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THE STRASBOURG COURT – BETWEEN INDIVIDUAL OR GENERAL JUSTICE

Abstract

The main problem under consideration in the present Article is connected with a more visible process of transformation of the European Court of Human Rights – from a judicial organ for typically individual justice into the so-called sub-constitutional court dealing with problems of a general nature. The author tries to select and propose a proper systematization of all the various elements of the said process which have appeared at different moments in the systems' existence.

In the author's opinion the above-mentioned change of nature of the Strasbourg Court is an unavoidable consequence of present day realities. Nonetheless, an important question still remains open, namely, the one concerning a real need of Europeans as far as the protection of their human rights and freedoms are concerned. In order to construct a full picture of the problem the author also makes references to the basic literature on the subject. In this way the main arguments "pro" and "against" are available. For sure it is still too early to formulate one categorical answer concerning the transformation of the Strasbourg Court. The author only hopes that in the near future European individual justice will not totally disappear and that some kind of proper compromise will be reached.

Keywords

European Court of Human Rights - individual justice - general justice - constitutionalisation - quasi-constitutional organ - constitutional pluralism

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I. INTRODUCTION

From the present day perspective the problem referred to in the title creates one of the most real dilemmas within the system of human rights protection which was originally offered by the Council of Europe in the late 50s of the last century. During the past years, many millions of Europeans from the member states of this organization (starting from 10 in the beginning to 47 at the moment), and especially those from those countries which became full state-parties¹ to the European Convention on Human Rights of 1950² (hereafter: ECHR; the Convention), have been persuaded that this unique protective model is based upon an individual complaint system. If this had been true even at the early moments of the ECHR's existence, some divergent opinions could have been met. So, actually it can also be assumed that the original European Court of Human Rights (hereafter: ECtHR; the Court) was empowered with the possibilities of doing not only "individual" but also "general" justice.

Even at the very beginning, when the Convention entered into force, the division between "individual" and "general" justice was not so very clear. Thus, in the literature on the subject one can find a quite justified argument that the ECtHR has "dispensed both the individual and constitutional justice"³. Just for a short introduction let us remember that the main feature of "individual" justice expresses itself in offering a potential redress in each of the cases of finding a violation of the Convention standards upon an individual complaint of a victim. Quite on the contrary, "general" justice (some call it a "constitutional" one) is rather

¹ This remark seems to be necessary, as till 1998 the control jurisdiction of the European Court of Human Rights had had an optional nature. Thus, some of the early state-parties after ratification of the ECHR did not make a necessary declaration upon original Articles 25 and 46 of the ECHR. Another problem was connected with the process of ratification of the Convention – e.g. as an extreme example, France and Greece can be invoked in this regard. In both cases the above-mentioned period covered 24 years! France signed the ECHR on 4.11.1950, but did not ratify it until 3.05.1974. Similarly, Greece signed the Convention on 28.11.1950, but ratified it on 28.11.1974.

² Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.11.1950, European Treaty Series – No. 5. It is worth noting that the ECHR was ratified by Poland on 19.01.1993 – see. Dz. U. [Journal of Laws] 1993, No. 61, item 284.

³ S. Guggisberg, *The European Court of Human Rights: A Constitutional Court Endangering States' Sovereignty?*, Cork Online Law Review 2012, p. 98.

restricted to selected cases, usually concerning the most serious or systematic violations and problems. Thus, in the way of a proper selection the Court receives the chance to create “European standards or common values”, whatever that means⁴.

In the above context the main problem that we face at the moment is a visible change of priorities in the activity of the ECtHR. It seems that the Court is rather willing to accept a kind of disproportion between the individual and general justice. According to the opinions of persons dealing with the issue the second option starts to be a kind of a “front line” - preferable choice at the moment.

Actually, in the doctrine it was underlined that the whole debate covered two different attitudes, i.e. a conservative and a quasi-constitutional one⁵. The first option prefers to keep the *status quo* connected with some regular necessary organizational and procedural amendments. As for the second proposal the transformation of the Court should go in the direction of a judicial-constitutional organ.

It is not the purpose of this article to discuss in detail a model of constitutional justice, as this is a separate problem in itself. Actually, to be more specific the term “constitutionalisation” in the present discussion is used in a specific way, as especially in the case of international judicial organs the notion of “quasi-constitutional” seems to be a more adequate one. Moreover, it should be accepted that in the whole debate concerning the problem referred to in the title, the most important consideration is the purpose which should be achieved and not the method used as such⁶.

To show how very complicated – even from the theoretical perspective – the problem is, it is worth quoting a totally different approach. According to it, the whole analysis has three dominant frameworks, namely “individual justice”, “constitutional justice” and “pluralism”. It should

⁴ See the considerations in this regard: S. Greer, *The European Convention on Human Rights: Achievement, Problems and Prospects*, Cambridge: Cambridge University Press 2006, pp. 172-174.

