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EFFECTIVENESS OF THE EUROPEAN COURT OF HUMAN RIGHTS' JUDGMENTS IN POLAND – NORMATIVE AND PRACTICAL ASPECTS

Б. Грановська. **Ефективність рішень Європейського суду з прав людини в Польщі – нормативні та практичні аспекти.** – Стаття.
Основною метою цієї статті є висвітлення на системній основі проблеми виконання рішень ЄСПЛ у Польщі. Так як шляхи вищезгаданої процедури можуть змінюватись в державах-учасницях ЄКПЛ (відповідно до принципу субсидіарності) деякі польські фахівці також схильні до сумнівів. Проведений аналіз стосується, в рівній мірі, нормативної та практичної основи. Незважаючи на цілком задовільні рішення, Польща, як і раніше, потребує більш організованого механізму, а також юридичної точності статусу рішень ЄСПЛ на національному рівні. Напевно, належна і злагоджена співпраця установ, що беруть участь у процедурі виконання, поряд з деякими законодавчими заходами поліпшать нинішню ситуацію.
Ключові слова: рішення Європейського суду з прав людини, внутрішнє (національне) виконання, польська нормативна база, організаційні аспекти, статистика, пропозиції de lege ferenda.

Б. Грановская. **Эффективность постановлений Европейского суда по правам человека в Польше – нормативные и практические аспекты**. – Статья.
Основной целью этой статьи является освещение на системной основе проблемы исполнения решений ЕСПЧ в Польше. Так как пути вышеупомянутой процедуры могут варьироваться в государствах-участниках ЕКПЧ (в соответствии с принципом субсидиарности) некоторые польские специалисты также подвержены сомнениям. Проведенный анализ касается, в равной степени, нормативной и практической основы. Несмотря на вполне удовлетворительные найденные решения, Польша, по-прежнему, нуждается в более организованном механизме, а также в юридической точности статуса постановлений ЕСПЧ на национальном уровне. Несомненно, надлежащее и согласованное сотрудничество учреждений, участвующих в процедуре исполнения, наряду с некоторыми законодательными мерами, приведет к улучшению нынешней ситуации.

Ключевые слова: постановления Европейского суда по правам человека, внутреннее (национальное) исполнение, польская нормативная база, организационные аспекты, статистика, предложения de lege ferenda.

***B. Gronowska*. Effectiveness of the European Court of Human Rights' judgments in Poland – normative and practical aspects. –** the Article.
The main purpose of this Article is to present in a systematic way the problem of execution of the ECtHR judgments in Poland. As the ways of the above-mentioned procedure can vary in States Parties to the ECHR (due to the principle of subsidiarity) some of the Polish specialties in this regard are exposed. The analyses concern both the normative and practical background. Despite quite satisfactory solutions Poland still needs more co-operative organizational model as well as the legal precision of the status of the ECtHR judgments at the domestic level. For sure a proper and consequent co-ordination of the institution involved in the execution procedure together with some more legislative precision will improve the present situation in this regard.
Keywords: judgments of the European Court of Human Rights, domestic execution, Polish normative background, organisational aspect, statistics, proposals de lege ferenda.

The problem under consideration touches the very essence of the process of doing justice. It is obviously known that the justice is really done only when a final judgment of a court is properly executed. It seems like a paradox, that while the knowledge of international individual complaint procedure is rather well known, the problem of the execution of judgments has been somehow neglected for quite a long time [1]. This statement concerning the importance of the execution receives a particular meaning especially in the case of judgments of international courts. In this regard – as compared to the domestic judgments – some contradictions can arise which are inevitably connected with the collision of traditional rules of international treaty law. Thus, on the one hand there is an undisputed obligation of the states parties to fulfill their treaty obligations «in a good faith» [2] and on the other hand there is a principle of subsidiarity of the international protection of human rights and freedoms [3].

Briefly, the confrontation of the two above-mentioned rules means that the final international judgment (decision) should be executed, however it is rather up to the state concerned to decide about the practical way and means in which the execution is done at the domestic level. The

European Court of Human Rights (ECtHR, the Court) formulated this in a very clear way «*the Court's judgment leaves to the State the choice of the means to be used in its domestic legal system to give effect to the obligation under Article 53» (present 46)* [4]. Actually, this strict attitude towards the subsidiarity principle had been successively modified. Thus in Papamichalopoulos and Others v. Greece (1995) [5] the ECtHR stressed that the Contracting States are «*in principle*» free to choose the necessary means to execute the judgment, Then, the situation received a totally new dimension together with the direct ordering by the Court in its judgments of the so-called individual and general measures. As for the first category of measures the ECtHR is not that willing to use the possibility, however it happens usually in the cases e. g. of a wrongful dismissal of a person from work, arbitrary detention or parental rights to visit their children [6]. The situation looks differently in the case of general measures, as they are usually connected with the obligation of the state to correct the systemic (structural) problem in order to prevent the similar violation of the ECHR in future. This category of measures is strictly connected and appeared together with the introduction of the pilot and semi-pilot judgments into the ECHR procedure [7].

None the less – from the international public law perspective – it is obvious that the wrongdoer is obliged to redress the damage caused and to prevent its repetition [8]. Actually, the division between individual and general measures is not that strict one, as – assuming that the state party is also under the obligation to prevent a repetition of the violation – even in individual case it may be necessary to adopt some general measures. This is very visible in resolutions of the Committee of Ministers concerning its supervision function (the Polish examples of such situation will be presented below).

