

**Execution of the European Court of Human Rights' Judgments
in Poland and Ukraine: Recommendations for Ukraine.**

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Abbreviations

CoE - Council of Europe;

CoM - Committee of Ministers;

Court, ECtHR - European Court of Human Rights;

Convention, ECHR - European Convention on Human Rights;

Abstract

The present paper is devoted to assessment of efficiency of the European Court of Human Rights' judgments execution national mechanisms of Poland and Ukraine. The research reveals the main structural problems in the national legislation in both countries that appear during the process of execution of the Court's judgments.

The paper is focusing in more detail on the issues related to Ukraine, the paper reveals the main problems in the execution process and also suggests possible solution for the removal of structural problems in Ukraine, and assessing the possibility to borrow Polish experience for Ukraine.

The analysis shows that adoption in Ukraine of similar measures with those that were made in Poland during the last few years may lead to the improvement of the execution of the ECtHR judgments.

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Introduction

The European Court of Human Rights - is an international judicial body whose jurisdiction extends to all Council of Europe member states that have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). In events where the member states have violated one or more of the human rights provisions concerning civil and political rights stipulated by the Convention and its protocols, ECHR hears the cases on the basis of the submitted application by an individual or groups of individuals, whose rights were violated.

All ECHR Contracting States undertake the obligation to follow and to recognize the judgments of the European Court of Human rights, according to Article 46 of the European Convention of Human Rights. Considering this, it is possible to claim that the “ECtHR has the binding force or effect which indicates that reference is being made to concepts of *res iudicata* in national legal systems”¹. This means that the measures that may be taken by the Contracting State directed to the implementation of the judgments should be perceived within the framework of the obligations deriving from this article.²

Both Ukraine and Poland – are the countries with the communistic past, and both of these countries have ratified the Convention and undertook its obligation only in the early 1990th.

¹ Dominik Haider, *The pilot-judgment procedure of the European Court of Human Rights, Leiden : Boston, Mass.: Martinus Nijhoff Publishers*, (2013), 335 p, p. - 76

² *European Convention of Human Rights*, accessed in March 2015:
http://www.echr.coe.int/Documents/Convention_ENG.pdf

Since ECtHR deals with the human rights and freedoms violation cases, it is possible to presume that a number and the issue of applications to the ECtHR from the particular country correlates with the level of protection of such rights and freedoms in that countries. Around a decade ago both Ukraine and Poland were constantly remaining in the list of countries with the biggest numbers of application, among such other countries as Russia, Turkey, Romania and others. However, during the last 5 years Poland is clearly demonstrating significant improvement of the situation with the execution of the ECtHR judgments.

It is clear, that Council of Europe member states occasionally fail to comply with the obligations undertaken under the ECHR and are failing execution of the Court's judgments. Within the structure of the Council of Europe, the body which is responsible for the monitoring of the execution of judgments is the Committee of Ministers. This body is monitoring the execution of the ECtHR judgments by the responding states however at the same time Committee of Ministers has very limited authorities to influence the execution framework of those states. As a general rule, responding states are obliged to perform either individual measures, most commonly a financial compensation to the applicant, or the general measures – removal of the source of the Convention violation.

Problem and importance are based on the continuous deterioration of Ukraine's compliance with the obligations under the Convention. It was truly shocking to learn the figures of the 2014 ECtHR statistics, which shows that in 2014 there were 13650 applications against Ukraine, that's almost 20% of all the applications that were submitted to the Court from all the member states and that is more than any other Council of Europe's member state figure.³

³ Analysis of statistics – 2014; ECtHR, accessed in March 2015;
http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf,

That is a clear indication of alarming situation with the Ukraine's compliance with the Convention. Moreover, around 90% of decisions that were issued against Ukraine are not executed.⁴ There are several major reasons for that, like non-execution of the domestic courts decisions which cause the increase of the applications to the ECtHR challenging this non-execution, and judgments in those cases cannot also be executed till the decision of the national court will be executed. Another reasons include the absence of a clear and effective institutional execution mechanism, lack of allocated in the state budget money for paying the compensations, etc. Therefore, the main problematic issue of this paper is an analysis of the main problems occurring during the execution of the ECtHR judgments in Ukraine as well as analysis of measures taken in Poland that significantly improved compliance with the obligation to execute ECtHR judgments.

Currently there are several voluntary working groups of reputable legal experts in Ukraine who are working on a drafting of the legislation bills aimed for improving of the situation with the execution of the ECtHR judgments. Taking into account that the level of compliance with the execution ECtHR judgments is having an impact on the future cases against Ukraine, which, in turn, affects the credibility of Ukraine as a democratic and legal state, the issue of establishing **effective** procedure for the execution of ECtHR judgments is of a great relevance.

As for the Polish experience, according to statistics, notwithstanding quite high number of applications to the Court against Poland at the same time the percentage of the judgments

⁴ "Human rights advocates: the non-execution of the judicial decisions has become a national tradition in Ukraine" [Pravozakysnyky: nevykonannya rishen sudiv v Ukraini stalo natsionalnoyu tradytsiyeyu], 08.12.2014, accessed in March 2015: <http://helsinki.org.ua/index.php?id=1418036630>;

executed by Poland is really high, basically, almost 100%.⁵ Today, one of the biggest challenge for Polish authorities is more efficient adjustment of its legislation to the demands of the Council of Europe in order to minimize the quantity of the human rights violations and to decrease the number of applications to the ECtHR against Poland.

Being a Ukrainian citizen, I am concerned about the level of development of its legal institutes, mechanisms, legislation, the level of the protection of the basic rights and freedoms. Having experience of working in the Ukrainian legal sphere, I came to the conclusion that it is extremely vital for a person involved in many sorts of legal work in Ukraine, such as litigation, representation of the interests of individuals in the courts, and other spheres, to be aware about the current situation regarding the functioning of the ECtHR case law in Ukraine, execution of its judgments, and the ways of preventing violations of rights and freedoms that are protected by the Convention. Therefore, for a young specialist in legal sphere, this topic has an enormous practical value.

The literature which was used in general is insufficient therefore the main sources of information used in this paper are primary sources, like statutes, case law, interpretations of the official bodies of both Ukraine and Poland, as well as the official documents of the Council of Europe. Quite a few information on the execution of the ECtHR judgments in both countries was found in a number of monographs, articles, mass-media articles. There is an obvious lack of sources of the assessment of operation of the ECtHR judgments execution systems in Poland and Ukraine, especially there is lack of contemporary sources, since most of the main and decent pieces of sources are dating back to 2010 or earlier, which is not

⁵ Robert Kropiwnicki, System of the execution of the ECtHR judgments in Poland [System wykonywania wyrokow Europejskiego Trybunalu Praw Czlowieka w Polsce], accessed in March 2015: http://www.bibliotekacyfrowa.pl/Content/59078/19_Robert_Kropiwnicki.pdf

completely helpful, taking into account the major changes which occurred in both the national systems and the functioning of the ECtHR in general. Of a great help was a possibility to interview Polish and Ukrainian lawyers from the ECtHR registrar in Strasbourg, France, which helped to get the first-hand information from the people directly involved in the execution process.

The primary research questions, are what are the main obstacles in the mechanism of proper execution of the ECtHR judgments in Ukraine and Poland and what lessons can be learned by Ukraine on the example of Poland, which is demonstrating significant improvement in the removal of the structural legislative obstacles. At the same time, subsidiary research aims include detailed analysis of the legislative and institutional frameworks of mechanism of execution of the ECtHR judgments in Poland and Ukraine, revealing of the main structural problems, analysis of the steps that are made by both countries in order to remove the structural problems.

Current research is conducted in an empirical research method of national ECtHR judgments execution practice. Since this paper involves analysis of the practical data, the interviews and meetings with the ECtHR and Council of Europe staff were conducted reflecting personal views on actual issues. During the research trip to the ECtHR in Strasbourg, I was able to interview **Ireneusz Kondak**, Courts Registry, lawyer; **Oksana Pokalchuk**, Court's Registry, assistant attorney, **Oleksandr Ovchynnykov**, Department for the Execution of Judgments of the European Court of Human Rights, lawyer; and **Szymon Janczarek**, Department for the Execution of Judgments of the European Court of Human Rights, lawyer.

Chapter 1 Framework for the execution of the ECtHR judgments

Pursuant to Article 46 (1) of the Convention, states undertake an obligation to abide by the final judgment of the Court. In the following chapter the general framework for the execution of the ECtHR judgment, legal nature of the judgment as well as the recent reforms of the process of the execution will be analyzed.

1.1 Legal nature of the ECtHR judgments and Legal obligations of the state following from the ECtHR judgments;

Execution of the ECtHR judgment is a special legal mechanism which is different from the mechanism of the execution of the national courts, particularly in both Ukraine and Poland, and is arising from the obligations of the States assignees of the Convention. Since the ECtHR is a supranational judicial institution which require the execution of the judgments of the international judicial institution on the national level, special execution mechanism is provided for it.

Starting from the moment of the issuing of the judgments by the ECtHR, as it is mentioned in the Article 46 of the Convention, the Member States of the Council of Europe "undertake to abide by the final judgment. According to Lech Garlicki, the obligation of execution of judgments should be perceived as the international obligation of the state, and the state bodies together with the state itself shall be considered as a direct addressee of such international

obligations.⁶ However, unlike the typical obligation deriving from the international law, the execution of the obligations under the ECHR should obviously include certain obligation deriving from the national law as well.