⁵ K. Drzewicki, *Reforma Europejskiego Trybunału Praw Człowieka – filozofia zmian czy zmiana filozofii* [Reform of the European Court of Human Rights – a Philosophy of Change or a Change of Philosophy?], *Europejski Przegląd Sądowy* [European Judicial Review] 2006, vol. 6, pp. 4-8.

⁶ *Ibid.*, p. 10.

be mentioned that the debate takes place both in professional (judges, diplomats, NGOs) and academic circles. Of course, each of them has its own preferences⁷.

II. ECTHR - THE STARTING POINT

Returning to the main problem of this paper, it is beyond any doubt that the individual complaint mechanism could be seen as the most original feature of the ECHR. Nonetheless, it cannot be forgotten that as in the case of other international treaties the inter-state complaint also received its proper place. This fact is underlined here because it perfectly corresponds with the basic aim of the ECHR. If one reads carefully the Preamble to the ECHR the following words formulated by the member states receive a special meaning: “(...) being resolved, as the governments of European countries which are like-minded (...) to take the first steps for the collective enforcement of certain rights stated in the Universal Declaration”.

Reference to this well-known quotation from the ECHR Preamble is quite intentional. It should be stressed that the main purpose of the present article is to consider the potential – and actually more and more visible – transformation of the ECHR model which we may face in the near future, and the actuality which we have already slowly started to notice. If so, as the starting point of the analysis, one should surely have a look at the very beginning of the system as such, especially as far as the intentions of the Drafters of the Convention were concerned. Thus, the reference to the “collective enforcement” created a kind of objective obligations on the states-parties to the ECHR⁸. The importance connected with the idea of “collective enforcement” can be backed up by the somehow neglected power of the Secretary General to request information from any state-party to the ECHR (Article 52, previous Article 57 of the

⁷ S. Geer, L. Wildhaber, *Revisiting the Debate About “Constitutionalising” the European Court of Human Rights*, *Human Rights Law Review* 2013, vol. 12, no. 4, pp. 655-684.

⁸ The expressive reference to this obligation was made by the European Court of Human Rights in the case *Ireland v. the United Kingdom*, application no. 5310/71, judgment of 18.01.1978, at par. 239.

ECHR⁹). At the same time in the literature a viewpoint was formulated that “the Convention mechanism was created to perform a specific function to serve European public order in the field of human rights and fundamental freedoms”¹⁰.

In the above context it could reasonably be argued – at least it seems so – that the Authors of the ECHR did not exclude any future transformation of the created system depending on the actual needs. The only problem which still remains open is how far this transformation is possible, and even more importantly, how far it will bring advantages to the quality of the protection of human rights in Europe.

The process of the so-called constitutionalisation of the ECtHR is a result of two basic reasons, or at least so it seems. The first one, which started the process was quite trivial; it was simply connected with the practical difficulties arising from a dramatic increase in the number of applications. Certainly, a single court, even working on a daily basis, sooner or later would not be able to fulfill its tasks correctly. The second reason demanding the above-mentioned transformation is the time factor, i.e. the accession of new member states with their own difficulties which has produced a real challenge for ECtHR which started to be aware that “old tools” were not sufficient any more.

Quite paradoxically, the accession of new member states from Central and Eastern Europe has been estimated in the literature as a danger for the constitutionalisation process. The fear of the “de-constitutionalisation” of the ECtHR system was connected with a traditional vision of constitutionalism, which seem to “presuppose a degree of homogeneity as regards the constituency of the constitutional policy (...)”¹¹.

Taking this statement as a true thesis as far as the single constitutional court is concerned, the same cannot be said about the international court

⁹ See: P. Mahoney, *Does Article 57 of the European Convention on Human Rights Serve Any Useful Purpose?*, [in:] G. J. Wiarda, F. Matscher, H. Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J. Wiarda*, Köln-Belin-Bonn-München: Carl Heymanns Verlag KG 1990, pp. 388-389.

¹⁰ A. Z. Drzemczewski, *European Human Rights Convention in Domestic Law. A Comparative Study*, Oxford: Clarendon Press 1985, p. 10.

¹¹ W. Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgment*, *Human Rights Law Review* 2009, vol. 9, no. 3, p. 400.

of such nature as to be able to serve so many different legal and axiological domestic orders. It is commonly known that the ECtHR has its own “weapon” called the doctrine of margin of appreciation. In this regard it should be accepted that an unavoidable increased resort by the Strasbourg Court to this doctrine “would seem to contradict the purpose of a constitutional court”¹². To be quite honest there are also different viewpoints in the literature in which some of the experts refer to the positive effects of the said accession¹³.

