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POLAND AND ITS “CONTRIBUTION” TO THE STRASBOURG CASE-LAW

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Annotation: Traditional attitude concerning the international human rights case-law put the main attention upon the so-called domestic impact of the international judgments. The present article tries to show an another possible perspective, namely the specific influence of the particular judgments which in effect brings something new in the international control model under consideration.

According to the title of the present Article the above-mentioned problem will be analyzed against the background of the activity of the European Court of Human Rights in Strasbourg. Moreover, the considerations will be connected with one State-Party to the European Convention on Human Rights of 1950, namely Poland. In this regard the Author proposes the following structure of the presentation, i.e. 1/ examples concerning the problem of proper interpretation of the treaty standards, 2/ possibility of being the corner-point as far as the functioning of the Convention individual complaint procedure is concerned, 3/ reference to the cases of “typical” domestic element, and last but not least 4/ the cases of a very specific nature in the sense of being very complicated because of different reasons.

In the Author's opinion all the elements taken together can provide for two advantages, i.e. 1/ better knowledge and understanding of particulars concerning State-Parties to the Convention and 2/ having a solid occasion to understand all the details and “mysteries” of the Convention's control machinery, which finally produce a more reliable imagination concerning the real protective possibilities of this mechanism.

The final conclusion of this article is connected with the thesis of interactions between the Strasbourg Court and domestic authorities. Thus, the substantive influence is mutual, no matter how different it can be from the purely legal view-point. It is for sure the fact of belonging to the same European system of human rights control we should co-operate at every possible way for the purpose of greater effectiveness of our system. This is exactly the reason why the Author of the article proposes to think seriously about the possibility concerning the erga omnes effect of the Strasbourg judgments in the sense that they should be also taken into account by other State-Parties to European Convention on Human Rights. This kind of attitude (actually, fully supported by the Council of Europe's organs) should be treated as one of the basic prevention measures as far as the similar violations of the Convention's standards are concerned.

In this regard the publications informing about the specificity of the protection of human rights in particular State-Parties seems to be of a significant importance and as such they should be treated as the way of necessary and solid dissemination of information concerning the ECHR system.

Keywords: Poland; domestic authorities; European Convention on Human Rights; European Court of Human Rights; case-law; impact of the international judgments; interactions between the Strasbourg Court and domestic authorities.

The main purpose of this article is to provide a synthetic reflection concerning the practical impact of the cases concerning Poland upon the general tendencies and trends within the Strasbourg case-law[1]. The Author is fully aware that despite the term "contribution" implies mainly positive effects, however some problematic issues or even complications in this regard can also appear. Exactly due to this fact the term "contribution" is understood broadly in this paper.

While considering the state's contributions to the Strasbourg case-law, a similar opinion can be formulated as far as any of the State-Parties to the European Convention on Human Rights of 1950 (ECHR, Convention) are concerned. For sure, each of them could have provoked more or less complicated legal discussions between the judges of the European Court of Human Rights (ECtHR, Court). Like one should remember that the interaction can be mutual, i.e. while "influencing the shape of the Strasbourg case law, the State-Parties can initiate the domestic impact in one or another country, depending on the "good will " of the latter.

Actually, in the hitherto English language human rights literature, the problem of the so-called Polish case-law in Strasbourg has been already invoked, however with a visible difference as far as the basic thesis was concerned[2] or as the way of presentation was proposed [3]. Both these issues have been treated in the above-mentioned literature in a rather traditional way and that was the reason why the decision concerning the preparation of this article has been made up.

Thus, just in the beginning it would be proper to state that the structure of present article will differ from the above-mentioned papers as it will concentrate upon the following issues:

1/ possible practical impact of the "Polish" judgments upon the way of interpretation of the ECHR standards;

2/ effective influence of the above-mentioned judgments on the ECHR control machinery and its functioning,

3/ general attitude of the Council of Europe and the ECtHR towards different problems of Member-States being in transition and finally,

4/ the reference to the "controversial" Polish cases (as for their socio-political context) and proposal of appreciation of the attitude of the ECtHR towards this kind of problems.

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[1] Poland became a Member–State of the Council of Europe in November 1991 r. It ratified the European Convention o Human Rights of 1950 on 19 January 1003 r, however the declaration concerning the control jurisdiction of the European Court of Human Rights under previous Article 46 of the ECHR was deposited on 1 May 1993 r. Until the day of finishing this Article there have been 1049 judgment against Poland out of each in 887 judgments at least one violation of the ECHR were found.

[2] See e.g. A. Drzemczewski, M.A. Nowicki, The Impact of the ECHR in Poland, European Human Rights Law Review 1996, issue 3, pp.261-286; M. –B. Dembour, M. Krzyżanowska- Mierzewska, Ten Years On: The Popularity of the Convention in Poland, European Human Rights Law Review 2004, issue 4, pp. 400-423.

[3] See M.-B. Dembour, M. Krzyżanowska- Mierzewska, Ten Years On: The Voluminous and Interesting Polish Case Law, European Human Rights Law Review 2004, issue 5, pp. 517-543.

According to the Author's opinion this kind of attitude allows a deeper understanding concerning the specificity of the functioning of the Strasbourg individual control machinery. At the same time it can provoke some reflections concerning the image of the ECtHR at the particular domestic levels.

Ad 1. In this sub-point it would be proper to make a reference to two relatively old, but still interesting cases, each one of them will lead to different effects and conclusions. Thus, the first one is a rather well known *Case of Witold Litwa v. Poland (2000)*[1] and concerns directly the classic problem of the international treaty law, i.e. the interpretation rule concerning treaty standards. As it is commonly known the leading role in this regard is up to the Articles 31-33 of the Vienna Convention on the Law of the Treaties 1969[2], according to which the process of interpretation must start with ascertaining the "ordinary meaning of the terms of the treaty – in their context and in the light of its object and purpose".