It should be mentioned that article 46 shall be applied only to those judgments that became “final judgments” of the court under the definition of Articles 42 and 44 of the Convention⁷. Namely, the judgment shall be considered final in case if the parties explicitly stipulate that they do not want to refer the case before the Grand Chamber, or after 3 months after the date of judgment, or when the Grand Chamber “rejects the request to refer under Article 43”⁸.

In accordance with the Article 46 (2) of the Convention, the execution of the judgment by the Member State shall be supervised by the Committee of Ministers of the Council of Europe, therefore the Court does not make the control of the execution of the judgment.⁹ After every judgment the CM adopts a resolution which contains recommendations for the government of the responding state on the ways the judgment has to be executed. The case is considered closed when it is executed in a full scope.¹⁰

Pursuant to the legal nature of the ECtHR judgment, the final judgment of the Court creates two kinds of obligations: obligation of the responding state to abide with the judgment and the obligation of the Committee of Ministers to control the proper execution of such judgment. s

⁶ Leszek Garlicki, *Convention for the Protection of Human Rights and Fundamental Freedoms, Volume 2. Comments on the Articles 19-59 and on Additional Protocols* [Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Tom 2. Komentarz do artykułów 19-59 oraz do protokołów dodatkowych], Warszawa : Wydawn. C.H.Beck, 2010-2011, p. 352;

⁷ Ibid;

⁸ *European Convention of Human Rights*, accessed in March 2015:
http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁹ Ibid;

¹⁰ Ibid;

a general rule, in result of the execution, the measures that should be taken by the state may include measures of an individual or general character.¹¹

It is also worth mentioning, that in cases of the continuous violation of the Convention, for example in cases of deprivation of the liberty, responding states are obliged to terminate the continuous violation of the Convention immediately. Another obligation of the state is to mitigate the damages to the individuals whose rights under the Convention were violated.¹²

The national authorities of the responding states are free to choose the method of the implementation of the courts judgments, and enjoy the margin of appreciation, since neither Article 46 nor any other article provide the way the responding state have to execute the judgment. There are several possible ways for the implementation, depending on a situation, the state can either adopt a new law or revise the already existing one; change the judicial interpretation of the particular legal act; introduce structural changes to the public body; introduce a new domestic remedy, etc.¹³

Individual Measures

The main objectives of the individual measures may be characterized by three main points - to terminate the continuous violation, to pay the just satisfaction and to restitute the violated right of the individual.

¹¹ Supervision of the execution of judgments and decisions of the European Court of Human Rights, accessed in March 2015: http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp

¹² Leszek Garlicki, Convention for the Protection of Human Rights and Fundamental Freedoms, Volume 2. Comments on the Articles 19-59 and on Additional Protocols [Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Tom 2. Komentarz do artykułów 19-59 oraz do protokołów dodatkowych], Warszawa : Wydawn. C.H.Beck, 2010-2011, p. 352;

¹³ Mark E Villiger, Binding effect and Declaratory Nature of the Judgments of the European Court of Human Rights: an overview; edit. in Judgments of the European Court of Human Rights – Effects and Implementation, Nomos Verlagsgesellschaft, Baden-Baden, (2014), p. 34;

As for the ways of execution of the judgments, in its early practice the Court was not giving obligatory commands on the way the responding state have to execute the judgments, however starting from the second half of 1990th the Court started to use such practice and particular exceptions started to appear.¹⁴ This was changed due to the issue of the reconsideration of the future role of the Court, firstly it was done within the framework of the Article 41 of the Convention (just satisfaction), and later under the Article 46.¹⁵ For instance, in its 2013 case *Youth Initiative for Human Rights v. Serbia*, the Court stipulated that the responding state have to ensure the enforcement of the decisions of the national authorities.¹⁶ In another decision of 2013, *Oleksandr Volkov v. Ukraine*, the Court explicitly stipulated that the responding state have to reinstall the applicant on the position of the judge of the Supreme Court of Ukraine within the shortest possible period of time.¹⁷

Moreover, there are also other kinds of individual measures that can be used by the state. For example, in cases of violation of Article 6 of the Convention (Right to fair trial) - demand of the Court to make the revision of the criminal process when the convicting judgment was issued (*Salduz v. Turkey*); in cases when there was a clear violation of the property rights – making return of the real estate, and when it is impossible – providing a restitution in an amount pointed out by the Court (*Zwierzynski v. Poland*); in cases of violation of the Article 8

¹⁴ Leszek Garlicki, *Convention for the Protection of Human Rights and Fundamental Freedoms, Volume 2. Comments on the Articles 19-59 and on Additional Protocols* [Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Tom 2. Komentarz do artykułów 19-59 oraz do protokołów dodatkowych], Warszawa : Wydawn. C.H.Beck, 2010-2011, p. 352;

¹⁵ Mark E Villiger, *Binding effect and Declaratory Nature of the Judgments of the European Court of Human Rights: an overview*; edit. in *Judgments of the European Court of Human Rights – Effects and Implementation*, Nomos Verlagsgesellschaft, Baden-Baden, (2014), p. 34;

¹⁶ Hans-Joachim Cremer, *Prescriptive Orders in the Operative Provisions of Judgments by the ECtHR*; edit. in. *Judgments of the European Court of Human Rights – Effects and Implementation*, Nomos Verlagsgesellschaft, Baden-Baden, (2014), p. 39;

¹⁷ *Ibid*

(Right to respect of family and private life) – Court may require from the state to provide a possibility for the applicant to have an access to the child (*Gorgulu v. Germany*).¹⁸

General Measures

Probably the best tool with a help of which the ECtHR can influence national legal systems - are the obligations to perform general measures by the responding state. The main objective of the general measures – is a prevention of the future Convention violations by the responding state, and making the state to remove the structural problem in its legal system that violates the Convention. General measures, for instance, may require introduction of effective remedies against the excessive length of the judicial proceedings (*Yuriy Nikolayevich Ivanov v. Ukraine*); introduction of an effective remedies against the unlawfulness and excessive length of the detention on remand (*Kharchenko v. Ukraine*), etc.¹⁹

As for the legal nature of the ECtHR judgments, they are legal precedents, therefore they grant the Court with international law-making powers. In most of the cases the judgments contain not just simply a solution for the individual case, but also legal rules for such settlement, therefore the judgments are contributing to the formation of the international legal provisions of the Convention.²⁰

According to the recent tendencies, the Court is also tend to set in its judgments deadlines for the responding states for execution of the judgments, especially in the pilot judgments. From

¹⁸ Leszek Garlicki, *Convention for the Protection of Human Rights and Fundamental Freedoms, Volume 2. Comments on the Articles 19-59 and on Additional Protocols* [Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Tom 2. Komentarz do artykułów 19-59 oraz do protokołów dodatkowych], Warszawa : Wydawn. C.H.Beck, 2010-2011, p. 352;

¹⁹ Supervision of the execution of judgments and decisions of the European Court of Human Rights, accessed in March 2015: http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp

²⁰ Ibid; p. 361;

the first sight it might make an impression that setting deadlines may imply certain limitation on the legislative process inside the country, however according to the certain scholars, any influence of the court on the legislative process of the responding state is impossible due to the legal nature of the judgments. Therefore, setting the deadlines is rather making a question by the court of when the respondent state will meet the requirements of the Convention in certain sphere.²¹

1.3. Improvement of the execution process - reforms of the Court;

One of the main objectives of the functioning of the Court was its high efficiency. Due to the enormous increase of the Court's caseload (from 8400 applications per year in 1999 to 50000 in 2008) the efficiency as well as the pace of the process and a credibility of the Court as an institution have significantly decreased.²² As it is often said, the "Court became the victim of its own success".²³ Therefore, there has been long debates on the necessity of the Court's reforming, and starting from the beginning of 2000th a big number of proposals in this field were prepared by the Steering Committee on Human Rights (*Hereinafter* - CDDH).²⁴

The long-lasting discussions resulted in three conferences conducted by the Committee of Ministers during the 2010-2012, and in an adoption of 3 Declarations which established the

²¹ Almut Wittling-Vogel, *The Role of the Legislative Branch in the Implementation of the Judgments of the European Court of Human Rights*; ed. in. *Judgments of the European Court of Human Rights – Effects and Implementation*, Nomos Verlagsgesellschaft, Baden-Baden, (2014), p. 59;

²² Analysis of statistics, 2012, accessed in March 2015:
http://www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf

²³ Profile: European Court of Human Rights, 7 February 2012, accessed in March 2015;
http://news.bbc.co.uk/2/hi/europe/country_profiles/4789300.stm

²⁴ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2014 Annual report, accessed in March 2015:
http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf;

process of the reforming of the Court. In particular, Interlaken Declaration (2010), Izmir Declaration (2011), and Brighton Declaration (2012).²⁵ Probably the main point that was underlined in all three Declaration is emphasizing on the principle of the subsidiarity of the ECtHR.²⁶ With this principle the Court is stipulating that the primary role for protection of the human rights should be played by the national authorities.