For the purpose of a further analysis the Author proposes a more systematic attitude, i.e. normative standards in their confrontation with the practical problems. Thus, after some brief information concerning the rather technical changes which happened with the ECHR control model, the main attention will be given to the process of the so-called constitutionalisation of the Strasbourg machinery. It is worth remembering that in the middle of the 90s of the last century the ECtHR regarded the ECHR as a “constitutional instrument of European *ordre public*”¹⁴. Having this statement in mind it is quite easy to go a step forward and ask a further question concerning the role of the ECtHR as the control organ of the said treaty¹⁵.

But let us start from the beginning. In this regard one cannot forget about the realities of the first decades of the existence of this revolutionary, at that time, international human rights protection system. Actually, this was the first such proposal after the Second World War which created the *locus standi* for individuals before the European organs. If one asks a question concerning the model of the Strasbourg justice system it would be rather easy to argue for its individual nature.

However, at the same time we cannot lose sight of the simple fact that the original control model of the ECHR was to serve only 10 founding

¹² Ibid., p. 401.

¹³ Ibid., pp. 410-411.

¹⁴ *Loizidou v. Turkey*, (Preliminary Objections), application no. 15318/98, judgment of 23.03.1995, at par. 75. See also S. Philips, *The Courts v. the Executive: Old Battles on New Battlegrounds?*, *European Human Rights Law Review* 1996, no. 1, pp. 45-47.

¹⁵ Earlier this kind of speculation was presented by A. Drzemczewski, *A Constitutional Court for Europe?*, *The Law Society's Gazette* 30.04.1986, p. 1301.

states¹⁶. Thus, not surprisingly, both the European Commission of Human Rights (the Commission) as well as the ECtHR were able to deal successfully with a clear model of individual justice. It is enough to say that during the first twenty years of the system's operating there were only approximately 20 judgments delivered, i.e. one judgment per year¹⁷. Moreover, it should be added that the control organs of the ECHR were confronted with rather similar legal dilemmas of a so-called "western European" nature.

Personally, even at this early stage, I would dare formulate an opinion that the Drafters of the ECHR – even being very close to the idea of individual justice – just in case "left a space" for the future. A confirmation of this kind of attitude can be found e.g. in the competence of the Court in giving advisory opinions¹⁸. *Nota bene*, this important competence (interesting from the viewpoint of the "constitutional" nature of the Court) was broadened in 1997 by the Convention on Human Rights and Biomedicine in Article 29¹⁹.

Moreover, the passage of time brought a totally new situation and – in consequence – challenges for the Strasbourg machinery. The crucial moment appeared in the early 90s of the last century when the membership of the Council of Europe started to grow in a spectacularly quick way. What is even more important, the new partners from Central and Eastern Europe appeared in Strasbourg not only with a serious number of problems, but most of all with the new nature of the said issues. In the late 80s of the last century – quite besides new additional protocols, i.e. No. 9 of 1990, No. 10 and No. 11 of 1994, there were "hot discussions in the literature and many authors' proposals for remedy of the situation"²⁰. A huge number of cases which appeared in Strasbourg certainly made it

¹⁶ Among the first "10" member states only two have a somehow different "Western" nature, i.e. Greece and Turkey.

¹⁷ The European Court of Human Rights. Some Facts and Figures 1959-2009, Strasbourg 2009, pp. 5-6.

¹⁸ The competence of the ECtHR to give advisory opinion was introduced by Protocol No. 2 of 6.05.1963. At present see Article 47 of the ECHR.

¹⁹ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of 4.04.1997, CETS no. 164.

²⁰ See e.g. interesting and detailed proposal of H. Petzold, J. L. Sharpe, *Profile of the Future European Court of Human Rights*, [in:] Wiarda, Matscher, Petzold, supra note 9, pp. 471-510.

“a victim of its own success”²¹, but to be quite honest, one could see it as a rather problematic satisfaction.

What seems to be important at this stage of the present considerations is a remark that the first changes introduced were of a typically procedural nature subordinated to: a) strengthening the individual’s position (Protocol No. 9)²²; b) simplification of the procedure before the Committee of Ministers of the Council of Europe (Protocol No. 10)²³ and most of all c) a decisive rebuilding of the Court for the purpose of its swiftness and efficiency in dealing with individual cases carried out according to Protocol No. 11²⁴.

Just having a quick look back to the efforts which had been made at this first stage, it is obvious that they were mainly connected with the structure and more efficient operation of the Court (1 judge formation, 3 judges committees with the competence of solving series cases, the introduction of priority policy and lastly, the institution of pilot judgment in the case of systemic/structural violations). Actually it is the last institution which – at least according to the author’s opinion – created a kind of bridge between the two models of justice discussed in the present article. However, this still does not change the fact that all the previous modifications have had a rather technical nature and not a systemic one.