In the case of W. Litwa there was a problem concerning proper interpretation of the word "alcoholics" as it had been used in Article 5 § 1 (e) of the ECHR. The applicant, an older and blind man, while being under the moderate influence of alcohol, started to make some disturbances at the post-office. Due to the intervention of the post-office clerks the police arrived and took W. Litwa for several hours to the sobering-up chamber.

In his application sent to Strasbourg W. Litwa complained about unlawful and arbitrary deprivation of his liberty which according to him constituted the violation of Article 5 § 1 (e) ECHR. The main point of contention between the parties concerned the argument if W. Litwa could be classified as "alcoholic" as the government strongly insisted while invoking Article 5 § 1 (e) of the ECHR. According to the applicant "alcoholic" means something else than the term of "intoxicated person", and thus the Convention standard invoked by the government was not relevant in his case (§ 44).

Obviously, and this was confirmed by the ECtHR, from the medical viewpoint a single or occasional instances of alcohol intoxication was not equivalent to "alcoholism". The latter term – according to its scientific and lay usage – concerns persons addicted to and dependant on alcohol and not those being temporarily under its influence (§ 60).

At this stage of consideration of the above-presented case a real problem appeared, as the catalogue of the accepted cases of deprivation of liberty specified in Article 5 of the ECHR, is an exhaustive list by its nature. Surely, from the legal view-point such exceptional standards cannot be given an extensive interpretation (*exceptiones non sunt extendendae*).

On the other hand, the Strasbourg Court agreed with the Government's justification that a strict interpretation of the term "alcoholic" would lead to totally absurd results in the context of the purpose of Article 5 of the ECHR. It is

[1] *Case of Witold Litwa v. Poland, judgment of 4 April 2000,appl. no. 26629/95.*

[2] Vienna Convention on the Law of the Treaties, done on 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331. Poland ratified this treaty in 1990 (see Official Journal 1990, No. 74, item 439).

beyond the doubts the intervening police officer is not able to know if an intoxicated person in front of him is alcoholic or just a drunken man.

Actually, according to the best knowledge, this is the only one of such cases where finally the ECtHR agreed to accept a more flexible interpretation of a standard with the *ex definitione* exceptions. It was done through the reference to the preparatory works on the Convention, where it was stated that the *ratio legis* of Article 5 § 1 (e) of the ECHR had been "to cover the right of the Contracting States to take the necessary measures for combating /…/ drunkenness" (§ 55). Moreover according to the Court the invoked standard is directed to the persons who are not medically diagnosed as "alcoholics", but whose behavior under the influence of alcohol intoxication poses a threat to public order or create danger for himself/herself.

Saying so the ECtHR decided to deal with the case in substance and finally holding by 6 votes to 1 it found a violation of Article 5 § 1 (e) of the Convention due to establishing that the police intervention – even being legal and serving the justified aim – was disproportionate against the background of the circumstances of the case (briefly, being under the modern influence of alcohol cannot justified the deprivation of liberty in the sobering-up chamber).

What seems to be worth stressing is the fact that it was for the first time in the ECtHR activity when the Court departed from its tradition of not adding anything else to the list of exceptions which justifying deprivations of liberty. In his concurring opinion Judge G. Bonello described this even as "an anomalous and dangerous approach". In this regard the similar criticism was formulated in the concurring opinion of the Judge B. Conforti who despite reminding that "*in claris non fit interpretation"* and concluded that where the Convention gives the clear and precise rule concerning the conduct of the State, " the Court's decision should not be made to depend on an assessment of the minor details of the case". Actually, even in the Polish literature concerning the protection of human rights there were critical opinions and comments in this regard[1].

Whatever the final opinion of this controversial issue would be for sure that the ECtHR relied mainly upon the protective and preventive purposes of Article 5 § 1 (e) of the Convention, which without any doubts equal with a broader way of interpretation of exceptions *ex definitione* which seems at least to be a controversial one.

On the other hand it would be difficult to agree with a strict interpretation in such cases which in effect – while losing a real protective nature – would lead to additional restriction towards the sick persons as alcoholics surely are. Nonetheless, this Polish case was included into the Strasbourg case-law as the first one concerning the term being a "bone of contention". Furthermore, it is a very good example, that even the Founding Fathers of the Convention could not foresee the detailed controversies which might have arisen upon the "word which seems to be commonly understood" in the specific circumstances.

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[1] See: Gronowska B. Wyrok ETPCz w sprawie Witolda Litwy przeciwko Polsce z 4 kwietnia 2000 r. (problem legalnosci pozbawienia wolnosci w izbie wytrzeźwień) Prokuratura I Prawo 2000, nr 7-8, ss. 139-145. (Gronowska B. Judgment of the ECtHR iin the case of Wilotd Litwa v. Poland of 4 April 2000 (problem of legality of detention in sobering-op chamber) Procurature and Law 2000, No 7-8, pp. 139-145).

The second example, though still connected with the interpretation issue, has led to the practical effects on a large scale, both in the Strasbourg case-law as at the domestic levels. The famous *Case of Kudła v. Poland (2000)*[1] for sure can be treated as a precedential case[2]. Thus, against the background of very typical "Strasbourg stories", (i.e. these ones connected with the time of pre-trial detention, the reasonableness of its length as well as the requirement of the reasonable time of judicial trial as such), the ECtHR decided for the first time to change its attitude towards the interpretation of the mutual relation of Articles 6 and 13 of the ECHR.

Until this particular case the traditional opinion of the Court was expressed in such a way that "the requirements of role of Article 6 § 1 to Article 13 are less strict than, and are here absorbed by, those of Article 6". To put it in a different way "the role of Article 6 § 1 in relation to Article 13 is that of a *lex specialis,* the requirements of Article 13 being absorbed by those of Article 6 § 1" [3].