These Declarations suggest to the Committee of Ministers to create certain filtering mechanisms in order to reduce the caseload and to improve the admissibility mechanism. In particular, the Interlaken Declaration suggests simplified mechanism of the amendment of the ECHR in the organizational issues; Izmir Declaration suggested introduction of the application fee to the ECtHR, and in Brighton Declaration which contains the most significant issues for the reforming of the Court.²⁷

Among the main innovations that were underlined in the Brighton Declaration are, first of all, suggestions to amend the Convention in terms of changing the application deadline after exhausting of domestic remedies – to 4 months from current 6 months; (2) amending the admissibility criteria, namely, the Court would consider whether the national court had correctly understood the Conventional provisions and applied the Conventional principles correctly, and the Court would also consider the reason why the case must be considered at the ECtHR level, which afterwards would let the Court to focus on the serious cases of the

²⁵ Reforming the European Convention on Human Rights, 2014, accessed in March 2015: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Compilation%20ReformECHR2014_en.pdf

²⁶ Reforming the European Convention on Human Rights, 2014, accessed in March 2015: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Compilation%20ReformECHR2014_en.pdf

²⁷ Ibid;

Convention violations.²⁸ In addition to that, the Court would be able to provide the national courts with the advisory opinions on issues that are related to the interpretation and application of the rights under the ECHR. That possibility is stipulated by the Protocol 16, which is currently have not come into force yet.²⁹

Regarding the practical results of the reform process, since 1 January 2011 a new twin-track system of supervision of the execution of the judgments was introduced, so called "standard" and "enhanced" supervision, which was designed for revealing among all the judgments firstly those which indicate on a structural problems of the state and those which require urgent individual measures³⁰ Taking into account rapidly increasing numbers of applications coming from the member states, it is possible to assume that innovation was extremely vital for protection especially of those applicants who were suffering from the continuous violation of the Convention.

Apart from that, the implementation of measures was accelerated particularly after the Brighton Declaration, which resulted in the preparation by the CDDH of the two Protocols to the Convention that would enshrine the innovations. Protocols No. 15 (which include among others the issues with the principle of subsidiarity, increasing of the role of the national parliaments in the execution process, amendments to the abovementioned admissibility

²⁸ Derek Walton, Subsidiarity and the Brighton Declaration, ed. in. *Judgments of the European Court of Human Rights – Effects and Implementation*, Nomos Verlagsgesellschaft, Baden-Baden, (2014), p. 204;

²⁹ Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, accessed in March 2015: http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf

³⁰ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2014 Annual report, accessed in March 2015: http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf;

criteria, and Court-related issues, like age of judges, etc) and Protocol No. 16 (allows the Court to provide the advisory opinion on application and interpretation of the Convention).³¹

All in all, the suggestions enshrined in the Brighton Declaration received a positive feedback from a number of scholars.³² And that is not a surprise, since the suggestions do not look like a declaratory and unrealistic ideas but instead they make an impression that they look like concrete steps which can significantly reduce the caseload of the Court and therefore increase the effectiveness of the Court.

Concluding remarks

This chapter shed a light on the legal nature of the state's obligation to abide with the judgments of the Court, as well as it showed the established by the Council of Europe procedure which regulates the execution of the ECtHR judgments by the member states. It also pointed out on the issue of the recent challenges on the functionality of the Court, problem with the caseload which has a negative impact on the efficiency of the Court as the institution. In light of this, some dramatic changes were adopted by the Council of Europe which, as practice already shows, have resulted improvement of the situation with coping with large numbers of applications.

³¹ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, accessed at http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf

³² Derek Walton, Subsidiarity and the Brighton Declaration, ed. in. Judgments of the European Court of Human Rights – Effects and Implementation, Nomos Verlagsgesellschaft, Baden-Baden, (2014), p. 200;

Chapter 2 Legislative and institutional framework of the execution of the ECHR judgments in Poland;

Poland made its way towards the Council of Europe immediately after the collapse of the communist system inside the country and obtained a special guest status with the Council of Europe right after the first democratically held elections in 1989. The Convention was signed by Poland in 1991 and it came into force on 1 March 1993. On the very same day the Polish government declared "the competence of the Commission to receive individual applications" from those who claim to be a victim of the violation of the Convention which occurred after the moment of the ratification of the Convention.³³ Overall the process of entering the Council of Europe as well as the ratification of the ECHR for Poland was an important step for the newly reestablished democratic state and some scholars call this as having even bigger importance for Poland than entrance to the EU.³⁴

Within a very short period of time Poland became one of the leaders in terms of number of applications submitted from the nationals of this country. In 2004 Poland had the 3rd biggest ratio of applications per 10,000 inhabitants - 1,52.³⁵ However the striking feature of Polish case law is that the large number of applications against Poland did not mean that the situation with human rights was alarming - among all the ECtHR cases on Poland there were no cases that would indicate serious deficiencies in the field of human rights in Poland, or a breach of a right of liberty or other rights.³⁶

³³ Magda Krzyzanowska-Mierzevska. Poland and Slavakia, edit. in., A Europe of Rights; Oxford university Press, Oxford, 2012, p. 532;

³⁴ Ibid, p.533;

³⁵ Ibid, p. 567;

³⁶ Ibid p. 532;

2.1 Legislation and institutional framework of the process of the execution of the ECtHR judgments in Poland;

2.1.1. Governmental involvement

Starting from the second half of the 1990s the number of applications to the ECtHR from Poland has dramatically increased, especially during the period from 1997 to 2006.³⁷ At that point most of the cases dealt with violations of Articles 5 and 6 of the Convention. From then on the execution of the judgments became not only the issue of paying financial compensation, but also removing the structural violations of the Polish legislation.³⁸

The system of institutions aimed at execution of the ECtHR judgments consists of several bodies. First of all, in the relations with the ECtHR, Poland is represented by the Plenipotentiary of the Minister of Foreign Affairs for the proceedings before the European Court of Human Rights. This person is appointed to the office by the Minister of Foreign Affairs and deals exclusively with the issues related to the ECtHR. While performing his/her obligations the Plenipotentiary should defend the interests of Polish people and ensure the respect for the law, including international legal obligations of the state in the field of human rights.³⁹

³⁷ Robert Kropiwnicki, System of the execution of the ECtHR judgments in Poland [System wykonywania wyroków Europejskiego Trybunału Praw Człowieka w Polsce], accessed in March 2015: http://www.bibliotekacyfrowa.pl/Content/59078/19_Robert_Kropiwnicki.pdf

³⁸ Ibid

³⁹ Plenipotentiary Minister of Foreign Affairs. Proceedings before the European Court of Human Rights [Pełnomocnik Ministra Spraw Zagranicznych ds. postępowań przed Europejskim Trybunałem Praw Człowieka] , accessed in March 2015: https://www.msz.gov.pl/pl/p/msz_pl/polityka_zagraniczna/europejski_trybunal_praw_czlowieka/pelnomocnik_ministra_spraw_zagranicznych_ds_postepowan_przed_europejskim_trybunałem_praw_czlowieka

First steps towards the organization of the effective mechanism for the execution of judgments were made in 2007, when the Polish Prime-Minister issued an ordinance # 73 of 19 July 2007 according to which an Inter-ministerial consultative-advisory Committee responsible for the supervisions of the process of the execution of the ECtHR judgments was created. The main objectives of this Committee are to develop Government's position in relation to the ECtHR judgments regarding Poland, analyzing of the compliance with the Convention of the current most important draft laws, and also judgments issued by the Court judgments, analyzing compliance with the Convention on the most important draft laws, which may have significant impact on the issue with the human rights in Poland.⁴⁰ Currently the Inter-Ministerial Committee is working on the basis of the most recent Ordinance of the Prime Minister #20 of 8 March 2013. According to the Ordinance, among the main aims of the Committee are:

- development of the proposals on the key issues arising from the complaints to the Court and from the judgments against Poland;
- development and presenting of the proposals to the Committee of Ministers aimed at prevention of the violation of the Convention by Poland;
- monitoring of the execution of the ECtHR judgments based on the information provided by the respective ministers;
- preparation of the annual reports on the execution of the ECtHR judgments;
- assessment of the draft legislation regarding their compliance with the Convention;
- etc.⁴¹

⁴⁰ Execution of judgments of the European Court of Human Rights [Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka], accessed in March 2015:
http://www.msz.gov.pl/pl/polityka_zagraniczna/europejski_trybunal_praw_czlowieka/wykonywanie_orzeczen_europejskiego_trybunalu_praw_czlowieka/

⁴¹ The rules governing the establishment and operation of the Inter-Ministerial Committee for the European Court of Human Rights Ordinance No. 20 of the President of the Council of Ministers of 8 March 2013 [Przepisy regulujące utworzenie i funkcjonowanie Zespołu do spraw Europejskiego Trybunału Praw Człowieka]

This Committee is the main communicative link between the ECtHR and the Polish government. It also plays a significant role in the execution of the ECtHR judgments.⁴²

According to the conception of creation of the Inter-Ministerial Committee, it should be working within the structure of the Ministry of Foreign Affairs of Poland, since this ministry is responsible for the realization of the international obligations and also as the body which is responsible for the representation of Poland at the ECtHR.⁴³ Another important feature of this body is that it creates a possibility of the representative of different ministries to cooperate in the sphere of the execution of judgments since very often the execution of judgments require the efforts of several ministries.⁴⁴

The members of this Committee represent all ministries as well as the General Prosecutors office. The operation of this Committee is conducted under the leadership of the plenipotentiary of the Ministry of foreign affairs.⁴⁵

After the appointment by the Ordinance of the Ministry of foreign affairs #121 of 29 September 2012 of the Deputy of the Head of the Team and Deputy Head for the additional

Zarządzenie Nr 20 Prezesa Rady Ministrów z dnia 8 marca 2013 r.], accessed in March 2015:

<http://www.msz.gov.pl/resource/c8199f2d-e2fe-4276-88f0-b003f84692c7:JCR>

⁴² Robert Kropiwnicki, System of the execution of the ECtHR judgments in Poland [System wykonywania wyrokow Europejskiego Trybunalu Praw Czlowieka w Polsce], accessed in March 2015:

http://www.bibliotekacyfrowa.pl/Content/59078/19_Robert_Kropiwnicki.pdf;

⁴³ Ibid;