²¹ Ch. Tomuschat, *Quo Vadis, Argentorum? The Success Story of the European Convention on Human Rights – and a Few Dark Stains*, *Human Rights Law Journal* 1992, vol. 13, no. 11-12, pp. 402-406.

²² Protocol No. 9 to the Convention for the protection of Human Rights and fundamental freedom of 6.11.1990, *European Treaty Series*, No. 140. According to this Protocol individuals received personal access to the ECtHR.

²³ Protocol No. 10 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 25.03.1992, *European Treaty Series*, No. 146. Actually the entrance into force of Protocol No. 11 deprived this protocol of its topical interest.

²⁴ Explanatory Report to Protocol No. 11 to the European Convention on Human Rights, *Human Rights Law Journal* 1994, vol. 15, no. 3, *passim*. See also: B. Gronowska, *Reforma procedury kontrolnej Europejskiej Konwencji Praw Człowieka z 1950 r. – wybrane zagadnienia [The Reform of the Control Procedure of the European Convention on Human Rights of 1950 – Selected Problems]*, *Przegląd Prawa Europejskiego [European Law Review]* 1996, no. 1, pp. 93-95.

III. THE ECtHR AT THE CROSS-ROADS

A totally different picture appeared in the 21st century when the Strasbourg workload and consequent back-log in everyday work started to be really alarming. For every lawyer it is obvious that a legal system in transition – and certainly in the Strasbourg system we have such a situation – needs much deeper reconstruction than one depending only on judicial activism or proper dynamic interpretations. In 2009 there were some optimistic voices in the literature on the subject, that “ECHR is a competent system of international human rights protection which is able to accommodate the complexities of transition”²⁵. Personally, one can have nothing against such an opinion, however under one condition that this is not just a wishful thinking. Actually, in the same article the above-quoted author faced such difficulties in the Strasbourg case law, which supported the thesis that ECtHR – in its present shape – is not able to resolve all the moral and social dilemmas connected with the transition phenomenon²⁶.

In the most recent history of the ECHR two major factors should be exposed. The first one is the unavoidable phenomenon of the so-called “series” and “systemic” cases, and the second one is connected with the mutual relation between the Strasbourg and Luxemburg Courts after the Treaty of Lisbon of 2007 entered into force in 2009²⁷. According to my best knowledge both abovementioned facts can play a crucial role as far as the future role of the Strasbourg Court is concerned.

The “series” and “systemic” cases started to be such a great problem for the ECHR that it decided to solve the problem in two ways. Firstly, it is important to say that there is a very small difference between the “series” or “systematic” problems before the ECtHR. To put it briefly – the first one is the automatic result of the second. The “series” cases have their origin in a systemic problem of domestic legal practice or system, which a particular state is not ready (or willing) to solve. In this regard the additional

²⁵ M. Varju, *Transition as the Concept of the European Human Rights*, European Human Rights Law Review 2009, no. 2, p. 170.

²⁶ *Ibid.*, pp. 182-189.

²⁷ For a deeper reflection see: S. Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon*, Human Rights Law Review 2011, vol. 11, no. 4, pp. 645-682.

difficulties arise from the rather limited possibilities of the Committee of Ministers of the Council of Europe, as far as its formal supervision over the execution of the ECtHR judgments is concerned²⁸.

However, facing such a serious problem, the Strasbourg Court found a very wise and solid solution called a “pilot judgment”, according to which a particular respondent state has no other choice but to solve the identified systemic problem at a domestic level²⁹. To be quite honest, from the point of view of the ECtHR, this institution is very convenient, as all similar cases are suspended till the required result is finally obtained. It is enough to say that sometimes such “series” or “systemic” cases concern e.g. a great number of persons³⁰. However, what should be remembered here are the consequences of introducing some new mechanisms. To put it briefly, what is convenient for the Court is not necessarily convenient for individuals. Just to give an example of the pilot judgments it should be noticed that while dealing with one such a judgment the other potential complainants are not able to have their cases heard in Strasbourg, as they must wait till the final decision. Anyway the solid “pilot judgment” can in a final effect serve *pro publico bono* and in the earlier practice such situations happened several times³¹.

Actually, owing to these positive results, the institution of pilot judgments was codified in March 2011 by introducing a new rule 61 to the Rules of Court³² and in this way it has become a constant element of the system. This is certainly one of the strongest arguments in favor of constitutionalisation of ECtHR, as the specificity of a pilot judgment lies

²⁸ This problem has been regularly notified in the Annual Reports on Supervision of the execution of judgments and decision of the European Court of Human Rights (see especially the 6th Annual report of the Committee of Ministers of 2012) – for more details see the particular reports on the www.coe.int/t/dghl/Monitoring/Execution/Source/Publications.

