group, Application no. 52690/99 and Rutkowski and Others, Application no. 72287/10 v. Poland.

<sup>89</sup> Ministers' Deputies Decisions CM/Del/Dec (2017)1302/H46-21 of 7.12.2017, Ministers' Deputies Decisions CM/Del/Dec(2017)1302/H46-21 of 7.12.2017 (access date: 6.3.2019).

<sup>90</sup> P. Kładoczny, K. Wiśniewska, *Wyrok w Strasburgu to nie koniec! Raport na temat wykonywania wyroków Europejskiego Trybunału Praw Człowieka* (The judgment in Strasbourg is not the end! Report on the enforcement of judgments of the European Court of Human Rights), Helsińska Fundacja Praw Człowieka, Warszawa 2018, p. 30.

<sup>91</sup> R. R. v. Poland, Application no. 2761/04, Judgment of 26.5.2011.

<sup>92</sup> P. and P. v. Poland, Application no. 57375/08, Judgment of 30.10.2013.

however, been criticized on the ground that instituting a patient's objection is not a sufficient measure of implementation as there are still no effective procedural guarantees ensuring the effective access to abortion when a woman is entitled to it.<sup>93</sup>

In some situations, compensation for damage caused by violation of the rights provided for in the ECHR may take place by resuming proceedings in the case. It should be noted that in accordance with the Polish law, the judgment of the ECtHR may be the basis for reopening proceedings in a criminal case. According to the provision of Article 540(3) of the Code of Criminal Procedure, 'proceedings are resumed in favour of the accused, when such a need arises from the judgment of an international body operating under an international agreement ratified by the Republic of Poland'. In addition, in accordance with Article 272(3) of the Act of 30.08.2002 Law on proceedings before administrative courts, it is possible to also request to resume proceedings in cases in which such a need results from the decision of an international body operating under an international agreement ratified by the Republic of Poland.

In the absence of an analogous provision in the Code of Civil Procedure, there appeared a controversy as to whether it is possible to resume proceedings in civil law cases, as well. The issue was decided by the Supreme Court, which in a resolution of 7 judges of 30.11.2010, stated that:

The final judgment of the European Court of Human Rights, in which the violation of the right to a fair hearing of the case by the court, guaranteed in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, drafted on 4.11.1950 in Rome (Polish OJ of 1993 no. 61, item 284, as amended), does not constitute grounds for resumption of civil proceedings.<sup>94</sup>

The important observation to be made here is that especially as regards the penal law, the majority of judgments finding violation reveal defects in the law itself or by the practice in which it is being applied.<sup>95</sup> This, as some authors observe, is particularly pertinent as regards violations

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<sup>93</sup> P. Kładoczny, K. Wiśniewska, *Wyrok w Strasburgu...*, p. 37-38.

<sup>94</sup> Resolution of the Supreme Court of 30.11.2010, III CZP 16/10.

<sup>95</sup> M. Wąsek-Wiaderek, *Wpływ orzecznictwa Europejskiego Trybunału Praw Człowieka na ustawodawstwo polskie w dziedzinie prawa karnego – zagadnienia wybrane* (The influence of the jurisprudence of the European Court of Human Rights on the Polish legislation in the field of criminal law – selected issues), [in:] 'VI Seminarium Warszawskie, stosowanie Konwencji o ochronie praw człowieka i podstawowych wolności w krajowym porządku prawnym' (VI Warsaw Seminar, Application of the Convention for the Protection of

involving proceedings of relevant bodies leading to issuing the judgments.<sup>96</sup> In such cases, usually the approach to the procedure based on the pro-ECHR interpretation will be sufficient. Thus, in cases like these, changes of legislation would not be necessary or would be the last resort. It is also true that the excessive length of judicial proceedings is to a large extent the effect of incorrect application of binding provisions of law.<sup>97</sup>

Having said this, one has also admit that a number of repeated changes of law aimed at carrying out ECtHR-sourced judgments could be avoided if the Convention was adequately taken into account at the stage of law-making. In its Recommendation REC(2004)5, the Committee of Ministers put forward, inter alia, that member states 'should ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case-law of the Court'.<sup>98</sup> In the study devoted to the setting out of ECtHR-based judgments by Poland's Sejm, one of the authors suggested, among others, the introduction of the obligation that a declaration be enclosed to draft legislation if such a draft covers issues dealt with by the Convention, and if so, the relations of draft regulations to the ECHR should be ascertained'.<sup>99</sup> The need for the introduction of preventive control in drafting legislation as to its compatibility with the Convention is justified, the more so that, as it was already mentioned, there had been no planned or systemic review of the legislation upon the ratification of the ECHR and subsequent judgments of the Strasbourg court in finding violation of the Convention by Poland that were issued as the result of individual complaints.