While dealing with the case of Kudła v. Poland, the ECtHR, taking into account a.o. the continuing accumulation of applications before it in which the only, or principal, allegation is that of failure to ensure a hearing within a reasonable time as required by Article 6 § 1, decided to review its previous case-law. In effect a totally new vision concerning the relation of the above-mentioned Articles appeared.

In consequence, in order to make the State-Parties more responsible for their obligations arising upon the ECHR – due to the subsidiarity principle[4] – the Court stressed that in any case of allegations concerning the reasonableness of the judicial trials these were up to the national authorities which should have been addressed in the first place. Otherwise, in the light of the factual situation in front of the ECtHR "the scheme of human rights protection set up by the Convention is liable to be weakened" (§ 155).

Thus, in result according to the great majority of the European judges (by 16 votes to 1 vote) it was considered that "the correct interpretation of Article 13 is that that provision guarantees and effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time" (§ 156).

In order to illustrate the further practical effects of this new interpretation line the example of Poland seems to be highly appropriate. In the traditional

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[1] *Case of Kudła v. Poland, judgment of 26 October 2000, appl. No 36210/96*

[2] For more about the concept of the „precedent" in the Strasbourg case law see: Balcerzak M. Zagadnienie precedensu w prawie miedzynarodowym praw człowieka, Toruń 2008, ss. 163-216 (Balcerzak M. Problem of precedent in the international law of human rights, Torun 2008, pp. 163-216).

[3] Such a viewpoint was traditionally represented by the ECtHR – see e.g. in the following cases: *Sporrong and Lonnroth v. Sweden, judgment of 23 September 1982, app. no. 7151/75, 7152/75, § 88; Kamasinski v. Austria, judgment of 19 December 1989, appl. no. 9783/82, § 110; Pizzetti v. Italy, judgment of 26 February 1993, appl. no 12444/86; Bouilly v. France, judgment of 7 December 1999, appl. no 38952/97, Giuseppe Tripoli v. Italy, judgment of 25 January 2000, appl. no 40946,98*

[4] The problem of the subsidiarity principle was invoked in an expressive way in the Kudła case, where the ECtHR stated" By virtue of Article 1 /…./ the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid to the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention" (§ 152 of the judgment).

Polish practice, before the judgment in Kudła case, the persons being in the same situation as the above-mentioned applicant, had at their disposal only a kind of administrative complaint to the president of a particular domestic court or from 2004 also the civil action under Article 417 of the Civil Code. For sure, these kind of legal measures did not meet the requirements of "effectiveness" as required by Article 13 of the ECHR[1].

Finally, on 17 June 2004 the Polish Parliament enacted a new Act on the complaint on the violation of the party's right to have a trial without an undue delay[2]. By its nature such a complaint was to be considered by a higher court and in consequence – at least according to the original version of the Act of 2004 – an individual claiming to be the victim could have received a financial amount of 1000 to 10.000 Polish zloties. Just in the beginning of the existence of this new Polish solution the ECtHR appreciated it in a rather positive way[3].

Unfortunately, the whole future practice approved the doubts of judge J. Casadevall who, as the only one, wrote a partly dissenting opinion to the final conclusion of the ECtHR in the judgment in the case of Kudła. According to him, "*it is not certain that the level of judicial protection afforded at European level by the Convention will be strengthened merely because the Court will now be able to find a double violation – firstly on account of the excessive length of the proceedings and secondly on account of the lack of any effective remedy to complain about it./…/ Ultimately only the litigant would suffer the consequences of this situation"* (points 4-5 of the opinion).

Actually, in the Polish practice not only an additional domestic remedy appeared (which should be firstly exhausted by the victims) but also the compensation provided for the in original version of the Act of 2004 appeared quite quickly to be illusory. According to the statistics the applicants were able to receive only the financial redress in amount close to the lowest level provided for by the Act of 2004 (app. 20% of the available sums). Well, as compared this situation to the possible just satisfaction ordered in Strasbourg the domestic amount of financial redress occurred largely below the levels. Even the ECtHR noticed, that the compensations received under received by the victims at the domestic levels should be at least proportional to those received in Strasbourg[4].

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[1] The concept of "effectiveness" of a domestic remedy covers not only practice but the laws contexts – see cases of: *Aksoy v. Turkey, judgment of 18 December 1996, appl. no. 21987/93, § 95; Aydin v. Turkey, judgment of 28 September 1997, appl. no. 28293/95, § 103, Kaya v. Turkey , judgment of 19 February 1998, appl. no. 22729/93, § 106; Ilhan v. Turkey, judgment of the Grand Chamber of 27 June 2000, appl. no. 22277/93 § 97.*

[2] Dz. U. 2004, no 179, poz. 1843. (Official Journal 2004, No. 179, item. 1843). See also Balcerzak M. Projekt ustawy o skardze na przewlekłość postepowania karnego – w celu wykorzystania wyroku Europejskiego Trybunału Praw Człowieka w sprawie Kudła przeciwko Polsce (skarga nr 30210/96, wyrok z 26 października 2000 r.), Biuletyn Biura Informacji Rady Europy. Ochrona Praw człowieka w Systemie Prawa Europejskiego, 2003, nr 3, passim (Balcerzak M. Project on the complaint concerning the prolonged judicial procedure – for the purpose of the execution of judgment in the case of Kudła v. Poland /appl. no. 30210/96, judgment of 26 October 2000), Bulletin of the Council of Europe's Information Office. The Protection of Human rights in the System of European Law", 2003, No 3, passim; Kłak Cz. P. Skarga a przewlekłość postępowania karnego a Europejska Konwencja o Ochronie Praw Człowieka I Podstawowych Wolności, Rzeszów 2011, passim (Kłak Cz. P. Claim for the prolonged criminal procedure and the European Convention on Human Rights, Rzeszów 2011, passim);

[3] *Case of Krasuski v. Poland, judgment of 14 June 2005, appl. no 61444/00, § 69.*

[4] It is especially important as In the *Case of Scordino v. Italy (No.1), judgment of 29 March 2006, appl. no. 36813/97* the ECtHR stated that "the Court awards higher levels of compensations than those awarded by the Convention institutions prior to 1999 (§ 176).