Thus, within the international protection of human rights it is a common standpoint that all the states should prevent the violations of the said rights and in the case of infringement they should undertake proper steps towards the effective reparations for the victims (like restitution, compensation, rehabilitation of the victim, satisfaction and elimination of the same problems in future) [9]. The achievement of such goals needs from the states to provide for with adequate legal basis composed both of international and domestic standards.

Turning to the judgments of the ECtHR the starting point is surely connected with the present Article 46 of the European Convention on Human Rights (ECHR; the Convention). The plain text of paragraph 1 of this Article leaves no space for any doubts that «*the High Contracting*

Parties undertake to abide by the final judgment of the Court in any case to which they are parties». The further content of Article 46 of the ECHR confirms the truly obligatory nature of binding force and execution of the Court's judgments. Moreover, it is not an exaggeration to repeat that the «*spontaneous execution of a judgment in good faith should be the corollary of the recognition of the competence of the Court*» [10].

The main task of this paper is to present the normative and practical aspects of the execution of the above-mentioned judgments in Poland. To realize this task the analyses will be divided into three sub-parts, i. e.: 1/ a general picture of Poland in front of the ECtHR; 2/ the normative background concerning the execution of the ECtHR judgments both as regards the individual and general measures, and 3/ the organizational framework dealing with the above-mentioned execution procedures. As a conclusion some controversies will be presented as well as the basic *de lege ferenda* postulates will be formulated. Before going into details one more remark is necessary. It is above the question that the ECtHR judgments finding a violation of the ECHR can «produce» so many practical problems at the domestic level and this is mainly due to the fact that one case is different as compared to the other, but each one requires a proper reaction at the domestic level. One also cannot forget that some of the wrong will not be able to repair especially in such a way which is satisfying for the victims [11].

Poland in Strasbourg

Poland became a member state of the Council of Europe in 1991 and ratified the ECHR on 19 January 1993 (the declaration under previous Article 25 of the Convention concerning the individual complaint procedure was deposited on 1 May 1993) [12]. At the moment of writing of this text the number of «Polish» judgments in the Strasbourg case law [13] amounted to 1106 (among which in most of those cases at least one violation was found). For example, in 2012 the ECtHR delivered 74 judgments against Poland out which 56 were successful for the individual victims [14]. Something that was really confusing was a great and quick increase of cases sent to Strasbourg (here, in the sense of final judgments) which started to be delivered by the ECtHR. For example, till 1998 there were only 4 judgments, whereas e. g. in a single 2007 – 315; till 2010 we had 945 «Polish judgments and lastly in 2011 – 72; and in 2012 – 74.

What should be seen as a positive change is the fact that – according to the official information of the Polish Ministry of Foreign Affairs of

26 June 2013 – now we are at the 11th position as regards the number of applications sent to Strasbourg. To the contrary, in the period of 2000-2006 we were just at the first position together with Russia.

At the moment the subject matter of Polish judgments are nearly the same as in the case of other States-Parties to the Convention (mainly Article 6, 5 of the ECHR and originally art 8, whereas in the general picture it is right of property) [15]. According to the official information 64 % of the Polish judgments are connected with excessive length of the judicial, judicial-administrative procedure as well as the detention pending trial. However in all those cases the applicants received their financial just satisfaction ordered in the judgment. As for the rest 36 % of cases there are problems of lustration procedures (10 judgments), medical care in penitentiary institution (7 judgments) and overcrowding in prisons (3 judgments). These cases are under a stricter supervision procedure of the Committee of Ministers of the Council of Europe. Approximately 40 judgments are under ordinary supervision control (these are the judgments concerning the censorship of prisoners correspondence, right of access to court, right to respect of private and family life, freedom of expression) [16].

However, the main issue under present consideration is the real effectiveness of the Strasbourg judgments, in the sense of their domestic impact based upon the full and adequate execution of them by Polish authorities. Regrettable, in this regard Poland cannot serve as the best example. According to the Resolution 1914(2013) of the Parliamentary Assembly of the Council of Europe [17] Poland was included in the group of nine states having the severe problems with the effective reparations concerning the violations of the ECHR and still facing major structural problems which may lead to delays in the execution of the Court's judgments (together with Bulgaria, Greece, Italy, the Republic of Moldova, Poland, Romania, the Russian Federation, Turkey and Ukraine) [18].

Thus, before going into details it is worth mentioning that according to the official information presented by the Committee of Ministers of the Council of Europe there are still app. 800 judgments awaiting their full execution. As it is easy to guess most of them are connected with the necessary general measures, as well as some individual ones.

Actually, at the moment the only quite satisfactory sphere is connected with the payment of just satisfactions ordered by the ECtHR under present Article 41 of the Convention. It is mainly due to the fact that procedure is not too much formalized (it will be presented separately

below). But for a general orientation maybe it will be interesting to mention, that in the last 5 years the total amount of 11 million PZL were paid to those who were the victims of the violations of the ECHR by Polish authorities. Until now, the highest just satisfaction which was ordered in Strasbourg against Poland amounted to 247 thousand EUR plus additional over 18 thousand EUR for costs and expenses [19], and concerned the deprivation of property of 3 persons without adequate compensation (the land was expropriated for the purpose of public road building). The ordinary amounts of just satisfaction concerning non-material injury keep the level of 3-6 or sometimes 10 thousand EUR.