⁴⁴ Enforcement of judgments of the European Court of Human Rights [Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka], accessed in March 2015:

http://www.msz.gov.pl/pl/polityka_zagraniczna/europejski_trybunal_praw_czlowieka/wykonywanie_orzeczen_europejskiego_trybunalu_praw_czlowieka/

⁴⁵ Robert Kropiwnicki, System of the execution of the ECtHR judgments in Poland [System wykonywania wyrokow Europejskiego Trybunalu Praw Czlowieka w Polsce], accessed in March 2015:

http://www.bibliotekacyfrowa.pl/Content/59078/19_Robert_Kropiwnicki.pdf

coordination of the Committee, these positions became the first high-rank positions in Poland that are dealing exclusively with the execution of the ECtHR judgments.⁴⁶

Worth attention the fact that during the assembly of the Inter-Ministerial Committee of 12 December 2013 the Committee adopted the procedure of the execution of the ECtHR judgments. The main stages of the algorithm are: (1) issuance of the judgment of the ECtHR against Poland which indicates the violation, during this stage Plenipotentiary provides the information about the judgment to the minister responsible for the subject of the violation; (2) analysis of the judgment by the responsible minister and start of the execution or preparation of the information on the execution of the judgment; (3) within the two weeks after the judgment came into force (around 3, 5 months after it was issued) the responsible minister shall spread the information on the judgment among the competent governmental bodies and prepare the draft of the plan to the Committee of Ministers on the execution of the judgment; (4) adoption of the document for the Committee of Ministers, harmonization of the document with the Plenipotentiary; (5) implementation of the action plan as soon as possible on which the responsible minister shall report once per 3 month at the Inter-Ministerial Committee; and the last stage (6) reporting on the execution before the Committee of Ministers.⁴⁷

Starting from 2012, the Plenipotentiary of the Minister of Foreign Affairs for the proceedings before the European Court of Human Rights is responsible for the preparation of the Annual report on execution of the judgments of the ECtHR. The most recent one was issued in March

⁴⁶ Ibid.

⁴⁷ Algorithm of execution of the judgment of the European Court of Human Rights [Algorytm wykonania wyroku Europejskiego Trybunału Praw Człowieka], accessed in March 2015: <http://www.msz.gov.pl/resource/5354a04e-9360-4717-a62d-56a6d8fe540a:JCR>

2014 and is reflecting the data for the year of 2013.⁴⁸ The Annual report is providing a list of the documents that were provided to the Council of Europe during the 2013 as the response to the process of execution of the ECtHR judgments, like action plans which contain the strategies for the implementation of judgments of the Court as well as reports on the already taken measures.⁴⁹

It also contains the statistical information which reflects the recent changes. According to the statistics, there is a significant improvement of the situation for Poland. For instance, comparing with 2011, when Poland was 7th on list of the countries with the biggest numbers of the pending cases, in 2013 Poland became 13th. Regarding the changes in the number of application against Poland, during 2011 there were 6305 applications submitted to the Court against Poland, and in 2013 the number of applications have decreased to 5031.⁵⁰

2.1.2 Parliamentary Involvement

Another very important institution established recently in Poland - is a Parliamentary subcommittee on the execution of the ECtHR judgments. It was established on 5 February 2014.⁵¹ The decision on the creation of the Parliamentary subcommittee on the execution of the judgments of the ECtHR was made on a joint meeting of the Parliamentary Committees of

⁴⁸ The report of execution of judgments of the European Court of Human Rights by Poland in 2013 [Raport z wykonywania wyroków Europejskiego Trybunału Praw Człowieka przez Polskę za 2013], accessed in March 2015: <http://www.msz.gov.pl/resource/68a5442b-f7da-463b-83d0-6eeafc871f0a:JCR>

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ The establishment of the Parliamentary Subcommittee on the execution of judgments of the EctHR [Powołanie podkomisji sejmowej ds. wykonywania wyroków ETPCz], accessed in March 2015: http://www.msz.gov.pl/pl/polityka_zagraniczna/europejski_trybunal_praw_czlowieka/aktualnosci/powolanie_podkomisji_sejmowej_ds_wykonywania_wyrokow_etpcz

Justice and human Rights and the Parliamentary Committee of Foreign Affairs as the response to the numerous recommendations from the Parliamentary Assembly of the Council of Europe and different NGO's.⁵²

According to the recommendations made on the Parliamentary Assembly of the Council of Europe within the framework of the reformation of the ECtHR in November 2011, increasing of the parliamentary involvement is one of the guarantees of the execution of judgments of the ECtHR, and such systems already exist in the UK, the Netherlands, and Romania.⁵³

It should be noted that prior the creation of the subcommittee there were altogether four meetings held between the Parliamentary Committees of Justice and Human Rights of the lower house – Sejm, and the Rule of Law and Petitions Committee of the Senate devoted to the issue of the execution of the ECtHR judgments. During those meetings it was decided that the special Subcommittee devoted to the execution of the ECtHR judgments will be consisting of 11 members and they will have regular meetings on which they will control the actions of the Government in execution of the ECtHR judgments and also analyze the government's annual reports.⁵⁴

Among the main responsibilities of the subcommittee is a detailed examination and consideration of the information provided by the Polish Council of Ministers on the execution

⁵² Sejm on guard of human rights [Sejm na straży praw człowieka], 06 February 2014, accessed in March 2015: <http://prawo.rp.pl/artykul/757643,1084809-Podkomisja-zajmie-wykonywaniem-orzeczen-Trybunalu-w-Strasburgu.html?p=1>

⁵³ The report of execution of judgments of the European Court of Human Rights by Poland in 2013 [Raport z wykonywania wyroków Europejskiego Trybunału Praw Człowieka przez Polskę za 2013], accessed in March 2015: <http://www.msz.gov.pl/resource/68a5442b-f7da-463b-83d0-6eeafc871f0a:JCR>

⁵⁴ Sejm na straży praw człowieka, [Sejm on guard of human rights], 06 February 2014, accessed in March 2015: <http://prawo.rp.pl/artykul/757643,1084809-Podkomisja-zajmie-wykonywaniem-orzeczen-Trybunalu-w-Strasburgu.html?p=1>

of the ECtHR judgments by Poland, monitoring of the pending cases before the Court against Poland as well as preparation of the draft laws aimed to the realization by the Polish Council of Ministers of the obligation to execute judgments of the ECtHR.⁵⁵

According to the Minister of Foreign Affairs, the decision for the creation of this Subcommittee meets the expectations of the Council of Europe regarding the issue of the involvement of the parliaments of the Council of Europe member states into the process of the execution of the ECtHR judgments.⁵⁶

2.2. Main structural problems

Many scholars have pointed out main Polish problems that resulted in a large number of cases against this country. The case law in early 2000th was dominated mainly by 2 issues - length of the proceedings, as well as the excessive length of detention on remand, and due to this scholars have called Poland a "length country".⁵⁷ The fact that in 2006 in only 17 cases out of 262 that challenged the issue of the excessive length of the proceedings the Court found no violation of the state which indicates on existence of systematic problems in Polish legislation.

⁵⁵ The establishment of the Parliamentary Subcommittee on the execution of judgments of the EctHR [Powołanie podkomisji sejmowej ds. wykonywania wyroków ETPCz], accessed in March 2015: http://www.msz.gov.pl/pl/polityka_zagraniczna/europejski_trybunal_praw_czlowieka/aktualnosci/powolanie_podkomisji_sejmowej_ds_wykonywania_wyrokow_etpcz

⁵⁶ Idem

⁵⁷ Magda Krzyzanowska-Mierzevska. Poland and Slovakia, edit. in., A Europe of Rights; Oxford university Press, Oxford, 2012, p. 567;

According to the 2013 Annual report of the Committee of Ministers, by the end of 2013 there were several Polish groups of cases that were under close supervision by the Committee of Ministers. It should be noted, that under the term “*group of cases*” Committee of Ministers consider the numerous pending cases that have similar issue with the case execution of which is under close supervisions by the Committee of Ministers.

The major and most problematic group of cases is *Fuchs group/Kudla group/Podbielski group* – and they are united under one similar problem of **excessive length of the court proceedings**, administrative, criminal and civil proceedings respectfully⁵⁸. According to the data in the 2013 CM annual report, as the number the CM raised a concern about the Fuchs group since over the year the number of cases pending before the administrative courts have increased. At the same time the CM welcomed the introduction of the amendment of the Code of Administrative Procedure in 2011 and requested the statistical data from the authorities. In 2014 report there were no significant changes with this case. This group is particularly interesting because of the similarity with the Ukrainian *Naumenko group of cases*, and its execution is also pending.

The next group, which deals with the issue of the special prison regime for "dangerous detainees"⁵⁹ - *Horych group*. In the its 2014 annual report the Committee of ministers have

⁵⁸ Supervision of the Execution Of Judgments and Decisions of the European Court of Human Rights; 2013 Annual Report of the Committee of Ministers, accessed in March 2015, http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf;

⁵⁹ Supervision of the Execution Of Judgments and Decisions of the European Court of Human Rights; 2013 Annual Report of the Committee of Ministers, accessed in March 2015, http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf;

indicated on the significant progress with the execution of this case, particularly, the authorities have introduced several amendments to the legislation on that issue.⁶⁰

Kaprykowski group, which deals with inadequate medical care in prison, violating Article 3 of the Convention⁶¹ and *Orchowski group*, which deals with the issue of prison overcrowding which violates Articles 3 and 13 of the Convention and others⁶² - on both of those groups the Polish authorities have provided action plans to the CoM in 2014, and no assessment by the CoM was not made yet.