²⁹ The first “pilot judgment” concerned the so-called Bug River cases from Poland – see *Broniowski v. Poland*, application no. 31443/96, judgment of GC of 22.06.2004.

³⁰ For example in the case of *Broniowski* there were nearly 80 000 persons entitled to compensation because of “River Bug Lands” – see Factsheet – Pilot judgments, Strasbourg April 2013, p. 1.

³¹ For such positive general changes see e.g. application no. 35014/97, judgment of GC of 19.06.2006; *Burdov v. Russia (No. 2)*, application no. 33509/04, judgment of 15.01.2009; *Olaru and Others v. Moldova*, application no. 476/07, 22539/05, 17911/08, 13135/07, judgment of 28.07.2009; *Maria Atanasiu and Others v. Romania*, application no. 30767/05, 33800/06, judgment of 12.10.2010.

³² Rules of Court, 1.05.2013, Registry of the Court, Strasbourg 2013.

in ordering to the state concerned use of the so-called “general measures” which should be applied at the domestic level. In the previous practice the Court’s judgments were of a declaratory nature, i.e. in the conclusion there was only a statement concerning the violation (or not) of the Convention. It was up to the respondent state to solve the problem at the domestic level in its own way. Now, in the case of ordering the “general measures” the situation is in some way different, as the Court demands that the state takes such measures and moreover prescribes the deadline which is under formal control. In the case of non-fulfillment of this obligation the Court decides not to adjourn the examination of similar applications pending before it³³. However, leaving aside for a moment the human dimension of the described phenomenon, one can find a strong argument for the institution of the “pilot judgment”. From the purely legal point of view, this is a solution which serves in a proper way the principle of subsidiarity of international human rights protection. It is beyond any doubt that it is the first and the basic obligation of the state concerned to protect properly and efficiently all the persons within its jurisdiction. In my opinion the institution of “pilot judgments” has changed the profile of the ECtHR towards the court dealing not as much with individual justice, but rather being more visibly open for general justice.

Moreover, it can be argued that the strengthening of subsidiarity of the ECHR control mechanism is not the only positive effect of the process of transformation of the ECtHR into a court of constitutional nature. In this regard it is worth reconsidering a thesis according to which “(...) constitutional justice, arguably less intrusive than individual justice, has the potential to strengthen states’ sovereignty and is probably more efficient”³⁴. If so, there will be another important argument towards the process being discussed, namely a better respect for sovereignty which in the case of international control procedures, especially those of judicial nature, has always been a delicate and strategic issue³⁵.

³³ Such a decision was taken in the case of *Ananyev and Others v. Russia*, application no. 42525/07, 60800/08, judgment of 10.01.2012.

³⁴ Opinion of Guggisberg, *supra* note 3, p. 103.

³⁵ R. Harmen, *The European Court of Human Rights as a “Constitutional Court”: Definitional Debates and the Dynamics of Reform*, [in:] J. Morison, K. McEvoy, G. Anthony (eds), *Judges, Transition and Human Rights*, Oxford: Oxford University Press 2007, p. 33 and 44.

Maybe at this stage of consideration it is still too early to formulate a final conclusion as to whether this kind of transformation is good or bad for the total model of the future ECHR control mechanism. The only aim of this short reflection was to underline that sometimes the politics of the so-called “small steps” can lead to a definitive reconstruction.

Honestly speaking, the Strasbourg Court is a unique institution also in that sense that being the first European “human rights hero” it is more and more in trouble. Three important conferences about the future of it left no doubt that it is impossible to keep the Court in its original shape³⁶. It can be assumed that the ECtHR has been a little exhausted and actually, due to all its achievements, it is quite understandable.

For those people who fully admire the ECtHR, one of the crucial moments signaling the necessity of change, was the proposal and then the entrance into force of the Protocol No. 14 of 2004³⁷. Besides the typical proposals serving the simplification and fluency of the procedure, the Authors of the Protocol decided about something totally new from the quality perspective - that is to introduce a new admissibility criterion, namely the requirement for the applicant to “suffer a significant disadvantage” (see Article 35 § 3 (b) of the ECHR). From the very beginning this requirement provoked a discussion both between the judges and the human rights academics. First of all, it is a typically valuable criterion at the disposal of the European judges, open to their interpretation. Certainly, at least in the beginning, they could find themselves in very difficult situation. Secondly, this kind of requirement will certainly eliminate many individual cases and thus close the Strasbourg “door” to those awaiting justice³⁸.

³⁶ For more details see: High Level Conference on the Future of the European Court of Human Rights, Interlaken 19.02.2010; High Level Conference on the Future of the European Court of Human Rights, Izmir 26-27.04.2011 and High Level Conference on the Future of the European Court of Human Rights, Brighton 19-20.04.2012.