Normative aspect concerning the execution of the ECtHR judgments

In this regard the starting point is for sure the binding Polish Constitution of 1997 [20]. It is the first Polish Constitution which in a clear way solved the problem of traditional dilemma concerning the relationship between the international and domestic legal systems. Moreover, it represented a purely «monistic» model. Thus, according to Article 9 of the Constitution «Poland respects and complies with the international law which is binding for it». This is a typical general rule of good will of domestic authorities towards the international obligations. Then, the most important is the Chapter concerning the «Sources of Polish Law», where in the Article 87 one can read as follows: generally binding sources of law in Poland are Constitution, acts, properly ratified [21] international agreements and decrees. Lastly, according to Article 91 section 2 whenever there is a conflict between an ordinary legislative act and international agreement which cannot be normally solved, it is the latter which prevails. Consequently, it means that the position of some of the international treaties ratified by Poland are placed between Constitution and the legislative ordinary acts which should be compatible both with the treaty and the Constitution.

The above-mentioned regulation creates the general legal background assisting the execution of the Strasbourg judgment but for sure some other specific measures are still necessary.

Implementation of individual measures at the domestic level

Let us start with the implementation of individual measures, as in this case – at least it can seem so – the whole executive procedure should not be that complicated. Unfortunately, it is not always the case, as the individual measures concern quite different situations, depending on the circumstances of the case. Theoretically speaking the easiest situation

is that one of *retitutio in integrum (*of course if it is still possible) and payment of financial just satisfaction ordered in the judgment [22]. As it has been previously mentioned most of Polish cases concern the violation of «reasonable time» of a particular procedure, so in such case the only redress for the victim can be just a proper compensation.

To be more specific, even if it is a case of individual measures the respondent state often make something more in order to prevent the similar violations in future. To illustrate this tendency it would be proper to read carefully the content of the Committee of Ministers resolutions concerning the conclusion that a particular state has complied with its obligations under Article 46 para.1 of the ECHR.

Some representative Polish examples of such situation can be found in the following CM resolutions:

a) in the case of Musiał against Poland (1999) [23] where the applicant criticized the judicial proceedings concerning the lawfulness of the detention in a mental hospital as regards the conducting it «speedily (violation of Article 5 para. 4 of the Convention). As for the individual measures the respondent state paid to the heirs of the diseased applicant the sum provided for in the judgment. Moreover, in order to prevent the similar situation the Ministry of Justice disseminated the judgment (in Polish translation) to the courts. It has been further decided to increase the number of experts attached to the regional courts and their honorarium rates [24];

b) in the cases Kreuz No. 1 (2001) [25] and 11 other cases against Poland there was a typical problem concerning the violation of the applicants' right of access to courts due to refusal to exempt them from court fees between 2004-2005 (violation of Article 6 para.1 of the Convention). The European Court considered that the just satisfaction awarded to applicants compensated them for the deprivation of access to a court. However, the Polish Parliament enacted a new Law on court costs in civil cases, which entered into force on 2 March 2006. In this new document a simplified calculation of proportional costs was introduced and new rule for exemption from costs were accepted [26];

c) in the case of Zawadka against Poland (2005) [27] concerning the violation of the right to respect for family life as far as the applicant's contact with his abducted minor son was concerned the applicant received a detailed information concerning possible avenues of redress (including the possibility to institute proceedings on the basis of the 1980 Hague Convention on the Civil Aspects of International Childs

Abduction). Besides, the ECtHR judgment has been published on the website of the Ministry of Justice and sent to the presidents of court of appeal and the National Police Commander-in Chief with suggestion to include the problem in police officer' training programmes [28], and last but not least

d) in the case of Jakóbski against Poland (2010) [29] the authorities refused to provide a detainee with a meat-free diet in prison, contrary to the dietary rules for his faith (violation of Article 9 of the ECHR). As the applicant was released in 2011 no other individual measures appeared to be necessary (of course applicant received the just satisfaction in respect of non-pecuniary damage). None the less, the current legal provisions provide the detainees with the possibility to apply to the prison authority for diet taking into consideration their religious beliefs. As the Polish government convinced the Committee of Ministers that violation of that kind was rather of isolated nature it obliged itself to publish and disseminate of the Court's judgment as an adequate measure to avoid similar violation in future [30].

It does not seem necessary to present lots of other similar resolutions and cases [31]. However what is worth noting it is a combination of individual and «general» measures which can produce a very satisfactory result. As it has been mentioned above most of individual measures – mainly due to the impossibility of making *restitutio in integrum* – are based upon the payment of just satisfaction ordered in the ECtHR judgments.

Returning to the problem of just satisfaction orders in Poland this is the least complicated part of the ECtHR' judgments executions. We do not have here a formal domestic procedure (especially taking into account that the Strasbourg judgment in Poland does not require a writ of execution). In the beginning the problem was within the competence of the Ministry of Finances, but at the moment it is up to the Ministry of Foreign Affairs (who has at its disposal a certain «budget» for this purposes). After the judgment became final the officials are in contact with the victims and sends them financial just satisfaction directly to their private bank accounts. Maybe for some of you this kind of really not formalized action (*semi*-administrative, as it is based on the decision of executive authorities) can be controversial. However, in practice at least this part of the judgment is executed without unnecessary delays.

The situation is totally different when the violation of the ECHR in a particular case is connected with a wrong administrative decision

or judicial judgment. In this regard a leading role is played by the Recommendation No. R. (2000)2 of the Committee of Ministers of the Council of Europe concerning the possibility of re-examination or reopening of certain cases [32].

Following this recommendation of the Committee of Ministers in Polish law new institutions were introduced, namely the possibility of reopening the criminal and administrative procedures in connection with the Strasbourg judgment finding a particular violation at stake. This was included in the Code of Criminal Procedure of 1997 (CCP) [33] and in the new the Law on the procedure in front of the administrative courts of 2010 [34]. In both the cases there is a possibility for an individual to put in motion a new procedure in his/her case whenever any mistakes in the previous processes were found and confirmed by the Strasbourg judgment.