Another group, which touches upon very sensitive for the Polish community issue – abortion, deals with the **lack of legal framework regarding the legal abortion** – *Tysiac v. Poland*. In this case the applicant was challenging the lack of the legal framework regulating therapeutic abortion.⁶³ This group of cases is under the close control by the Committee of Ministers due to the unsuccessful attempt to use on practice adopted in 2009 law on Rights of Patients. The procedure seemed very complicated and excessively lengthy, and these problems were raised by the certain NGOs. The CoM required from the authorities to adopt certain amendments that would simplify the procedure.⁶⁴ This group of cases is of big interest due to the enormous sensitivity of the issue of abortion in Poland, which remains very conservative on certain issues.

⁶⁰ Ibid

⁶¹ Ibid.

⁶² Ibid.

⁶³ Case *Tysiac v. Poland*, of 20 March 2007, accessed in March 2015;
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79812#{\"itemid\":\[\"001-79812\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79812#{\)

⁶⁴ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2014 Annual report, accessed in March 2015:
http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf;

Overall, within the last couple of years Poland has developed quite an impressive institutional system of execution of the ECtHR judgments, the most important elements of which are active involvement of the government in the form of creation of the Inter-ministerial Committee, as well as, creation of the Parliamentary subcommittee responsible solely for the execution of the ECtHR judgments. Compared to Ukraine – the structure of execution mechanism is quite different, the executive bodies are of much bigger importance and involve the highest officials of the state in the process of the execution.

As for the Committee of Minister's statistics, there is significant improvement of the situation even comparing the 2012, 2013 and 2014 statistics. For instance, in 2012 there 9 new leading cases, i.e. those that revealed the structural problem in the legislation. In 2013 there were 6 such cases and in 2014 only 1.⁶⁵ Moreover, there is also a positive tendency in the decrease of number of the non-executed pending cases, for instance in 2013 in the group of pending up to 2 years cases (1 group) under the enhanced procedure in 2013 there were 4 cases, in 2014 – 0; in the group of pending from 2 to 5 years (2 group) – in 2013 6, in 2014 – 3; however there was an increase of the pending more than 5 years (3 group) leading cases under the enhanced procedure – from 4 in 2013 to 7 in 2014.⁶⁶ As for the group of general procedure cases, the figures have respectfully changed in the following way: 1 group – from 9 in 2013 to 3 in 2014, 2 group – from 25 to 13 respectfully, and in the 3 group – from 12 to 14 respectfully.⁶⁷

⁶⁵ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2014 Annual report, accessed in March 2015:
http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf;

⁶⁶ Ibid

⁶⁷ Ibid

Moreover, in 2013 there were only 23 judgments of the Court against Poland, the smallest figure during the last decade for Poland.⁶⁸

In general the developments of the past years indicate a significant improvement in the situation with the execution of the ECtHR judgments, especially in terms of implementation of the measures of the general nature and combating systemic problems in the legislation.

Reasons for the improvement of situation with the ECtHR judgments execution in Poland;

The significant decrease of the number of applications that are submitted to the Court against Poland, from 6305 in 2011 to 5031 in 2013⁶⁹ - indicate that Polish Government is on the right track with the taken for the improvement of the situation with the execution measures. Polish scholars emphasize that such a success is obviously connected with the creation governmental body – Inter-Ministerial Committee which is dealing solely with the execution of the ECtHR judgments and is completely responsible for its actions.⁷⁰ Due to the possibility to coordinate the governmental involvement of the relevant ministers on the level of the Council of Ministers in the execution process the coordination of the state institution in the common work on the structural problems became much more efficient and productive.

⁶⁸ Robert Kropiwnicki, System of the execution of the ECtHR judgments in Poland [System wykonywania wyroków Europejskiego Trybunału Praw Człowieka w Polsce], accessed in March 2015: http://www.bibliotekacyfrowa.pl/Content/59078/19_Robert_Kropiwnicki.pdf

⁶⁹ Robert Kropiwnicki, System of the execution of the ECtHR judgments in Poland [System wykonywania wyroków Europejskiego Trybunału Praw Człowieka w Polsce], accessed in March 2015: http://www.bibliotekacyfrowa.pl/Content/59078/19_Robert_Kropiwnicki.pdf;

⁷⁰ Ibid;

Apart from the governmental involvement, very powerful is the parliamentary involvement, which can be observed on the example of the creation of the Parliamentary subcommittee which is also dealing exclusively with the issues of execution of the ECtHR issues. Intense involvement of the different branches of government in the process of execution is important due to the balancing of the responsibilities between the different powers and not concentrating the obligation to execute the ECtHR judgments solely on the government. It seems that well-established coordination between the state bodies in the execution process is probably one of the most-important factor for the improvement of situation with the execution of the ECtHR judgments.

It should also be noted, that the creation of the Parliamentary sub-committee on the ECtHR issues was a response on the ideas stipulated in the Brighton Declaration on amending the ECtHR, namely increasing of the importance of the principle of the subsidiarity in the execution of the ECtHR judgments, that would require more active participation of the national parliaments in the execution process.⁷¹

Concluding Remarks

Overall it is possible to assess the performance of Poland in the process of execution of the ECtHR judgments as quite successful, especially during the last 2-3 years. The main reasons that boosted the progress in the execution are the creation in 2007 of the specific governmental body within the Polish Council of Ministers – the Inter-Ministerial Committee, which require deep involvement of all the ministers of Polish Council of Ministers into the

⁷¹ Reform of the European Court of Human Rights, accessed in March 2015:
<http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13007.htm>

process of execution of the ECtHR judgments as the requirement to report regularly before the Inter-Ministerial Committee on the taken measures. This step helped to mobilize a big number of the high officials who are occupying high offices in the executive power around the problem of the need to execute comply with the demands of the Council of Europe to execute the judgments of the ECtHR.

Another significant step – is the creation of the Parliamentary Subcommittee activity of which is completely devoted to the issue of the execution of the ECtHR judgments. The active involvement of the Parliament in the process of the execution is particularly important since the Parliament, as the only legislative body of the state is responsible for the adaptation of the Polish legislation with the requirements arising from the ECtHR judgments.

Chapter 3. Legislative and institutional framework of the execution of the ECHR judgments in Ukraine

Ukraine applied for membership in the Council of Europe in July 1992, less than a year after obtaining independence in 1991, and after quite a hard and controversial process it finally became 38th Contracting State of the Council of Europe on November 9th 1995.⁷² Almost 2 years later, on July 17th 1997, Ukraine ratified the European Convention on Human Rights and Fundamental Freedoms, which entered into force on September 11th of the same year. Together with the ratification Ukraine has undertaken obligation to abide with the judgments of the ECtHR and execute the judgments of the Court. During the period of Ukraine's membership in the Council of Europe Ukrainian lawmakers have created legislative framework for the application of the Convention and execution of the judgments of the Court, which resulted in creation of the institutional framework too. Probably the best indicator of the efficiency of the execution framework are the statistical figures in the Annual reports of the Committee of Ministers on the execution of the judgments of the Court. Unfortunately, figures regarding Ukraine indicate that the execution system does not work properly.⁷³ This chapter focuses on the national mechanism of the execution of the ECtHR judgments, as well as the analysis of the main challenges in the execution process.

⁷² Magda Krzyzanowska-Mierzevska. Poland and Slavakia, edit. in., Kellers, Hellen; Stone Sweet, Alec, A Europe of Rights; Oxford university Press, Oxford, 2012, p. 611.

⁷³ Supervision of the Execution Of Judgments and Decisions of the European Court of Human Rights; 7th Annual Report of the Committee of Ministers, accessed at http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf

3.1 Legislative and institutional framework of the ECtHR judgments execution process in Ukraine, main problems.

According to the paragraph 1 of Article 46 of the European Convention of Human Rights, which deals with the binding force of the ECHR and the execution of judgments, “the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”⁷⁴. The judgments of the ECHR not only influence the law of the Contracting states, but should also have an impact on the development of the national legislation of those Contracting States.

Pursuant to Article 9 of the Constitution of Ukraine, as well as to Article 19 of the Law of Ukraine “On International Treaties”, all international treaties that were duly ratified by the Ukrainian Parliament should be considered as a part of the national legislation.⁷⁵ Additionally, Article 19 of the Law “On International Treaties” provides that such international treaties shall be applied in the same way as it is established for national legislation, however the provisions of the international legal act should prevail over domestic legislation, but the international legal acts should not contradict the Constitution of Ukraine.⁷⁶ Therefore, the European Convention on Human Rights is an equitable piece of Ukrainian legislation which should be applied by the Ukrainian courts along with the acts of the national law.

The main Ukrainian legal act which regulates the execution of the ECtHR judgments as well as the application of the ECtHR case law – is the Law of Ukraine “On the execution of Judgments and the application of the practice of the European Court of Human Rights”

⁷⁴ European Convention of Human Rights, accessed in March 2015:
http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁷⁵ Constitution of Ukraine, Article 19 “Valid international treaties ratified by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine.” <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>; Law of Ukraine “On International Treaties” [Pro mizhnarodni dohovory] entered into force on 03 August 2004; <http://zakon4.rada.gov.ua/laws/show/1906-15>;

⁷⁶ Law of Ukraine “On International Treaties” [Pro mizhnarodni dohovory] entered into force on 03 August 2004; <http://zakon2.rada.gov.ua/laws/show/1906-15>;

adopted on February 23rd 2006. One of the most important features of this Law is the fact that Article 17 of the Law establishes the case law of the ECtHR as well as the Convention itself as the sources of law in Ukraine.⁷⁷ Since Ukraine is a civil law country, where legal precedent was never considered as a source of law, this provision creates new practice for the Ukrainian courts.