Interestingly enough it was not only the problem of money but also the practical functioning of this new domestic mechanism. Thus, in the case of Tur v. Poland (2007)[1] the ECtHR concluded that the remedy under "the 2004 Act cannot be regarded as "effective" within the meaning of Article 13, and consequently there was a violation of this standard.

In consequence on 20 February 2009[2] the Act of 2004 was amended in such way that the levels of possible compensation became higher (2000 -20.000 Polish zloties). Moreover, when the complained is declared admissible and when the applicant requires the financial redress, the court is obliged to deal with the financial issue. Thus it is impossible to ignore the applicant' request in this regard. This kind of solution was lacking in the Act of 2004.

This is for sure a very positive example, concerning a dynamic duty of the State-Party to the ECHR, in that sense that it should always control the trends in the Strasbourg case-law in order to provide for as effective domestic remedies as possible and fully compatible with the ECtHR standards.

The just presented case can lead to the second field of consideration, namely the impact of the content of "Polish judgments" upon the way in which the ECHR control the Convention machinery works.

Ad 2. This is exactly this spectacular and new tendency which appeared within the Strasbourg procedure and was strictly connected with the structure or systemic violations of human rights as prescribed in the ECHR. Nowadays, the term "pilot judgments" is a well known institution of the Strasbourg procedure, becoming its constant formal element[3].

However, it should be reminded that the first pilot judgment appeared in the case Broniowski v. Poland (2004). The Strasbourg Court was just facing nearly 80.000 similar cases concerning the violation by Poland of the right of property (Article 1 of the Protocol No. 1) in front of the problem of adequate compensation for the persons entitled to it as far as the so-called "beyond the River Bug" properties were concerned. According to the common opinion a very practical step was done by the ECtHR, though surely it could be a little disappointing for those individual applicants who were concerned. Thus, in practice the Court concentrated itself on this particular case whereas during this time all the other similar applicants were waived, i.e. just waiting till the final solution of the first one of such cases[4].

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[1] *Case of Tur v. Poland, judgment of 23 October 2007, appl. no. 21695/05, § 68.*

[2] Dz. U. z 2009, Nr 61, poz. 498 (Official Journal of 2009 , No. 61, item 498).

[3] The institution of the pilot judgment was inserted by the ECtHR into the Rules of the Court on 21 February 2011 – see Rule 61[1] Of the Rules of the Court, European Court of Human Rights, Strasbourg 18 March 2011, pp. 1-2. It is worth mentioning that the Council of Europe were looking for the solution of systemic problem by itself – see the Resolution of the Committee of Ministers Res(2004)3 on the cases arising systemic problems, (in:) Guaranteeing the effectiveness of the European Convention on Hyman Rights. Collected texts, Strabourg 2004, p. 80-81. See also The Pilot –Judgment Procedure, Information note issued by the Registrar, Strasbourg 2002.

[4] For more information see: Leach P. Beyond the Bug River – A New Dawn for Redress Before the European Court of Human Rights, European Human Rights Law Review 2005, issue 2, pp. 151-159; Krzyżanowska-Mierzewska M. Sprawy mienia zabużańskiego przed ECtHR, Europejski Przegląd Sądowy 2008, Nr 12, pp. 20-25. (Krzyżanowska-Mierzewska M. "Beyond the Bug River" Cases in front of the ECtHR, European Judicial Review 2008, No. 12, pp. 20-25),

Due to the deep consideration of the "beyond the River Bug" properties in front of accessible compensation in the time being (15% of a real value of the lost property, however no more than 50.000 Polish zloties) according to the Act of 2003[1] the Strasbourg Court found an evident violation of the contested Article and recommended the State –Party to take necessary steps concerning the general measures to make the whole situation compatible with the ECHR standards.

In effect a new domestic regulation was elaborated in 2005, according to which the limit of possible compensation was increased to 20% of the property left in the east parts of previous Polish territory (however under the friendly settlement considered between the parties)[2]. Actually the problem is still under consideration, as on 12 December 2013 Polish Parliament undertook the new efforts towards the strengthening the position of persons entitled because of the "Beyond Bug River" properties. The procedure is still pending[3].

A very similar situation appeared in the second Polish case – Hutten-Czapska v. Poland (2005/2006)[4], in which the problem of the right of property was connected with the private owners of apartments (the population of nearly 100.000 victims in queue for Strasbourg Court). In this case according to the first judgment of the ECtHR[5] the restrictive system of rent control concerning the private owners of the buildings, according to which the ceiling on rents was so low that they even did not cover the costs of property maintenance was a violation of Article 1 of the protocol No. 1 to the ECHR. Due to the whole pilot judgment procedure a new law was enacted which solved the problem in a way o more proper "fair balance" of the colliding personal interests[6].

One could easily claim that the above-mentioned judgments happened by an accident, being they in proper place and proper time, i.e. while looking of the ECtHR for any rescue mechanism concerning not only particular breach of the Convention but likewise the efficacy of the individual compliant procedure under the ECtHR[7]. Surely they were. But in the international (also domestic) justice system the mechanism works in the same way. One simply should wait

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[1] Ustawa z 12. XII 2003 r. o realizacji prawa do rekompensaty z tytułu pozostawionego mienia poza obecnymi granicami Rzeczypospolitej Polskiej, Dz. U. z 2004 r., Nr 6, item 39 (Act on the realization of the right to compensation for the property left beyond the current Polsh boarders – Official Journal of 2004, No. 6, item 39.