Of course, the mere existence of proper legal basis for elimination of the judicial or administrative mistakes does not solve the problem immediately. For example, for some of the scholars there is a dilemma concerning the independence of the judges reopening the case upon the basis of the Strasbourg judgment [35]. During the scientific discussion there are even quite controversial proposals of using the procedure before the Constitutional Tribunal under Article 193 of the Constitution which provides for a possibility of assessing the compatibility of the violated norm with the ECHR as such. Finding the lack of compatibility would open «the door» for the re-opening *erga omnes* of the procedure under Article 540 para. 2 of the CCP [36].

Unfortunately the same cannot be said about the civil procedure, which still lacks this kind of possibility. There is a «hot» discussion in the literature on the topic, but as for now any consensus has not been elaborated [37]. The main argument used in this regard exposes the specificity of this kind of procedure, especially the necessity of stabile protection of the rights of third parties involved in the process at stake and of course the basic rule of *res iudicata* in the civil law context. There are also arguments that such automatic re-opening of civil procedure can produce a new violation of the ECHR and this time to the detriment of a party who was not engaged in the procedure before ECtHR [38]. But to be quite honest, there are lots of viewpoints to the contrary, according to which in such complicated situations the involvement of the constitutional rules are considered to be involved as the «last resort measure» [39]. Actually the only possibility of re-opening of the civil

procedure is possible only when the judgment of the Constitutional Court's judgment was in the applicant's favour [40].

Interestingly enough, the problem was also dealt with by the Polish Supreme Court, but unfortunately it came to two opposite conclusions. Thus, in an earlier decisions it decided in favour of the ECtHR judgments [41], but not long ago quite surprisingly it changed its position [42]. To put it briefly, *de lege lata* the ECtHR judgment cannot justify re-opening of the previous domestic procedure. In the literature there is a popular opinion, that only after a detailed analyses *ad casu* may arise a conviction of the court that the incorrect decision should be verified [43]. Fortunately, the problem is not closed as according to the official attitude of the Working Group of the Minister of Foreign Affairs the possibility of re-opening of civil procedures should be reconsidered at least as an «optional» possibility, depending on the circumstances of the case which should be taken into account by the court [44].

Even if the last mentioned attitudes can bring some optimism one cannot forget that the situation is not purely regulated which makes the whole situation «misty». According to the published reports there are only 4 countries (Switzerland, Norway, Denmark and Malta) which provide for the possibility of re-opening the civil case which was in contradiction with the ECHR [45]. Thus, what we need in Poland now is a solid and complex solution of the problem. The main shortcoming in this regard is a visible lack of legislative regulation concerning the implementation of the ECtHR judgments, which makes the situation sometimes simple chaotic [46].

Implementation of general measures at the domestic level

For sure the proper execution of the so-called general measures creates a totally different story than the previous one. Let us remember, that this kind of measures are mainly connected with the institution of the «pilot» or «semi» pilot judgments which opened a new chapter in the Strasbourg individual complaint procedure. These «true» generally measures which are ordered in the ECtHR judgments concern the systemic domestic problem (being this of practical or legislative nature) but in any case they concern big population of potential victims. Actually, it was the famous case of Broniowski v. Poland (2004) [47] which introduced this new instrument into the Strasbourg procedure [48]. It worth stressing that the execution of pilot judgment in the case of

Broniowski – however finally accepted by the Committee of Ministers – provoked some criticism in Polish doctrine [49].

Before the analyses of the execution of the pilot judgments in Poland one more remark seems to be worth mentioning. In Polish cases in Strabourg there is a very important judgment, namely Kudla v. Poland [50] which – at least according to my opinion – was a *sui generis* pilot judgment. Due to this case the ECtHR for the first time decided that the interpretation concerning mutual relation between Articles 6 and 13 of the Convention could not be longer seen in the framework of «*lex specialis derogat legi generali*». In effect in most of the state parties to the ECHR the domestic legislature prepared special acts concerning the effective measure against the prolonged domestic judicial procedure. In Poland it was the act of 2004 [51] which was amended in 2008 [52] (for the purpose of stronger effectiveness and real financial satisfaction for the victims) [53]. In my opinion the Kudła Case was the first visible signal that the ECtHR would no longer tolerate evident shortcomings at the domestic level of the state parties to the Convention.

For sure the general measures – for their very nature – need time, as most of them are connected with necessary legislative or systemic changes both in the sphere of law as well as in the practice. As far as the above-mention Broniowski Case was concerned the proper execution of general measures happened on 12 December 2007, when the Committee of Ministers noted that a new law had been passed to settle cases concerning the lack of adequate compensation for persons repatriated from the territories beyond the Bug River after the Second World War. It should be noted that in the same situation as the applicant there were 80 thousand persons entitled for the compensation [54].

The same can be said about the Case of Hutten-Czapska v. Poland (2006) [55], in which the pilot-judgment procedure was closed after the Court was satisfied that Poland had changed its laws in such a way that the landlords could now recover the maintenance costs for their property and make a decent profit and have a reasonable chance of receiving compensation for past violation of their property rights [56]. It was noted that a new law had been passed to settle controversial cases concerning restrictive system of rent control for the landlords. It is also worth adding that in this case the problem concerned 100 thousand persons.