As a matter of fact, the existence of such Law in the national legislation is without exaggeration can be called an outstanding practice among the Council of Europe states, for instance in Poland, notwithstanding of the well-structured institutional system, there is no statute that regulate the issues of the application of the ECtHR practice as well as the execution of the ECtHR judgments.

Additionally, this Law has affirmed the provision of the execution of the ECtHR judgments by performing of the actions of the individual and general nature.⁷⁸ As it was already mentioned in Chapter 1, individual measures may require the state to perform actions directed to the remedy of the effects of the violation of the Conventional rights of the applicant, and general measure require the state to perform action in order to prevent future similar violations.

Article 3 of the Law on Execution of the ECtHR Judgments provides the sequence of the process of the execution of the ECtHR judgments. First of all, it distinguishes the body that represents Ukraine before the ECtHR. According to the Article 1 of the Law on the execution

⁷⁷ Law of Ukraine " On the execution of Judgments and the application of the practice of the European Court of Human Rights" [Pro vykonannya rishen ta zastosuvannya praktyky Ievropeyskoho sudu z prav lyudyny] entered into force on 30 March 2006; <http://zakon4.rada.gov.ua/laws/show/3477-15>;

⁷⁸ Ibid.

of the ECtHR judgments, Representative Body – is a body that is responsible for the representation of Ukraine before the ECtHR and for the coordination of the execution of its judgments.⁷⁹ As it is stipulated in the Resolution of the Prime Minister of Ukraine of July 2nd 2014 #228 “*On the adoption of the Provisions of the Ministry of Justice of Ukraine*” among the main tasks of the Ministry of Justice – are providing of the representation and the protection of the interests of the state at the European Court of Human Rights as well provide the coordination of the process of the execution of the ECtHR judgments.⁸⁰ Therefore, the Ministry of Justice is in charge of representation of Ukraine before the ECtHR, where the Ministry is represented by the Governmental Agent before the ECtHR, and Ministry is also responsible for the whole process of the execution of the ECtHR judgments.

Execution of the individual measures

Another important peculiarity of the Law on Execution of the ECtHR judgments is the regulation of the issue of the individual and general measures that should be taken by the states as a result the ECtHR judgment. Particularly, Article 10 of the Law specifies, that in addition to the payment of the just satisfaction, the following individual measures may be applied by the state, (1) restoring if it is possible a previous status of the applicant before the violation, (2) other measures that may be specified in the Courts judgment.⁸¹ Therefore, that provisions of the Law create additional obligation to the already existing one in the Council of Europe's regulations.

⁷⁹ Law of Ukraine " On the execution of Judgments and the application of the practice of the European Court of Human Rights" [Pro vykonannya rishen ta zastosuvannya praktyky Ievropeyskoho sudu z prav lyudyny] entered into force on 30 March 2006; <http://zakon4.rada.gov.ua/laws/show/3477-15>;

⁸⁰ Resolution of the Prime Minister of Ukraine of July 2nd 2014 #228 “*On the adoption of the Provisions of the Ministry of Justice of Ukraine*” [Pro zatverdzhennya polozhennya pro Ministerstvo Justytsiyi Ukrayiny] entered into force on 11 July 2014; <http://zakon4.rada.gov.ua/laws/show/228-2014-%D0%BF>

⁸¹ Law of Ukraine " On the execution of Judgments and the application of the practice of the European Court of Human Rights", Article 10; [Pro vykonannya rishen ta zastosuvannya praktyky Ievropeyskoho sudu z prav lyudyny] entered into force on 30 March 2006; <http://zakon4.rada.gov.ua/laws/show/3477-15>;

Moreover, the involvement of the Ministry of Justice in the execution of the individual measures is particularly important. The Ministry of Justice is responsible for the timely notification of the applicant about the issuance of the final judgments based on his application, explanation the rights of applicant under that judgments. The Ministry of Justice is and also in charge for the submission to the State Executive Service of Ukraine, which belongs to the system of bodies of the Ministry of Justice, the copy and the translation of the resolution of the final judgment in the case against Ukraine, which has found the violation of the Convention by the state. From this moment the State Executive Service of Ukraine should be further responsible for providing the just satisfaction to the applicant.

According to the provisions of the Article 8 of the Law on the Execution of the ECtHR Judgments, payments resulting from ECtHR judgments shall be executed within the period of 3 months from the moment when such judgments acquire the status of final. Violation of this term should result in the charging of penalties.

Execution of the general measures

As it was already mentioned, very often additionally to the individual measures, the Court may require the state in the judgment to perform general measures, which would remove the structural problem in the legislation and would prevent future violations. In the national legislation, application of the general measures is stipulated in the Article 13 of the Law on the Execution of Judgments. Article 13 provides, that general measures may include in particular, (a) amending the national legislation and the practice of its application; (b) amending the administrative practice, (c) performing of the legal expertise of the draft law; (d) provision of the professional training on the application of the ECHR and the Court

practice of the prosecutors, attorney, other state servants, and (e) also other measures that may be required in the ECtHR judgment.⁸²

Regarding the mechanism of the execution of the general measures, it is more complicated than with the general measures, and it is quite vague. The same Law in Articles 14 and 15 provides that the Government Agent before the ECtHR (who is also a Deputy Minister of Justice) should prepare suggestion on the mechanism of execution of general measures and have to submit the report with the suggestions once per 3 months to the Cabinet of Ministers of Ukraine. Based on those reports, the Prime Minister later decides on which body among the central bodies of Ukraine should perform action in order to execute the general measures.⁸³ On practice, the preparation of the reports by the Governmental Agent before the ECtHR include long-lasting discussions between the representatives of the government as well as the representatives of the Department for the Execution of Judgments of the ECtHR on finding best ways for the implementation of the judgments.⁸⁴ Overall as it can be seen, on the level of the implementation of general measures there is quite a significant involvement of the government in the process.

Parliamentary involvement

Another important part of the execution instrument - is the involvement of the Parliament in the process. In the Ukrainian Parliament, Verkhovna Rada, the ECtHR related issues are usually raised and lobbied by the Parliamentary Committee on Legal Policy and Justice,

⁸² Law of Ukraine " On the execution of Judgments and the application of the practice of the European Court of Human Rights", Article 13; [Pro vykonannya rishen ta zastosuvannya praktyky Ievropeyskoho sudu z prav lyudyny] entered into force on 30 March 2006; <http://zakon4.rada.gov.ua/laws/show/3477-15;>,

⁸³ Ibid, Articles 14, 15

⁸⁴ Interview with Oleksandr Ovchynnykov, Department for the Execution of Judgments of the ECtHR; March 2015;

(former name till December 2014 - *the Parliamentary Committee on the Rule of Law and Justice*). One of the objectives of this Committee – is supervision of the execution of the ECtHR judgments.⁸⁵ At the same time, issues related to the ECtHR are among many other issues this Committee is dealing with, which results in not really efficient work in this field. Moreover, decision of this Parliamentary Committee was one of the reasons for the application to the ECtHR in the case *Volkov v. Ukraine*⁸⁶, dealing with the improper dismissal of the Judge of the Supreme Court from his office and in which the ECtHR actually found a violation in the actions of the Head of this Committee.⁸⁷

Additionally to that, currently there are discussions about the possibility to create separate Parliamentary Committee that would be dealing exclusively with the issues of the execution of the ECtHR judgments, namely, drafting the possible amendments to the existing legislation or new laws.⁸⁸ These talks came about after the already mentioned recent initiatives of the Council of Europe to increase the participation of the Parliaments in the process of the execution of judgments. Judging from generally quite low involvement of the Ukrainian parliament in the process of the execution of the general measures, creation of such Committee may really have a positive impact on the execution process for Ukraine.

Overall, the legislative mechanism cannot be assessed as very clearly established, notwithstanding the existence of the separate statute which regulates the procedure on the

⁸⁵ Web-site of the Parliamentary Committee on Legal Policy and Justice, accessed in March 2015:
http://kompravpol.rada.gov.ua/kompravpol/control/uk/publish/article?art_id=49604&cat_id=44804

⁸⁶ Case of Oleksandr Volkov v. Ukraine of 27 May 2013, accessed in March 2015;
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115871#{\"itemid\":\[\"001-115871\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115871#{\)

⁸⁷ Ibid;

⁸⁸ Interview with Oleksandr Ovchynnykov, Department for the Execution of Judgments of the ECtHR; March 2015;

national level, which is definitely a positive feature. At the same time, the situation with the arrangement of the institutional framework is far from being transparent and clear and it lacks the clear distribution of roles during the execution of the general measures.