[2] Finally, in this case a friendly settlement was achieved and due to this fact the Grand Chamber in its judgment of 28 September 2005 struck out the case from the list. It is worth mentioning that the old regulation was replaced by a new Act of 8 July 2005, according to which the minimal level of compensation was risen to 20% of the actual value of the "Beyond the River Bug" property – Dz. U. nr 169, poz. 1418. (Official Journal of 2005, No. 169, item 1418).

[3] This new effort is directed towards the widening of the scope of persons entitles, i.e. among them there will be also the persons who before the date of 1 September 1939 did not live in the territory where their property was.

[4] Dz.U. z 2003 r, Nr 61, poz. 488 (Official Journal of 2003, No. 61, item 488).

[5] *Case of Hutten-Czapska v. Poland, judgment 22 February 2005, appl. no. 35014/94; judgment of the Grand Chamber of 19 June 2006.*

[6] The contested Decree on housing commissions of the Polish Committee of National Committee Libration of 9 October 1994 was replaced by the new regulation, namely the Act on rights of inhabitants of 8 December 2006 and Act of change in the management of real estates of 24 August 2007. Due to the friendly settlement achieved by the parties the Grand Chamber struck out of the list the above-mentioned case on 12 April 2008.

[7] Actually, such efforts appeared earlier also in the professional literature – see: Dembour M.B. "Finishing off" Cases: The radical Solution to the problem of the Expanding ECtHR Caseload, European Human Rights Law review 2002, issue 5, p. 611 and the following.

until the decisive organ is still ready enough to deal with the exactly same systemic problems. In this regard, it simply happened the patience of ECtHR was at the limits and thanks to the "mere" Polish case a new control machinery element appeared.

Ad 3. In this part of the article a very interesting question concerning the quality of the protection of human rights in new State-Parties appears. Exactly the problem is connected with the widely discussed phenomenon of lustration procedures in the ex-communist countries.

Let us remind that the Parliamentary Assembly of the Council of Europe adopted the Resolution 1069 (1996) concerning the measures to dismantle the heritage of former communist totalitarian systems[1].

In the above-mentioned document one can read as follows:

"The aim of lustration is not to punish people presumed guilty – this is the task of prosecutors using criminal law – but to protect the newly emerged democracy (point 12) and likewise;

/…/ It should be ensured that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and democratization process (point 13)".

Exactly this kind of problem arose in the case of Matyjek v. Poland (2007)[2] in which the applicant Tadeusz Matyjek (previous deliberate and secret collaborator with the Security Service) complained in Strasbourg about the quality of the lustration proceedings continued against him[3]. According to the applicant in the procedure he was not able to defend himself properly due to the fact that most of the materials were secret and confidential, thus the lustration court did not allow him to make any copies, to take notes made in the registry by the applicant nor to show the notes to anyone or to use them at the hearings.

On the other hand, due to contested law in a visibly different position was the Commissioner of the Public Interest who was a party to the proceedings and who did not face such strict limitations during the preparatory stage of procedure. In his application T. Matyjek complained about the violation of Article 6 of the ECHR, i.e. fair trial, equality of arms and right to defense.

Taking into account all the circumstances of this case the ECtHR accepted most of the arguments of the applicant. Interestingly, the ECtHR invoked an argument concerning the passage of time, as in its opinion "in December 2000, the confidentiality of some of the documents lifted, nonetheless the limitations were still applicable to newly included documents" (§ 61).

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[1] See the Resolution 1096(1996) on measures to dismantle the heritage of former communist totalitarian system, adopted by the Parliamentary Assembly of the Council of Europe on 27 June 1996 (23rd Sitting). Additionally, there are the Guidelines to ensure that lustration law and similar administrative measures comply with the requirements of a state based on the rule of law – Doc. 7568, adopted on 3 June 1996 (Reppourter : Mr Severin)

[2]*Case of Matyjek v. Poland, judgment of 24 April 2007, appl. no. 38184/03.*

[3] Ustawa z 11 IV 1997 r. o ujawnianiu pracy lub słuzby w organach bazpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne, Dz. U. z 1997, Nr 70, poz. 443 (L aw of 11 April 1997 on disclosing work for or service in the state's security services or collaboration with them between 1944-1990 by persons exercising public functions, Official Journal of 1997, No. 70, item 443).

Thus in its final and unanimous conclusion the ECtHR expressed the opinion that the Polish lustration proceedings against the applicant, "taken as a whole", cannot be considered as fair within the meaning of Article 6 § 1 taken together with Article 6 § 3 of the ECHR.

Ad 4. The last reference in this paper will be done to those cases which – while having their original domestic specificity – can serve as a perfect example for the proper understanding of the scope and quality of the European human rights offer elaborated by the Council of Europe. In the beginning of this article they were called as the "sensitive" cases, mainly due to their historic-socio and simply political context.

In this part of the presentation the reference to the two newest Polish cases should be done. Even dealing with totally different matters (as of past and the future) they have a kind of common background which is directly connected with their "political" (and in that sense "sensitive" or "fragile") nature.

The first example in this sub-point are the judgments of the ECtHR in case of Janowiec and others v. Russia (2012/2013)[1] which concerned the Second World war drama called "Katyń massacre" done by the Russian authorities in 1940[2]. In this particular case there were 15 close relatives of the direct victims who complained in Strasbourg a.o. the violation of Articles 2 and 3 of the ECHR as far as the Russian fact-finding procedure of 1990 was concerned. It concluded with the negative decision in 2004. The applicant complained that the Russian authorities neglected them totally as potential participants to the procedure.