On the other hand we still have problems with proper execution concerning a. o. the structural problem of overcrowding in Polish prisons [57]. However, according to the official Programme of the Activity of

Government concerning the execution of the European Court of Human Rights Judgments in Poland one can find several optimistic information as regards the biggest problems which we face in our country. Just to give you some important examples – first of all the organs responsible for detention pending trial have been informed about the necessity of a special due diligence as far as the justification of prolongation of detention is concerned. Similarly, during the last years there has been the increase of application of the alternative measures concerning the detention pending trial. Thus in the period 2005-2010 there was a decrease of 33 % concerning motion for the application of detention pending trial and decrease of 34 % of application of that measure. Likewise, in the same period there was a visible increase in application of non-custodial preventive measures: supervision of the police (in 2005 – 6406 and in 2010 – 15138); bails (in 2005 – 2411 and in 2010 – 7174); prohibition of leaving the country (in 2005 – 1723 and in 2010 – 3177) [58].

Organizational framework dealing with the execution of the ECtHR judgments in Poland

It is obviously known that the responsibility for implementation of the ECHR at the domestic level is up to the State party in the sense of all its organs. It was directly stressed by the Polish Supreme Court, according to which» *the Convention binds all the authorities and state organs, including the courts. Each of the state organ within its own competences is obliged to respect the international law which is binding for Polish Republic (Article 9 of the Constitution) /.../ Thus in the case of the ECtHR judgments the state has a legal obligation to undertake such steps which are necessary for the execution of the judgment»* [59].

Surely such a general statement in practice will need lots of specific «steps», mainly in organizational aspect. At the moment, in Poland the main coordination for the proper execution of the ECtHR judgments is up to the Vice-Plenipotentiary for the coordination of the ECtHR judgments who is subordinated to the Plenipotentiary of the Minister of Foreign Affairs in the field of procedure in front of the ECtHR. In 2007 a special Inter-Department Group for the ECtHR judgments was created (all the reports are available on the website of the Ministry of Foreign Affairs). Moreover, since May 2011 in the Ministry of Foreign Affairs a special Department for the coordination of the execution of the ECtHR judgments has started its activity.

From August 2010 in the Ministry of Justice a special unit has been created which is responsible for delivering the ECtHR judgments to

those courts which judgments were found in Strasbourg as violating the ECHR standards [60].

Besides, in 19 July 2007 the Prime Minister created a special Group on Cases of the European Court of Human Rights [61]. The main task of this Group is to prepare the regular reports concerning the problems at stake (according to the last amendment of 2013 such reports are prepared on an annual basis). Moreover on 17 May 2007 – due to the initiative of the Minister of Foreign Affairs – the Government adopted a special «Programme of the Government's Activity for the Execution of the Judgment of the European Court of Human Rights». It is important to stress that the «Programme» strictly cooperates with the Minister of Foreign Affairs as well as with other respective ministers depending on the problem at stake.

During last years the problem of the proper execution of the ECtHR judgments at the domestic level received a visible attention not only among the governmental representatives. On 2 October 2012 during the meeting of the Parliamentary Commission of Justice and Human Rights an official proposal concerning the creation of a Sub-Commission for Monitoring of the Execution of the ECtHR Judgments was accepted. Likewise, in December 2012 Poland delegated an experienced judge to the Committee of Ministers' Section on the Execution of Judgments. It is worth reminding that the active involvement of the domestic Parliaments into the execution procedure is highly recommended. Both the Committee of Ministers and the Parliamentary Assembly of the Council of Europe strongly supported the idea as such [62].

It is also worth mentioning that in the proper execution process many other official bodies are engaged, like Ombudsman, National Judicial Council, Supreme Barrister Council, Codification Commission for Civil Law as well as NGO-s. In the newest information concerning the above-mentioned bodies there is always a reference to the problem of ECtHR judgments execution which simply means, that the problem is treated as one of the priorities. According to the official information lots of different initiatives are undertaken in order to make all those involved in the process fully aware of the importance of the topic (seminars, courses of instructions or even something like a yearly special reward for a judge who makes the most frequent references to the Strasbourg case-law).

In accordance to the Interlaken and Brighton Declarations [63] also the civil society is encouraged to make its own contribution to

the discussed undertaking [64]. In December 2012 there was a special consultation meeting organized for the purpose of dissemination information concerning the main shortcomings in the field of ECtHR judgments' execution and then the participants were asked to present their opinions till the half of 2013 [65].

Quite intentionally I invoked in the title of my presentation the term «effectiveness» which is for sure broader than a mere execution. As it is commonly known the ECtHR judgments have a binding effect *inter partes*. However, both in the doctrine [66] as well as in the viewpoint of the Council of Europe [67] the third parties effect would be a strong step towards the solid and effective protection of human rights in Europe.

Conclusion – proposals de lege ferenda

As it is easy conclude in Poland we have quite a solid background allowing proper execution of the ECtHR judgments. However, the statistical data are not that perfect which immediately formulates the question what else should be done. To be quite honest – despite this extensive domestic background serving the proper execution of the ECtHR judgments – we are still (as it was mentioned earlier) not in a comfortable situation. Sometimes too many mechanisms can fail if there is not a proper coordination of their activity. I fully agree with the postulate that in Poland a central organ responsible for execution of ECtHR judgments is needed at least as the organ of full supervision. Another factor worth considering is the precision of the legal status of the ECtHR judgments in Polish legal system. Despite lots of good work hat have been already done there are still opinions of the specialists concerning the necessity of improvement of cooperation between all the organs engaged in the execution process. The same can be said about better dissemination and publication of the relevant information. Last but not least, there is even a postulate concerning the disciplinary responsibility of persons who are individually responsible for the violation of human rights in particular cases [68].

Besides this formal steps some more educational action is still necessary. Thus, I fully agree with all those proposals which expose the necessity of solid dissemination of information between professionals as well as other parts of population to explain the specificity of the ECHR individual complaint procedure.