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Human Rights and Fundamental Freedoms in the National Legal System), Warszawa 2013, p. 49.

<sup>96</sup> Ibidem.

<sup>97</sup> Ibidem, p. 50.

<sup>98</sup> Recommendation REC(2004)5 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, <https://bit.ly/priel2020-1-3>, [access date: February 2019].

<sup>99</sup> P. Radziewicz, *Rekomendacje dotyczące wykonywania wyroków Europejskiego Trybunału Praw Człowieka przez Sejm* (Recommendations concerning the implementation of judgments of the European Court of Human Rights by the Sejm), [in:] 'Wykonywanie wyroków Europejskiego Trybunału Praw Człowieka', BAS, <https://bit.ly/priel2020-1-2>, [access date: February 2019].



## 6. Conclusions

When assessing the impact of the ECHR on the system of Polish law, it should be borne in mind that both Poland's accession to the Council of Europe and the ratification of the Convention took place in a relatively short period of time. Unfortunately, it was not accompanied by any planned and systemic review of the national legislation with a view of ensuring its compatibility with the requirements of ECHR. After more than 40 years of Poland's membership in the so-called the eastern block dominated by the USSR and the experience of the functioning of the undemocratic political system based on the dictatorship of one party, one could hardly expect that the Polish legal system could be effectively adapted to the standards of the most advanced system of international protection of human rights ECHR in two or three years. This resulted, inter alia, in a relatively large number of complaints against Poland shortly after Poland recognized the competence of the Commission of Human Rights and ECtHR to receive individual complaints against Poland, as well as, in pilot judgments such as in *Broniowski case*, in which a 'widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons' was identified.<sup>100</sup>

Hundreds of judgments against Poland given by the Strasbourg Court in which violations were found, have revealed a variety of problems in the Polish legal system and practice. As the result of considerable efforts to implement these judgments, the Polish system of law is being continuously transformed in order to ensure it is in line with ECHR's human rights standards. This is, however, not an easy process, and the excessive length of judicial proceedings and of detention on remand remain to be leading strands in Polish case law.

The realization of Strasbourg-sourced judgments involves a number of general measures that need to be taken, including not only changes in the legislation, but also changes in practice, in the law's interpretation and the manner it is applied. Some flexibility in the process of the implementation is allowed though the margin of appreciation doctrine. Nevertheless, the raising awareness of the Strasbourg standards among judges, police officers, officials, etc. is of crucial importance for ensuring the proper

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<sup>100</sup> *Broniowski v. Poland*, at para. 189.



actualization of the Court's judgments. Poland used to be singled out among countries in which 'major structural problems concerning cases in which extremely worrying delays in implementation have arisen'.<sup>101</sup> Fortunately, in recent years some progress in the resolution of ECtHR-based judgments has been achieved, with the number of unimplemented judgments being significantly reduced. However, given the unsystematic verification of the compatibility of the Polish legal system with the ECHR through an instrument of an individual complaint, a more systemic approach to ensuring this compatibility is needed. One of such mechanisms could be the introduction of preventive control of draft laws with the Convention in the light of the case-law of the Court.

In the 25 years that have passed since the accession of Poland to the ratification of the ECHR by Poland, this instrument has become an integral part of the Polish domestic legal order. Its impact on the Polish legal system is of a dynamic nature by virtue of the Strasbourg Court case law which fills-in with specific contents, the general Convention norms. Keeping in mind the subsidiary character of its supervision mechanism, the ECHR remains the essential reference point for the protection of human rights in Europe– and exerts considerable influence on the Polish system of law. The continuous adaptation of the national legal system and practice in accordance with the Convention standards remains to be a long-term challenge for all state bodies and officials irrespective of whether they deal with law-making or application of the law.

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