Against the background of this particular case a very important problem concerning the possibility of making division as far as the substantive and procedural duties of the state arising from Article 2 of the ECHR were concerned. For persons being familiar with the ECHR system the above-question was not that clear, depending on the case-by-case practice of the ECtHR[3].

For the persons involved in the case of Janowiec and others v. Russia a kind of hope could arise upon the background of the case of Šilih v. Slovenia of 2007[4], in which for the European judges accepted the possibility of a separate consideration of positive procedural duties under Article 2 of the ECHR, even if the substantive problem in this regard appeared before ratification of the ECHR. Nonetheless, the above-mentioned case did not concern such a big time discrepancy and according to the opinion of the European judges there should have been a genuine connection between the death and the positive procedural duties of the State (§ 163).

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[1] *Case of Janowiec and others v. Russia, judgment of 16 April 2012, appl. no. 55508/07; judgment of the Grand Chamber of 21 October 2013.*

[2] See: Karski K., Szonert Binienda M. (eds.) Katyn. State-Sponsored Extermination, Cleveland, Ohio 2013, passim.

[3] See e.g.: *decision of the ECtHR in the case of Moldovan and other v. Romania of 13 March 2001, appl. no. 41138/98; decision of the ECtHR in the case of Voroshilov v. Russia, of 8 December 2005, appl. no. 2501/02; Case of Blečic v. Croatia, judgment of Grand Chamber of 8 March 2006, appl. no. 59532/00.*

[4] *Case of Šilih v. Slovenia, judgment of 28 June 2007, appl. no. 71463/01.*

Finally, due to the *ratione temporis* requirement the ECtHR did not deal with the tragedy as such and not with the situation before the ratification by Russia of the ECHR (which happened in 1998). Thus, it simply concentrated on the way in which the current Russian authorities treated the members of the next of kin of the direct victims in the period 1998-2004.

According to the 7 judges Chamber the judges (by 5 votes to 2 votes) found a violation of Article 3 of the ECHR to some of the applicants and (by 4 votes to 3 votes) decided that the Russian authorities failed to comply with their obligation under Article 38 of the Convention. Actually, the lack of the Russia's cooperation with the ECtHR was more than spectacular.

This case appeared once again in Strasbourg and this time in front of the Grand Chamber. Rather surprisingly and to a great disappointment both of the applicants and Polish society as a whole this time the Strasbourg Court took totally different viewpoint. According to its conclusion (by 13 votes to 4 votes) there was no violation of Article 3 of the ECHR in the case of applicants as even though "according to the Court's case law the suffering of the family members of a "disappeared persons" who can go through a long period of alternating hope and despair may justify finding a violation of Article 3 of the ECHR/…./ As regards the instant case, The Court's jurisdiction extends only to the period starting on 5 May 1998 (the day of entrance into force of the Convention in respect to Russia. The Court has found that from that date, no lingering uncertainty as to the fate of the Polish prisoners of war could be said to have remained. Even though not all the bodies have been recovered, their death was publicly acknowledged by the Soviet and Russian authorities and has become an established historical fact" (§ 186).

Thus, in conclusion in an unanimous opinion of the Grand Chamber the State concerned only failed to comply with the obligations under Article 38 of the Convention.

It could be difficult to oppose that this was one of more complicated cases, however the strictly formalistic attitude of the Court can bear some different reflections – from simply practical one (i.e. the Court tries to eliminate in future the similar cases concerning the events form the far away past) to simply political ones (like, e.g. that it was a kind of too lenient ECtHR towards Russia). Exactly, such opinions appeared immediately in the Polish professional literature[1].

Maybe the words used under the address of the ECtHR were too strong and emotional. Nonetheless we cannot forget that the whole ECHR control machinery deals with people and their different dramas. Thus in the case like this the ECtHR should be extremely careful as far as its public image is

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[1] See: Kamiński I. C. Właściwość czasowa (ratione temporis) Europejskiego trybunału Praw Człowieka w Strasbourgu w sprawach dotyczących prawa do życia – uwagi na kanwie "skarg katyńskich" (w:) Balcerazk M., Jasudowicz T., Kapelańska-Pregowska J. (eds.) Europejska Konwencja Praw Człowieka i jej system kontrolny – perspektywa systemowa i orzecznicza, Toruń 2011, ss. 333-357. (Kamiński I.C. Temporal Competence (ratione temporis) of the European Court of Human Rights in Strasbourg in the cases concerning the right of life – remarks upon the basis of the "Katyń applications), (in:) Balcerzak M., Jasudowicz T., Kapelańska-Pręgowska J. (eds.) European Convention on Human Rights and its control system – systemic and case-law perspective, Torun 2013).

concerned. On the other hand, one can try to understand the position of the ECtHR, if it was to be a kind of policy for improving the more fluent work of the Court in its confrontation with very "old cases", no matter which country they will concern. However, what we need in this regard is for sure a stabile and compatible Strasbourg case-law.

The next and similarly problematic case is connected with the widely discussed problem of confidential CIA detention centres for the persons suspected of being involved in the terrorism activities. At the moment in Strasbourg there are the applications of Al-Nashiri v. Poland [1] and Husayn (Abu Zubaydah) v. Poland[2]. In both of the cases the applicants, being they consequently of Saudi Arabian stateless Palestinian origins, complained that for six and nine months they were torture, ill-treatment and incommunicado detained in the Stare Kijkuty facilities while their transfer from Poland to the USA. At the moment of preparing of this Article the problem is still under consideration (on 3 December 2013 the Court held its hearing held in camera), nonetheless the applications were admitted as non ill-founded.