It is extremely important, as – what has been mentioned above – that the civil society can play an important role in creating the positive and

inspiring climate towards the fulfillment of Poland of its international obligations. Thus, lots of a further work is necessary in the field to create a real lobby groups in this regard.

Just as the end of this Polish story I would like to present a very specific case, where the breach of the ECHR was «repaired» before the final judgment of the ECHR was delivered. This is a kind of academic example concerning illegal practice which happened in Poland under old Code of Criminal Procedure of 1969 [69]. According to the binding rules the term of detention pending trial was regulated precisely only at the stage of the investigation. There was a visible gap in law as far as the accused and detained person was sent to the court; the Code simple did not regulate that any formal prolongation of detention pending trial should be based on a formal decision of the court.

Polish courts solved the problem in the easiest way, i. e. they assumed that because the defendant was at their disposal they do not need to formally decide about his/her staying in detention. Such a situation was evidently against the standard of Article 5 of the ECHR. The attitude of the Strasbourg Court was more than obvious (a violation of Article 5 of the ECHR). But what is interesting in this case the Polish Supreme Court in its resolution (no. I KZP 23/97) of 2 September 1997 (three years before the ECtHR judgment) corrected the situation in that sense that the all courts «had the duty to consider whether detention needs to be continued and to give an appropriate decision on this matter».

To keep in mind this example let me conclude that sometimes a final verdict is not necessary for improving the domestic legal system – it is simply just an old fashion of «good will and good faith» or even only a rational thinking in realizing particular international obligations.

Literature

1. J. Sobczak, Execution of Judgments – Problem of Effectiveness Monitoring of Execution of the European Court of Human Rights Judgments (in:) The European Court of Human Rights. Agenda for the 21st century, Warsaw 2006, p. 83.
2. This *classic* rule in the expressive terms was included in the Vienna Convention on the Law of the treaties of 1969 (seethe second section of Preamble and Articles 26-27), done in Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331.
3. Actually using the stylistics of the ECHR the principle of subsidiarity means that «the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual» – quotation fromP. van Dijk, F.

van Hoof, A. van Rijn, L. Zwaak (eds.) Theory and Practice of the European Convention on Human Rights, Fourth Edition, Antwerpen-Oxford 2006, p. 126. See also H. Petzold, The Convention and the Principle of Subsidiarity, (in:) R. J. Macdonald, F. Matscher, H. Petzold (eds.), The European System for the Protection of Human Rights, Martinus Nijhoff 1993, p. 41-62. It is also worth stressing that the subsidiarity as a leading principle of the ECHR system was expressively included in the Preamble to the Protocol No. 15 to the ECHR of 24 April 2013 (still not in force).

4. Belilos v. Switzerland, judgment of 29 April 1988, application no. 10328/85, para.78.
5. Papamichalopoulos and others v. Greece, judgment of 31 October 1995, (Article 50), application no. 14556/98, para 34.
6. Cases of: Assanidze v. Georia, judgment of 8 April 2004, application no. 71503/01; Ilascu and others v. Modova, judgment of 8 July 2004, application no. 48787/99; Oleksander Volkov v. Ukraine, judgment of 9 January 2013, application no. 21722/11; Savridin Dzhurayev v. Rusiia, judgment of 25 April 2013, application no. 71386/10.
7. The first Polish pilot judgments are the Cases of Broniowski v. Poland, judgment of 22 June 2004, application no. 31443/96 and case of Hutten-Czapska v. Poland, judgment of 19 June 2006, application no. 35014/97.
8. According to the International Law Commission «every internationally wrongful act of a State entails the international responsibility of that State» – See UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 (Draft Articles on State Responsibility)
9. See report of Th. Van Boven, UN Doc. E/1997/104 (16 January 1997). The similar attitude presented the ECtHR in the Case of Papamichalopoulos v. Greece, where it stressed that the respondent State «has a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. The Contracting States that are the parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach» – op. cit., para 47.
10. E. Lamber-Abdelgawad, The Execution of Judgments of the European Court of Human Rights, Human right files, No. 19, Strasbourg 2002, p. 6.
11. P. Grzegorczyk, Skutki wyroków Europejskiego Trybunału Praw Człowieka w krajowym porządku prawnym, Przegląd Sądowy 2006, nr 6, s. 6-42. *(Effects of the ECtHR judgments in the domestic legal order*)
12. See Dz. U. 1993, Nr 61, poz. 284-286 (Official Journal 1993, No. 61, item 284-286).
13. At the end of 2012 the total Strasbourg case-law amounts to 15.949 judgments. The statistical data in this paper are available in the HUDOC data base of the Council of Europe, www. coe. int.
14. See The ECHR in fact and figures 2012. The ECtHR in fact and figures, 212 – www. coe. int.