3.2. Main structural problems with the execution of the ECtHR judgments in Ukraine;

During the last few years the overall statistics show that the number of ECtHR judgments that are not executed is getting dangerously high – more than 90% of the judgments in 2013 were not executed.⁸⁹ At the same time, according to the same statistics, the level of non execution of the judgments of the national courts is round 70% - which is also a dangerous sign for the whole judicial enforcement system of Ukraine. Statistics also show that one of the main reasons of this is the fact that in most of the cases when the state is found responsible and is due to mitigate the damages to individuals or legal entities judgments are not executed, mainly because there is a lack of the clearly stipulated procedure of the execution of the courts decisions in the Ukrainian legislation and extremely inefficient cooperation between the governmental bodies in Ukraine. As the result, the general situation has also a negative impact on the execution of the judgments of the ECtHR.⁹⁰

Starting from 2008 the Committee of Ministers is annually preparing an execution report on the supervision of the execution of the ECtHR judgments, and Ukraine has always been in a group of countries with difficulties with execution of the Courts judgments. In the most recent

⁸⁹ Human rights advocates: the non-execution of the judicial decisions has become a national tradition in Ukraine, 8 December 2013, [Pravozakysnyky: nevykonannya rishen sudiv v Ukraini stalo natsionalnoyu tradytsiyeyu]; accessed in March 2015: <http://helsinki.org.ua/index.php?id=1418036630>;

⁹⁰ Human rights advocates: the non-execution of the judicial decisions has become a national tradition in Ukraine, 8 December 2013, [Pravozakysnyky: nevykonannya rishen sudiv v Ukraini stalo natsionalnoyu tradytsiyeyu]; accessed in March 2015: <http://helsinki.org.ua/index.php?id=1418036630>;

2014 Annual report that was released on March 24th 2015 it is possible to find the information about the main cases that reveal the systemic problems in the execution of judgments. Overall, comparing to the previous 2013, Ukraine has not improved its compliance with the obligation to execute judgments, but in the contrary, the figures deteriorated. For instance, the number of leading pending over 5 years cases under enhanced procedure comparing to 2013 in 2014 has increased from 12 to 15, moreover the statistics also shows that the situation with the payment of just satisfaction has also deteriorated, only in 5 judgments in 2014 payment was provided on time, comparing to 80 in 2013, and the number of cases out of time has also increased – from 12 to 15.⁹¹ That is a very alarming sign, since overall the performance of all states indicate that the general statistics for all Council of Europe members has improved.

3.2.1. Non-enforcement of the domestic judicial decisions

As for the main pending cases and groups of cases which reveal a systemic problems in the states, which were put into the annual report, they remain the same as in previous couple of years. Without a doubt, the most complicated problem Ukraine is facing while executing judicial decisions – is the non-enforcement of domestic judicial decisions, which is represented by the group of cases united under the 2010 pilot judgment in the case *Yuriy Nikolayevich Ivanov v. Ukraine*. According to the statistics in the 2014 Cm annual execution report, the main reasons for the majority of the applications from Ukraine were related to the problem of non-execution of the domestic judicial decisions.⁹² In its 2013 annual report the

⁹¹ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2014 Annual report, accessed in March 2015:
http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf;

⁹² Ibid.

CoM has pointed out that even though the Ukrainian authorities by December 2013 had adopted the necessary legislation for the improvement of the enforcement of the judicial decisions legislation, the CoM was still awaiting a report from the Ukrainian authorities with the assessment of the impact these changes will have on practice.⁹³ In particular, in 2012 within the process of the execution of the Pilot Judgments in *Y.M. Ivanov* case, the Ukrainian Parliament adopted the Law of Ukraine “On the State’s Guarantees on the Execution of the Judicial Decisions”.⁹⁴ However, the legal experts indicated a practical problem in realization of this law – it does not stipulate the way the judicial decisions of national courts could be executed if the national budget is lacking allocated funds in the state budget.⁹⁵

In 2014 Annual report, the CoM reported about the deterioration of the situation with the execution, particularly, the payment of the just satisfaction in many cases was not performed, and according to the Ukrainian authorities, the problem was with the allocation of the money in the state budget. Moreover, the CoM came to the conclusions, that the general measures taken by the state have not prevented the further similar violations.⁹⁶

The problem of the non-enforcement of the domestic judicial decision is a very deep and complex problem for Ukraine for many years already and it requires a wide and complex approach for the successful resolution. The problem looks never-ending, since the lack of the

⁹³ Supervision of the Execution Of Judgments and Decisions of the European Court of Human Rights; 2013 Annual Report of the Committee of Ministers, accessed in March 2015, http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf;

⁹⁴ Law of Ukraine "On the State’s Guarantees on the Execution of the Judicial Decisions” [Pro harantiyi derzhavy shchodo vykonannya sudovykh rishen]. entered into force on 16 June 2013, accessed in March 2015; <http://zakon3.rada.gov.ua/laws/show/4901-17>

⁹⁵ Without guarantees [Bez harantiy], accessed in March 2015; http://www.kypartners.com/Yakymyak_Yuryst_201311.html

⁹⁶ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2014 Annual report, accessed in March 2015: http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf;

national mechanism of the successful execution of the national courts judgments causes the non-execution of the pilot judgment in *Yuriy Nikolayevich Ivanov*⁹⁷ case and the increasing of the number of applications to the Court. The main argument of the authorities why the domestic judicial decisions are not executed – is the lack of the allocated in the state budget money.⁹⁸ Under these circumstances it become clear that probably one of the main reasons of the successful execution of the pilot judgments in *Y.M. Ivanov* is simple allocation of the funds in the state budget.

It should also be noted, that the Law of Ukraine “On the State Budget of Ukraine for 2015”, as well as the budget laws of previous years do not contain a separate provision regulating the allocation of funds of the state budget of Ukraine for the payments under the obligations deriving from the ECtHR judgments.⁹⁹

3.2.2. Excessive length of civil and criminal proceedings

Second largest group of main cases which reveal a structural problem in the Ukrainian legislation are united under the issue of the excessive length of the civil and criminal proceedings and are represented by the *Svetlana Naumenko group and Merit group*. These groups deal with the violations of Articles 6 and 13 of the ECHR, specifically with the

⁹⁷ Case of Yuriy Nikolayevich Ivanov v. Ukraine, accessed in March 2015;
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95032#{"itemid":\["001-95032"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95032#{)

⁹⁸ Does the state plan to pay its debts arising out of courts decision in 2015? [Chy planuye derzhava vyplachuvaty svoyu zaborhovanist po rishennyah sudiv u 2015 rotsi?] accessed in March 2015:
<http://helsinki.org.ua/index.php?id=1421760753>:

⁹⁹ Law of Ukraine "On the State Budget of Ukraine for the Year of 2015" 20 January 2015, [Pro derzhavnyi byudhzet na 2015 rik]. entered into force on 01 January 2015; accessed in March 2015;
<http://zakon1.rada.gov.ua/laws/show/80-19>;

excessive length of the civil proceedings and the lack of effective remedies.¹⁰⁰ According to the action plan and the communication between the CoM and the Ukrainian authorities, CoM have highlighted the positive movements made by Ukraine towards the adoption of the number of legal acts aiming to resolve the issue with the excessive length of proceedings and lack of effective remedies.¹⁰¹ Namely, the Ukrainian authorities referred to the adoption of the Law on the Judiciary and the Status of Judges, and introduction of amendments to the Civil Procedure Code as well as Criminal Procedural Code. However according to the annual report as of March 2013 the CoM was still requesting the Ukrainian government to provide evidences of the impact of these measures on the situation with solving this issue.¹⁰² In its 2014 Annual report, the CoM specified that no information from the authorities on the steps regarding the overcoming of this systematic problem was provided.¹⁰³

Probably the main obstacle nowadays in overcoming this systemic violation in Ukrainian legal system – is lack of provision in the national legislation that grants a right to challenge the exceeding length of the proceeding in the national courts.

¹⁰⁰ Supervision of the Execution Of Judgments and Decisions of the European Court of Human Rights; 2013 Annual Report of the Committee of Ministers, accessed in March 2015, http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf;

¹⁰¹ Action plan - Communication from Ukraine concerning the Naumenko group of cases against Ukraine, accessed in March 2015; <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2132401&SecMode=1&DocId=1913960&Usage=2>

¹⁰² Supervision of the Execution Of Judgments and Decisions of the European Court of Human Rights; 2013 Annual Report of the Committee of Ministers, accessed in March 2015, http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf;

¹⁰³ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2014 Annual report, accessed in March 2015; http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf;

3.2.3. Ill-treatment in various detention facilities

The next problematic group of cases for Ukraine which is under the close control of the Committee of Ministers – is a group which deals with the issues of the ill-treatment in the detention facilities and absence of the effective investigation and is represented by the *Kaverzin* group of cases. In *Kaverzin v. Ukraine*¹⁰⁴ case, the applicant, who is blind, was challenging his handcuffing while taking him out from his cell. The final judgment in this case was issued on 15.08.2012. In the 2013 report The Council of Ministers indicated on an urgent need to put in place specific reforms in legal system in order to prevent future practices of the police ill-treatment.¹⁰⁵ Particularly, in order to stimulate Ukraine on execution of the judgment, CoM encouraged Ukraine to establish National Preventive Mechanism under the UN Optional Protocol to the Convention against Torture, create a State Bureau of Investigation and other measures.¹⁰⁶ In the 2014 report, the CoM indicates on the particular progress with the application of the new Criminal Procedure Code as well as the adopted in 2011 of the Law of Ukraine “On Free Legal Aid”.¹⁰⁷ This law is quite an important and effective tool due to the enumeration of the safeguards for the imprisoned persons.¹⁰⁸ What is peculiar about this group is that the Governmental Agent in his report to the Cabinet of

¹⁰⁴Case of *Kaverzin v. Ukraine* of 15 August 2012; accessed in March 2015;

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110895#{\"itemid\":\[\"001-110895\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110895#{\)

¹⁰⁵ Supervision of the Execution Of Judgments and Decisions of the European Court of Human Rights; 2013 Annual Report of the Committee of Ministers, accessed in March 2015,

http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf;

¹⁰⁶ Ibid; and Case of *Kaverzin v. Ukraine*, accessed in March 2015;

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110895#{\"itemid\":\[\"001-110895\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110895#{\)

¹⁰⁷ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2014 Annual report, accessed in March 2015:

http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf;

¹⁰⁸ Law of Ukraine “On rendering a free legal aid” [Pro nadanna bezoplatnoyi dopomohy] entered into force 09 July 2011, accessed in March 2015: <http://zakon4.rada.gov.ua/laws/show/3460-17/print1389901366196681>