³⁷ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention, Strasbourg 13.06.2004, CETS No. 194.

³⁸ It is worth mentioning that during the initial stage of the reform of the ECtHR it was felt that the principle according to which anyone had the right to apply to the Court should be firmly upheld.

To be quite honest, a careful reading of one new proposal limits far-fetched fears, as in the text there are two safeguard clauses included. The first one refers to the necessity of dealing with a case because the “respect for human rights” requires so. The second guarantee compelling the Court to continue the examination of the case (even in the absence of significant disadvantage suffered by the applicant) is the Court’s opinion as to whether the case has been duly considered by a domestic tribunal.

In the official explanatory report to Protocol No. 14, one can read that such a criterion was necessary in view of ever-increasing caseload, otherwise European justice becomes illusory as a result of a totally paralysed Convention system³⁹.

At the moment the best way of creating any kind of proper reflection is just a short analysis of the cases which have already been considered under this new procedural model. According to the statistics available at the time of writing this article, i.e. for two years, the Court’s chamber has applied this criterion in 26 complaints (mainly under Article 6 and 13 of the ECHR as well as Article 1 of the Protocol No. 1 of 1952). The Court rejected 16 of the mentioned cases⁴⁰.

Certainly it is a little too early to formulate a definitive opinion, but what seems to be helpful for further consideration is just a short case presentation concerning two different cases which appeared at totally different times. Let us start with the somehow trivial case of *Dybo v. Poland*⁴¹. In this particular case the applicant – a war veteran – paid a sum of PLN 10 as reimbursement of the courts fees. However, after two years he received from the proper office by default only half of the awarded sum, i.e. PLN 5. The applicant made further efforts before domestic courts, however with no positive results. The court had not only awarded him no compensation, but also “caused additional stress and financial hardship by prolonging the proceedings”. In the unanimous opinion of the ECtHR even if the material disadvantage was of minor

³⁹ Explanatory Report to the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention, Agreement of Madrid 12.05.2009, para 78. Available at www.coe.int.

⁴⁰ Information taken from: The New Admissibility Criterion under Article 35 § 3 (b) of the Convention. Case-Law Principles Two Years On. Available at www.coe.int.

⁴¹ *Dybo v. Poland*, application no. 71894/01, judgment of 14.10.2003.

importance, the whole procedure (six years and five months) exceeded the standard of reasonable time as required by Article 6 § 1 ECHR. In result Mr. Dybo was ordered € 1,000 in respect of non-pecuniary damage under Article 41 (previous Article 50) of the ECHR (just satisfaction).

In the above context let us invoke the newer case of *Vladimir Petrovich Korolev v. Russia*⁴². In this case the problem was connected with the denial of the applicant's access to the proper authority which was necessary for him to receive a new travel passport. Just as in the previous case the applicant was confronted with the serious inactivity of the proper authorities. During the procedure the court ordered the Passport and Visa department to pay to the applicant 22.50 RUB in compensation for the court fees. Only in 2003 did the bailiff start enforcement proceedings. As the applicant was not able to substantiate the bailiff's alleged failure, in 2004 the court found that he had not complied with the requirements and then upheld a decision in detriment to the applicant.

In the case presented above one can find some interesting statements of the ECtHR concerning the rule of "significant disadvantage". Generally speaking, the Strasbourg Court recalled that "the assessment of this minimum level is, in its nature, relative and depends on all the circumstances of the case (...). The severity of a violation should be assessed, taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case" (point A).

Saying so, the Court "(...) is struck at the outset by the tiny and indeed almost negligible size of the pecuniary loss which prompted the applicant to bring his case to the Court". Fortunately, the above statement was connected with justification, that the "(...) impact of a pecuniary loss must not be measured in abstract terms; even modest pecuniary damage may be significant in the light of the person's specific condition and the economic situation of the country or region in which such a person lives". However, in a final conclusion the ECtHR considered that the petty amount at stake in the present case was of minimal significance to the applicant.

It is worth being reminded that the two cases presented above had a common background, namely the visible inactivity of the respondent

⁴² *Vladimir Petrovich Korolev v. Russia*, application no. 25552/05, decision on the admissibility of 1.07.2010.

authorities. And this kind of shortcomings should not be measured by a mere financial factor which was at stake.

The confrontation of the two presented cases can provoke some discussion concerning mainly the consequence of the application of a new admissibility criterion, at least as long as the Strasbourg Court will not elaborate a consistent attitude in this regard (it seems especially important and difficult in the case of non-material damages suffered by the potential victims.) A more careful analysis of the earlier practice has proved that in the cases of material damage the main point of reference would be of a financial nature⁴³. Whereas it seems to be a rational proposal, it does not solve the core of the problem. Sometimes, behind the banal value of damage, there is a more serious problem concerning the quality of the domestic justice system (as exactly was the case of *Dybo v. Poland* or *Korolev v. Russia*). Likewise, this kind of proposal seems to be of a little value in the cases of non-financial injuries suffered by the victims of violation of their ECHR rights and freedoms.