15. Ibid.
16. Notatka informacyjna nt. Stanu wykonania wyroków Europejskiego Trybunału Praw Człowieka przez Polskę, Ministerstwo Spraw Zagranicznych, Warszawa, 25 stycznia 2013, s. 2. (*Information Note about the State of Execution of the ECtHR Judgments in Poland, Ministry of Foreign Affairs*)
17. Resolution 1914(2013) on ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties, adopted by the Parliamentary Assembly on 22 January 2013 (4th Sitting).
18. Actually the same problematic states were exposed earlier in the Resolution 1787 (2011) on implementation of judgments of the European Court of Human Rights, adopted by the Parliamentary Assembly on 26 January 2011 (6th Sitting).
19. Bugajny and others v. Poland, judgment of 6 November 2007 (became final on 1 March 2010), application no. 22531/05.
20. Dz. U. 1997, Nr 78, poz. 483 (Official Journal of 1997, No. 78, item 483)
21. Not all of the international treaties have the same position according to the Polish Constitution. The «privileged» position mentioned in Article 91. 2 concerns only such treaties which should be ratified by President with the acceptance of Polish Parliament. All the human rights treaties belong to this category.
22. L. G. Loucaides, Reparation for Violations of Human Rights under the European Convention and Restitutio in Integrum, European Human Rights Law Review 2008, issue 2, p. 188-190.
23. Case of Musiał v. Poland, judgment of 25 March 19999, application no. 24557/94.
24. Resolution ResDH (2002)11 concerning the judgment of the European Court of Human Rights of 25 March 1999 in the case of Musial against Poland, adopted by the Committee of Ministers on 26 February 2001 at the 741st meeting of the Ministers' Deputies.
25. Case of Kreuz v. Poland, judgment of 19 June 2001, application no. 28249/95.
26. Resolution CM/ResDH (2011)67, Execution of the judgment of the European Court of Human Rights, Kreuz No. 1 and 11 other cases against Poland, adopted by the Committee of Ministers on 8 June 2011 at the 115th Meeting of the Miniters' Deputies.
27. Zawadka v. Poland, judgment of 23 June 2005, application no. 48542/99.
28. Resolution CM/ResDH (2011)238(1) Execution of the judgment of the European Court of Human Rights Zawadka against Poland, adopted by the Committee of Ministers on 2 December 2011 at the 1128th Meeting of the Ministres' Deputies.
29. Jakóbski v. Poland, judgment of 7 December 2010, application no. 18429/06.
30. Resolution CN/ResDH (2013)37 Jakóbski against Poland. Execution of the Judgment of the European Court of Human Rights, adopted by the Committee of Ministers on 7 March 2013 at the 1164th meeting of the Ministres' deputies.
31. For more examples see a detailed analyses done by I. C. Kamiński, R. Kownacki, K. Wierczyńska, Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w polskim systemie prawnym (w:) A. Wróbel (red.) Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku

prawnym, Warszawa 2011, s. 89-227.(*Execution of the ECtHR judgments in Polish legal system (in:) Assurance of the effectiveness of international courts' decisions in Polish legal system)*

32. Recommendation No. R. (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights, Appendix II, adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies It is also worth mentioning that the problem of effective execution of the ECTHR judgments was also the topic of debate of the Parliamentary Assembly of Council of Europe. In 2000 this organ adopted a special resolution 1226(2000) on Execution of judgments of the European Court of Human Rights, in which it presented a far reaching opinion that «the Court should oblige itself to indicate in its judgments to the national authorities how they should execute the judgment so that they comply with the decisions and take individual and general measures required»), ext adopted during the debate on 28 September 2000 (30th Sitting).
33. According to Article 540 para. 3 CCP of 1997 „the proceedings is reopened to the advantage of the accused whenever such a necessity arises against the background of a verdict of international organ which acts upon the basis of the international treaty ratified by Poland», Dz. U. z 1997 r., Nr 89. poz. 555. Moreover, due to the same Article para 2 there is another possibility of reopening of the proceedings in favour of applicant, namely in the case when upon the basis of the judgment of the Constitutional Tribunal a particular article being the basis of the sentencing was found invalid (i. e. contrary to the Constitution or duly ratified international treaty binding Poland). This can also apply to the issue under consideration.
34. See Article 272 § 3 Ustawy z 30. 08. 2002 r. – Prawo o postępowaniu przed sądami administracyjnymi (Dz. U. z 2002 r., Nr 153, poz. 1270 ze zm.) *(Law on the proceedings in front of administrative courts)*
35. A. Bojańczyk, Podważenie prawomocnego wyroku sądu karnego przez Europejski Trybunał Praw Człowieka (ETPCZ). Próba zarysu zagadnienia. Część II. Palestra 2001, nr 7-8., s 1032-133 (*Impairment of the final judgment of the criminal Court by the ECTHR. Outline of the problem)*; B. Nita, Orzeczenie ETPCz jako podstawa wznowienia postępowania karnego, Europejski Przegląd Sądowy 2010, nr IX, s. 6-7. (*The ECtHR judgment as a basis for Re-opening of the criminal procedure)*; J. Skrzydło, Wykonanie wyroku ETPCz, Europejski Przegląd Sądowy 2010, nr 11, s.11. (*Execution of the ECtHR judgment)*
36. P. Hofmański, E. Sadzik, K. Zgryzek, Komentarz do kodeksu postępowania karnego, T. II, Warszawa 1998, s. 880. (*Commentary to the Code of Criminal Procedure*)
37. E. Łętowska, Korzystny dla skarżącego wyrok ETPCz jako podstawa skargi o wznowienie postępowania. Glosa do postanowienia SN z 19. 19 2005 r. (V CO 16/05), Europejski Przegląd Sądowy 2006, nr 1, s. 45; (*The Judgment of the ECtHr delivered in favour of the applicant as a basis for the comlaint of re-opening*