Actually, this case – depending on the final verdict of the ECHR – can be an extreme example concerning the Polish highest political officials. Before the above-mentioned applications were sent to Strasbourg there was in the Polish society an open discussion concerning the "rumor about" the secret CIA detention centres in Poland. As it is easy to guess all the officials strongly negated and excluded such fact. Now, when the European human rights control mechanism was put in motion the same official persons changes their previous statements, saying e.g. "that it was only a kind of co-operation with the US" (ex-president Aleksander Kwaśniewski) or quite cynically that "it was done by the Americans, thus we have clean hands" (Ministry of Foreign Affairs - Radek Sikorski). For some of Polish society the case reveals not the best picture of Polish political elites.

Comparing the two different decisions of the two Chambers of the ECtHR in the case is could be concluded that the ECtHR would not like to work in future with the problems having their origins in a far away past. Even understanding this way of attitude, the problem still remains open as far as the present domestic authorities react for the problem in their contemporary legal system.

For sure the ECtHR is a true international court with its full necessary features, like independence and impartiality. On the other hand the present and future challenges can provoke some obstacles, especially if the Court will be confronted with more and more cases of this nature.

Openly speaking, in the Polish literature there have been a strong and professional criticism concerning both the cases. This happened not only in the first one, where we have already had the final conclusion, but also in the second one where we should still wait for such a judgment.

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[1] *Al-Nashiri v. Poland (communicated case) on 10 July 2012, appl. no. 28761/11.*

[2] *Husayn (Abu Zubaydah) v. Poland (communicated case) on 9 July 2013, appl. no. 7511/13.*

As for the case of Janowiec and others v. Russia it was expressly said, that "the ECtHR was following the will of the Russia, paying no much attention to the real harms of the applicants".

In the second case, just being under consideration, the Polish authorities also notified the ECtHR that for important reasons connected with the national security, they would be not so ready for a full co-operation with the ECtHR as required by Article 38 of the ECHR. Thus, like Russia we can face a similar problem as far as the fulfillment of our obligation under the Article 38 of the ECHR is concerned.

Conclusion

The last invoked examples can lead quite easily to a crucial question concerning the real "impartiality and independence" of the European judges. There is a common opinion that the politics is the greatest enemy for the effective human rights protection. For sure this issue creates the great concern of the Council of Europe. A very good example in this regard is the Resolution on Judiciary Ethics of 2008[1]. In this interesting document of the ECtHR one can find three basic principles which seems to be of great importance as far as the social confidence is concerned.

Thus, according to:

- the rule I (Independence) the judges should be free of all the external authorities or influence;
- in the rule II (Impartiality) judges should avoid conflicts of interests as well as situations that maybe reasonably perceived as giving rise to a conflict of interests, and lastly
- In the rule II (Integrity) there is a requirement of such a conduct which must be consistent with the high moral character.

Surely for some of the professionals such rules may not be of an adequate protective nature. Nonetheless, it would be dishonest to preclude all the efforts which aim at the strengthening of the European judiciary. It seems properly to quote the words of Baroness Hale of Richmond who said: " The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of individual from all judicial power"[2]

The further reflection would be connected with somehow different aspect of the ECHR control machinery. For every person dealing professionally with the ECHR system of control it would be a kind of absurd or at least pattern of being naive to argue that this kind of a unique international procedure concerning the observance of treaty human rights standards should not undergo any necessary modifications. It should be admitted that stressing exactly this moment of modifications is quite intentional. As everybody dealing with the

[1] Resolution on Judiciary Ethics, adopted by the Plenary court on 23 June 2008, Strasbourg 2008.

[2] Lord Steyn, Opinion: Democracy, the Rule of Law and the Role of the Judges, European Human Rights Law review 2006, issue 3, p.252.

ECtHR system knows perfectly well the judgments of the Strasbourg Court oblige only the parties to the conflict (inter-parties effect).

From the legal viewpoint such a solution cannot be criticized. But we also cannot forget that we are talking about a very specific field of international public law and this can be used in the wider discussion concerning the practical impact of different State-Parties to the ECHR judgments. After all, we belong to the same system of values, principles and commitments.

From the view-point of the present article it has been already stressed that every State-Party to the ECHR has its own problems and dilemmas. Consequently, the judgment of the ECtHR with its impact on inter-parties relation - can be a signal for the State-Parties to review their own system and legal solutions concerning a somehow similar problem.

In the above–mentioned context the Author of this paper is strongly convinced that the efforts towards the widening of the scope concerning the practical influence of the ECtHR judgment would be highly useful for the general prevention of similar problem within the State-Parties to the ECtHR.

To be more specific, this practical proposal was proclaimed earlier both in the literature[1] as well in the official documents of the Council of Europe[2]. Maybe it is still too early to imagine the final results, but just from a logic viewpoint this kind of influence of an individual ECtHR judgment can occur in future to be a very good solution as far as the prevention of similar violations of human rights are concerned.

ПОЛЬЩА ТА ЇЇ «ВНЕСОК» В ПРЕЦЕДЕНТНЕ ПРАВО СТРАСБУРЗЬКОГО СУДУ

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Анотація: У традиційному ставленні до міжнародної прецедентної судової практики з прав людини головна увага приділяється так званому впливу міжнародних

[1] See: Gronowska B. Effectiveness of the European Court of Human Rights' Judgment in Poland – Normative and Practical Aspect,(in:) Legal Ensuring of the Effectiveness Execution of Judgment and Implementation of Practice of the European Court of Human Rights, Odessa 2013, p. 185.

[2] See: the Recommendation Res(2004)5 of the Committee of Ministers to member state on the verification of the compatibility of draft law, existing law 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. Likewise this kind of solution is fully compatible with the Interlaken declaration which recall the Member-States "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 the other State where the same problem of principle exists within their own legal system – point B.4.c. of the Interlaken Declaration of 19 February 2010 Conference. In the Polish doctrine such a proposal was presented by a.o. M. Balcerzak Analiza prawna na temat wykonywania wyroków Europejskiego Trybunału Praw Człowieka przez Sejm, Biuro Analiz prawnych, Warszawa 2012, p. 15 (Balcerzak M. Legal analyses of the execution of the ECtHR judgments by Parliament, Office of the Legal Analyses, Warsaw 2012, p. 15).