Last but not least, in the case of *Luchaninova v. Ukraine*⁴⁴ a new aspect appeared. The applicant was found guilty of petty theft and reprimanded. Thus, the conviction of an offence was not accompanied by a penalty, however it was taken as a basis for the applicant's dismissal from work. The main problem in this case concerned the standard of fair trial which the applicant contested. For the purpose of this article the most important was the decision of the ECtHR that the dismissal from work had a negative effect on the applicant's personal situation and consequently she has suffered a significant disadvantage as a result of the alleged violation of the Convention (§ 50).

In conclusion, against the background of the present experience the ECtHR stressed that "(...) the severity of a violation should be assessed taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case. (...) The Court considers that (...) the following factors *inter alia*, should be taken into account: the nature

⁴³ Actually in the context of the *Dybo* case (note 37) while the works upon the Protocol No. 14 were still pending it was the Registry of the ECtHR which proposed the introduction of a minimal value at stake (€ 500) in a particular case. However, this proposal was not finally accepted – Drzewicki, *supra* note 12, p. 6.

⁴⁴ *Luchaninova v. Ukraine*, application no. 16347/02, judgment of 9.06.2011.

of the right allegedly violated, the seriousness of the impact of the alleged violation on the exercise of a right and/or the possible effects of the violation on the applicant's personal situation"⁴⁵.

It is not my intention to insist that even before the entrance into force of protocol No. 14 of 2004 – which was a turning point as far as the real direction that this institution is evolving towards – some professional voices have not paid any attention to the process of the consequent transformation of the ECtHR. Thus, there is no doubt that even earlier in official opinions, the ECtHR was classified as a *sui generis* constitutional court or at least a quasi-constitutional one⁴⁶. Actually, the whole discussion is directly connected with a broader problem concerning the debate about the “constitutionalization” of international public law⁴⁷. Nonetheless, in the whole debate there are also opinions that the ECtHR plays actually a double role, i.e. as a court for both individual and constitutional justice depending on the case⁴⁸.

IV. THE POTENTIAL EFFECT OF THE PROTOCOL NO. 15

Certainly the main and new chapter of this reflection is connected with Protocol 15 to the European Convention on Human Rights of 2013⁴⁹. In this document two elements seem to be important for the future of the ECtHR. First of all, following the decisions taken during Brighton Conference in 2012, it inserted to a preamble a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. Further changes concern the post of judges (they can serve until age of 74), easier relinquishment of jurisdiction by a Chamber in favor of the Grand Chamber (elimination

⁴⁵ *Guisti v. Italy*, application no. 1375/03, judgment of 18.10.2011, at par. 34; *Gagliano Giorgi v. Italy*, application no. 23563/04, judgment of 6.03.2012, at par. 55-56.

⁴⁶ C. A. Robin, *Voices from the European Court of Human Rights*, Netherlands Quarterly of Human Rights 2009, vol. 27, no. 2, p. 171.

⁴⁷ See for more details J. Zajadło, *Konstytucjonalizacja prawa międzynarodowego [Constitutionalisation of Public International Law]*, Państwo i Prawo [State and Law] 2011, no. 3, pp. 10-11.

⁴⁸ S. Geer, A. William, *Human Rights in the Council of Europe and the EU: Towards “Individual”, “Constitutional” or “Institutional” Justice?*, European Law Review 2009, vol. 15, no. 4, p. 466.

⁴⁹ This protocol was adopted on 16.05.2013 at the 123rd session of the Committee of Ministers of the Council of Europe. It will be opened for signature by member states on 24.06.2013.

of the consent of the parties) and the shortening of the time-limit concerning the possibility of applying to the Court (from six to four months). Last but not least, in Protocol No. 15 the new admissibility criterion was modified. Namely, the requirement which specified that no case could be rejected under Article 35 para 3 (b) if it was not duly considered by a domestic court, was deleted.

Just a closer look at the proposed changes bears some interesting reflections from the view-point of the present article. In the original text of the ECHR there were no *expressis verbis* references to the principle of subsidiarity (as e.g. in the case of the non-discrimination clause in Article 14). Nonetheless, it was invoked quite often in the case law of the control organs of this treaty. Does it mean that the newest proposal of Protocol 15 tends to make a mere order in the system as such or maybe it has to mean something more, especially in the context of a future accession of the EU to the ECHR? Or maybe we are going too far in our speculation and this kind of innovation serves only the reflection of the Court's pronouncements on the principle as such?