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40. Nowela z 22. 12 2004 r. (Dz. U. z 2005, Nr 13, poz. 98) *(Ammendemnt of 22 December 2004)*
41. See Decision of 17.04.2007 r. (I PZ 5/07) in which the Supreme Court affirmed that the ECtHR judgment delivered in favour of applicant can be the basis for changing the domestic judgments because of invalidity according to Article 401 p.2 Code of Civil Porcedure – see the positive comment to this judgment A. Śledzińska-Simon, Naruszenie prawa do sądu jako podstawa wzruszenia postępowania cywilnego z powodu nieważności – glosa do postanowienia SN z 17.04.2007 r. (I PZ 5/07), Europejski Przegląd Sądowy 2009, nr 2, s. 39-43. *(Violation of the right to court as the basis for impairement of the civil process because of its null and void)* The similar attitude can be found in the judgment of the Supreme Court of 28 I 2008 (V CSK 271/08), where the Supreme Court confirmed that the ECtHR judgment finding a violation of the ECHR can be treated as equivalent to a precondition of establishing the contradictory to law of a final judgment of a particular civil court.
42. Uchwała 7 sędziów SN z 30. 11 2010 r. (III CZP 16/10), OSNC 2011/4, poz. 34. According to the Supreme Court formulated in this resolution the opinion that „the judgment of the ECHR finding a violation Article 6 of the ECHR does not create the basis for the re-opening of the civil procedure». *(Resolution of the Supreme Court of 30 March 2010).*
43. T. Zemburzycki, op. cit., s. 13.
44. Program Działań Rządu w sprawie wykonywania wyroków Europejskiego Trybunału Praw Człowieka wobec Rzeczypospolitej Polskiej, Warszawa 17 maja 2007, s. 21. *(Programme of Activity of Goverment for the execution of the ECtHR judgments in Poland).*
45. A. Śledzińska-Simon, op. cit., s. 43.
46. E. Łętowska, Czekając na Godota, czyli jak wykonywać wyroki ETPCZ (uwagi na tle sprawy Moskal v. Poland), Europejski Przegląd Sądowy 2011, nr 2, s. 10.

(Waiting for the Godot; how to execute the ECtHR judgments (remarks against the background of the case Musial v. Poland).

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48. The institution of pilot judgment was codified in March 2011 when the Court added a new rule to its Rules of Court (Rule 61).
49. See M. Krzyżanowska-Mierzewska, Sprawa mienia zabużańskiego przed ETPCz, Europejski Przegląd Sądowy 2008, nr 12, s. 20-25. (*Case of the Beyond Bug River property in front of the ECtHR).*
50. Kudła v. Poland, judgment of 26 October 2000, application no. 30210/96, para. 146-149
51. Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sadowym bez nieuzasadnionej zwłoki (Dz. U. nr 179, poz. 1843).
52. Znowelizowana ustawa z dnia 20 luty 2009 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki (Dz. U. z 2009 r., Nr 61, poz. 489). *(ammendment of the previous act)*
53. In a new version of the Act the victim can also complain about the excessive length of the preparatory proceedings as well as the sum of possible compensation is higher (previously up to 10.000 PLZ now to 20.000 PLZ).
54. Despite the advantages connected with the pilot judgments one cannot forget that while such procedure is pending all other applicants' cases are suspended or declared inadmissible.
55. Case of Hutten-Czapska v. Poland, op. cit., (footnote 6).
56. Pilot Judgments, Factsheet, Strasbourg July 2012, p. 6.
57. See semi-pilot judgment of Orchowski v. Poland, judgment of 22 October 2009, application no. 17885/04. A similar problem can be found in the Case of Sikorski v. Poland, judgment of 9 November 2004, application no. 46004/99..
58. See Sprawozdanie z realizacji Programu Działań Rządu w sprawie wykonywania wyroków Europejskiego Trybunału Praw Człowieka w Polsce za okres 07.2008-o7.2012, Ministerstwo Spraw zagranicznych, warszawa 7 sierpnia 2012, s. 8-12. *(Report of the realization of the Governmental Programme for the execution of the ECtHR judgments in Poland during the period of 7.2008 -7.2012*).
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61. See zarządzenie nr 73 Prezesa Rady Ministrów. This document has been amended twice: on 8 January 2008 and then on 8 March 2013 – zarządzenie nr 20. (*Ruling No. 73 of the Prime Minister)*

62. Rec (2008)2 (6. II 2008), Res, 1787 (2011) 26 01 2011 (p.10.1. res. Parliamentary Assembly
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64. L. Miara, V. Prais, The role of civil society in the execution of judgments of the European Court of Human Rights, European Human Rights Law Review 2012, issue 5, p. 533-537.
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66. A. Bodnar, Zmiana konstytucji jako konsekwencja wykonania wyroku ETPCz – glosa do wyroku ECTPCz z 20.05.2010 r. w sprawie Ajalos Kiss v. Wegry, Europejski Przegląd Sądowy 2010, nr 10, s. 43-45. (*Change of Consitution as a consequence of the execution of the ECtHR judgment – commentary to the judgment of Ajalos Kiss v. Hungary);* M. Balcerzak, Analiza prawna na temat wykonywania wyroków Europejskiego Trybunału Praw Człowieka przez Sejm, Wykonywanie wyroków Europejskiego Trybunału Praw Człowieka przez Sejm, (Biuro Analiz sejmowych, warszawa 2012, s.15. (*Legal analyses of the execution of the ECtHR judgments by the Parliament)*
67. See the 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, adopted by the Committee of Ministers on 12 May 2004 at its 11th Session According to the Preamble (section 5) «further efforts should be made by member states to give full effect to the convention, in particular through a continuous adaptation of national standards in accordance with those of the Convention, in the light of the case-law of the Court». Likewise during the Conference in Interlaken the states parties to the ECHR were recalled to «take into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the convention by another State where the same problem of principle exists within their own legal system» – Interlaken Declaration, op. cit., point. B. 4. c.
68. A. Bodnar, Skuteczność Europejskiej Konwencji Praw Człowieka w Polsce, (w:) T. Giaro (red.), Skuteczność prawa, wyd. Liber, Warszawa 2009, s. 212-213. *(Effectiveness of the ECHR in Poland (in:) Effectiveness of law)*
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