рішень на національну правову сферу. У цій статті - спроба показати іншу можливу перспективу, а саме - особливий вплив окремих рішень, які фактично приносять щось нове у розглянуту модель міжнародного контролю.

Відповідно до назви статті зазначена проблема буде аналізуватися на підставі діяльності Європейського суду з прав людини в Страсбурзі. Крім того, розгляд буде пов'язано з державою - учасником Європейської конвенції з прав людини 1950 р., - Польщею. З урахуванням цього, автор пропонує наступну структуру презентації: 1) приклади, що стосуються проблеми належної інтерпретації договірних стандартів; 2) можливість бути кінцевим пунктом, оскільки йдеться про функціонування індивідуальної процедури оскарження в рамках Конвенції; 3) відсилання до судових справ з «типовим» вітчизняним елементом, і, нарешті, хоча це не останній елемент, 4) судові справи специфічного характеру як дуже складні з точки зору відмінності підстав.

На думку автора, всі елементи, взяті разом, можуть забезпечити дві переваги: 1) краще знання і розуміння особливостей, що відносяться до держав-учасників Конвенції; 2) дають грунтовний випадок зрозуміти всі деталі і «таємниці» контрольного механізму Конвенції, які в кінцевому рахунку продукують більш стійке уявлення щодо реальних захисних можливостей цього механізму.

Остаточний висновок статті пов'язаний з тезою про взаємодію між Страсбурзьким судом та вітчизняними властями. Таким чином, дійсний вплив є взаємним, незалежно від того, яким різним він може бути з точки зору суто правовий. Визнаючи факт приналежності до тої ж самої європейської контрольної системи захисту прав людини, ми повинні співпрацювати всіма можливими способами з метою більш високої ефективності нашої системи. Дійсно, це причина, чому автор статті пропонує серйозно подумати про можливості, що відносяться до ефекту erga omnes рішень Страсбурзького суду в тому сенсі, що вони повинні бути також прийняті до уваги іншим державами - учасницями Європейської конвенції з прав людини. Цей вид ставлення (в даний час повністю підтримуваний органами Ради Європи) повинен бути використаний як одна з базових превентивних заходів, коли мова йде про подібні порушення стандартів Конвенції.

У цьому відношенні публікації, що інформують про специфіку захисту прав людини в окремих державах-учасницях, як видається, мають важливе значення і як такі повинні використовуватися як спосіб необхідного постійного поширення інформації про систему ЄКПЛ.

Ключові слова: Польща; вітчизняні влади; Європейська конвенція з прав людини; Європейський суд з прав людини; прецедентне право; вплив міжнародних рішень; взаємодія між Страсбурзьким судом та вітчизняними властями.

ПОЛЬША И ЕЕ «ВКЛАД» В ПРЕЦЕДЕНТНОЕ ПРАВО СТРАСБУРГСКОГО СУДА

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Аннотация: В традиционном отношении к международной прецедентной судебной практике по правам человека главное внимание уделяется так называемому воздействию международных решений на национальную правовую сферу. В настоящей статье – попытка показать другую возможную перспективу, а именно – особое влияние отдельных решений, которые фактически приносят нечто новое в рассматриваемую модель международного контроля.

В соответствии с названием статьи указанная проблема будет анализироваться на основании деятельности Европейского суда по правам человека в Страсбурге. Кроме того, рассмотрение будет связано с государством – участником Европейской конвенции по правам человека 1950 г., - Польшей. С учетом этого, автор предлагает следующую структуру презентации: 1) примеры, относящиеся к проблеме надлежащей интерпретации договорных стандартов; 2) возможность быть конечным пунктом, поскольку речь идет о функционировании индивидуальной процедуры обжалования в рамках Конвенции; 3) отсылка к судебным делам с «типичным» отечественным элементом, и, наконец, хотя это не последний элемент, 4) судебные дела специфического характера как очень сложные с точки зрения различия оснований.

По мнению автора, все элементы, взятые вместе, могут обеспечить два преимущества: 1) лучшее знание и понимание особенностей, относящихся к государствам-участникам Конвенции; 2) дают основательный случай понять все детали и «тайны» контрольного механизма Конвенции, которые в конечном счете продуцируют более устойчивое представление относительно реальных защитных возможностей этого механизма.

Окончательный вывод статьи связан с тезисом о взаимодействии между Страсбургским судом и отечественными властями. Таким образом, действительное влияние является взаимным, независимо от того, каким различным оно может быть с точки зрения чисто правовой. Признавая факт принадлежности к той же самой европейской контрольной системе защиты прав человека, мы должны сотрудничать всеми возможными способами с целью более высокой эффективности нашей системы. Действительно, это причина, почему автор статьи предлагает серьезно подумать о возможностях, относящихся к эффекту erga omnes решений Страсбургского суда в том смысле, что они должны быть также приняты во внимание другим государствами-участниками Европейской конвенции по правам человека. Этот вид отношения (в настоящее время полностью поддерживаемый органами Совета Европы) должен быть использован как одна из базовых превентивных мер, когда речь идет о сходных нарушениях стандартов Конвенции.

В этом отношении публикации, информирующие о специфике защиты прав человека в отдельных государствах-участниках, как представляется, имеют важное значение и как таковые должны использоваться как способ необходимого постоянного распространения информации о системе ЕКПЧ.

Ключевые слова: Польша; отечественные власти; Европейская конвенция по правам человека; Европейский суд по правам человека; прецедентное право; влияние международных решений; взаимодействие между Страсбургским судом и отечественными властями.