As for the expressive reference in Protocol No. 15 to the doctrine of margin of appreciation it does not seem to be so complicated. According to the explanatory report this reference "intended (...) to be consistent with the doctrine (...) as developed by the Court in its case law"⁵⁰. Of course, while saying so we cannot deny the very complicated nature of the doctrine itself, which in the past created some serious problems⁵¹. However, it cannot be excluded that the formalization of the doctrine can produce some positive results, which are strongly pointed out even by its opponents⁵².

There is no doubt that it is not the doctrine of the margin of appreciation as such, which was criticized, but rather the way of its implementation. In this context an expressive reference to the doctrine laid

⁵⁰ Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights, adopted on 6.02.2013, Strasbourg, AS/JU (2013)11, p. 2.

⁵¹ See the newest analysis done by A. Wiśniewski, *On the Theory of the Margin of Appreciation Doctrine*, Polish Review of International and European Law 2012, no. 1, pp. 63-84.

⁵² Ibid. See also L. Garlicki, *Wartości kulturowe a orzecznictwo ponadnarodowe – "kulturowy margines oceny" w orzecznictwie strasburskim? [Local Values and Supranational Adjudication – Is There a "Cultural Margin of Appreciation" in the Strasbourg Case Law?]*, Europejski Przegląd Sądowy [European Judicial Review] 2008, no. 4, pp. 4-13.

down in Protocol No. 15 can constitute a reasonable solution, as this can produce a kind of pressure upon the judges to use it in a more consistent and consequent way. If this is the case both the references to the subsidiarity principle and the margin of appreciation doctrine can serve as an additional argument towards the transformation of the ECtHR status.

V. IS THERE ANY COMPROMISE POSSIBLE?

As a conclusion to this short reflection, two additional remarks seem to be worth making. The first one is connected with an unavoidable evolution of the ECHR system. Quite untypically – at least in the author’s opinion – this evolution went through the following stages: from accepting all individual cases which were declared admissible, through the stage of first selection (done with the pilot judgment procedure), to the stage of the second and most complicated selection, connected with the introduction of a new admissibility criterion (vide Protocol No. 14).

For the people dealing with the ECHR system we are entering a totally new world. However, do we have any alternative? There is a saying that every solution has its own price. On the one hand, for the millions of individuals in Europe, the ECtHR was, and still is, a unique and very optimistic signal that the European doors are open for solving their problems. On the other hand, the blockage in delivering judgments can quickly diminish the real value of the Court and suddenly this perfect institution will be confronted with a lot of disappointment and criticism.

Actually, another problem with which the ECtHR has been already confronted is the stability of the interpretation line in its case law which lies at the very heart of legal certainty, foreseeability and equality before the law. These kinds of demands are even more important in the case of the semi-constitutional court. It is well known that the ECtHR is not legally bound by its previous judgments. When justifying the overruling of previous judgments, the ECtHR usually invokes the following reasons: 1) autonomous interpretation of the ECHR, 2) the need to alter “precedent” in order to respond to increasing numbers of cases and 3) reference to

a famous living instrument doctrine which helps to interpret the ECHR according to contemporary standards⁵³.

At the very beginning of the Court's activity it could have been accepted. However, in the present day realities, the overruling and overturning of previous well established interpretations may give rise to a lot of doubts and controversies.

Certainly what we need today is a strong and fully effective European Court of Human Rights. It is up to this Court to give solid and stable signals to the state-parties as far as the modern shape of the protection of individuals is concerned. Personally, I even dare to formulate the opinion that the legal status of the ECtHR is not the most important factor. Nonetheless, something that would be an attractive alternative for me is a model of "constitutional pluralism"⁵⁴. But what really counts, is a consistency in justification of judgments delivered by the Court. This is especially visible in confrontation with extremely complicated cases with clear political and moral backgrounds which enter the Strasbourg court day by day. In such context – even for the greatest adherents of European individual justice – the mere European reality creates the necessity of the modification of the ECtHR nature. A totally different story is the question how this new Court – as the highest European Court of Human Rights – will manage properly with more and more fragile challenges with which it will be systematically confronted⁵⁵.

⁵³ A. Mowbray, *An Examination of the European Court of Human Rights' Approach to Overruling Its Previous Case Law*, Human Rights Law Review 2009, vol. 9, no. 2, pp. 187-193.

⁵⁴ Geer, Wildhaber, *supra* note 7, pp. 684-687.

⁵⁵ These kinds of problems I presented during the International Conference: Universal and Regional Dimensions of the Protection of Human Rights. New Challenges – New Solutions, Warsaw 22-23.04. 2013. See: B. Gronowska, *The European Court of Human Rights and potential dangers for its independence – some controversies* (in print).