Ministers of Ukraine in this particular case did not indicate on the measures that can be performed by the government in order to execute this case.¹⁰⁹

3.2.4. Unlawfulness and excessive length of detention on remand

Another major structural problem – is the unlawfulness and excessive length of detention on remand. This problem is the issue of the *Kharchenko group* of cases. It deals with the violations of Article 5 of the Convention – namely, the legislative lacuna which reveals the problem of the excessive length of the detention on remand as well as the lack of the judicial instruments for an effective review of the lawfulness of such detention.¹¹⁰ The Court indicated, that the national courts are not adequately motivate decision on application of the detention on remand towards the suspect.¹¹¹ In this light the CoM highlights that significant improvement is observed with the adoption of the new Criminal Procedural Code in 2012. Namely, the new Code complemented the already existing preventive measures such as detention on remand, pledge, personal bail with new ones, such as personal commitment, and house arrest.¹¹² Moreover, according to the Opinion of the Council of Europe on the new Criminal Procedure Code, the Ukrainian authorities have taken into consideration most of the recommendations made by the Council of Europe. Specifically, the Council of Europe lawyers have distinguished in a new Criminal Procedure Code the radical shift from the three-

¹⁰⁹ Vadym Chovhan, Problems of execution of the ECtHR judgments in the penitentiary system [Problemy vykonannya rishen IeSPL v penitentsiarniy sferi], of 08 June 2013, accessed in March 2015: <http://khp.org/index.php?id=1370666586>;

¹¹⁰ Supervision of the Execution Of Judgments and Decisions of the European Court of Human Rights; 2013 Annual Report of the Committee of Ministers, accessed in March 2015, http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf;

¹¹¹ Case *Kharchenko v. Ukraine* of 10 May 2010; accessed in March 2015: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103260#{"itemid":\["001-103260"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103260#{)

¹¹² Criminal Procedure Code of Ukraine, Article 176, [Kryminalnyi protsesualnyi kodeks Ukrayiny]. entered into force on 19 November 2012; accessed in March 2015: <http://zakon2.rada.gov.ua/laws/show/4651-17>

step Soviet-style regulation of the criminal proceedings into the more flexible one, moreover, the new Code introduced an “improved legislation framework regulating interference with private and family rights”. Additionally, the Council of Europe’s experts have indicated that the Code is significantly changes the approach of the perception of role of judges, attorney and prosecutors in the criminal proceedings. What is particularly important, the new Criminal Procedural Code have introduced truly adversarial procedure and introduced a set of instruments supporting the presumption of innocence and requiring more substantive evidences to consider person a suspect.¹¹³

Another very important innovation in the new Criminal Procedural Code – is the rejection of such evidence by the court as the voluntary surrender, which was a reason the massive usage of illegal methods of investigation, such as torture.¹¹⁴

From the one hand it seems that the adoption of the new Criminal Procedural Code (CPC) has improved the situation and provided a significant solution for the structural problem, but from another, according to the opinion of the Committee of Ministers, the progress has not improved as significantly as it is desirable.¹¹⁵ For instance, in the opinion the CoM of March 7th 2013, the CoM indicated, that the new CPC still lacks the regulation on the right to receive a compensation for the unlawful detention, as well as lack of actions on the training activities

¹¹³ Opinion on Criminal Procedure Code of Ukraine, Council of Europe, of 10 May 2012, accessed in March 2015

<http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/expertises/Opinion%20on%20the%20Criminal%20Procedure%20Code%20of%20Ukraine.pdf>;

¹¹⁴ New Criminal Procedure Code and the lawyers: questions at the verge of good and evil, of 21 May 2013; [Novyy KPK I advokaty: pytannya na mezhi dobra I zla] accessed in March 2015; <http://www.pravda.com.ua/columns/2013/05/21/6990340/>;

¹¹⁵ 1164th meeting of the Committee of Ministers on Kharchenko v. Ukraine case (5-7 March 2013) – Notes; accessed in March 2015; http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=kharchenko&StateCode=&SectionCode

on the regulations by the new CPC with the related professionals, like judges, prosecutors, etc.¹¹⁶

Therefore, notwithstanding really significant improvements of the situation with the unlawful detention on remand with the implementation of the new CPC, a number of procedural issues still remain as obstacles for the successful removal of this structural problem.

Concluding remarks

In general, the legislation framework for the execution of the ECtHR judgments is quite clearly stipulated in the Ukrainian statutes, but this cannot be said about the institutional framework. All the responsibilities for the execution of the ECtHR judgments are provided to the Ministry of Justice of Ukraine, unlike in Poland, where the institutional framework is formed within the Ministry of foreign affairs. After the adoption of the Law on the Execution of the ECtHR Judgments, which came into force in 2006, the execution mechanism got the legislative regulation, and in combination with a number of other legal acts on the general mechanism on the execution of the judicial decisions in Ukraine have set the sequence of actions that should be taken by the government in order to execute the judgments of the ECtHR.

At the same time, the functioning of the whole procedure is far from being perfect. As the practice shows, what looks perfect in theory does not always work on practice. The problems are appearing while executing both kinds of measures: individual and general. While the individual measures can be not executed due to the lack of allocated in the state budget money

¹¹⁶ Ibid;

for the execution, the obstacles for the execution of the general measures are much more complicated. In most of the cases general measures require such actions as amending the legislation in order to fix the existing structural problems. The practice shows that the state is demonstrating really high inefficiency with the finding solutions for removal of such structural problems as the non-enforcement of the domestic judicial decisions, excessive length of the detention on remand, excessive length of the judicial proceedings, and others. Probably one of the reasons of high inefficiency of execution of the general measures is a very low level of cooperation between different governmental bodies of Ukraine in the sphere of execution of the ECtHR judgments. Low parliamentary involvement in the process results in a really slow legislative reaction on the systemic problems which causes even larger number of applications against Ukraine submitted to the ECtHR. Apparently, Ministry of Justice of Ukraine, as the institution which is fully responsible for the execution of the ECtHR judgments in Ukraine is not showing a good performance in regards pushing through the legislative initiatives that would remove the sources of the Convention violations. If to compare two systems, Polish and Ukrainian, they have quite different approaches towards the execution process. While in Ukraine the legislative framework is better structured than in Poland, institutional structure as well as the performance is incomparably laid out better in Poland.

Chapter 4. Ways of Improvement of the ECtHR judgments execution process in Ukraine.

According to the CoM statistics, Ukraine is one of the leading countries in regards of a number of annual applications that are submitted to the Court.¹¹⁷ Moreover, the number of non-executed pending judgments keep increasing. Existing structural problems that were mentioned in Chapter 3 reveal the most problematic issues in the Ukrainian legislation that prevent successful execution of ECtHR judgments in Ukraine. This chapter provides closer overview of the main complex problems as well as possible solutions for those problems.

4.1 General overview of the ECtHR judgments execution problems in Ukraine and possible solutions;

All the structural problems that were distinguished by the Committee of Ministers reveal many more minor problems inside the operation of the execution mechanism. If one starts to examine structural problems more closely, it would turn out that very often the components of the structural problems are very similar.

As it was mentioned, the biggest structural problem in the execution mechanism in Ukraine is **non-enforcement of the domestic judicial decisions**. According to the statistics, up to 90%

¹¹⁷ Supervision Of The Execution Of Judgments And Decisions Of The European Court Of Human Rights, 2014 Annual report, accessed in March 2015:
http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf;

of the national courts decisions are not executed.¹¹⁸ The representative of the NGO Ukrainian Helsinki Human Rights Group Maksym Shcherbatyuk, has called this phenomena as the national tradition, especially when it comes about paying the compensation from the state budget.¹¹⁹ The state bodies can postpone the execution during years trying to delay the execution by any possible means. The State enforcement service, which is in charge of the execution of the judicial decisions, is extremely inefficient, for instance, in 2013 there were 8 million pending cases amounting 440 billion of Ukrainian Hryvnias of compensation, before the State enforcement service.¹²⁰

In most of the cases non-execution refers not only to the inability of the state to provide a financial payment but also to inability of the state body to perform particular actions. For instance, in land cases the court may oblige the local authorities to consider on its session certain land issue, but the local council simply do not include this issue into council's agenda. In this case the procedure may take years and there are no effective mechanisms that would improve situations like that.¹²¹

Another problem - is lack of the cooperation between the governmental bodies, a duplication of powers is unfortunately a common practice and this problem causes effects when it is not

¹¹⁸ Human rights advocates: the non-execution of the judicial decisions has become a national tradition in Ukraine, 8 December 2013, [Pravozakysnyky: nevykonannya rishen sudiv v Ukraini stalo natsionalnoyu tradytsiyeyu]; accessed in March 2015: <http://helsinki.org.ua/index.php?id=1418036630>;

¹¹⁹ Human rights advocates: the non-execution of the judicial decisions has become a national tradition in Ukraine, 8 December 2013, [Pravozakysnyky: nevykonannya rishen sudiv v Ukraini stalo natsionalnoyu tradytsiyeyu]; accessed in March 2015: <http://helsinki.org.ua/index.php?id=1418036630>;

¹²⁰ Ibid

¹²¹ Interview with Oksana Pokalchuk, Court's Registry, March 2015;

particularly clear which body should be responsible for the execution of the particular court's decision.¹²²

It should be mentioned that as the response to the pilot judgment in the case *Yuriy Nikolayevich Ivanov* the Ukrainian Parliament has already mentioned in Chapter 3 Law of Ukraine “On the State’s Guarantees on the Execution of the Judicial Decisions”.¹²³ At the same time the representatives of the NGO Ukrainian Helsinki Human Rights Group suggest to improve the execution control in more precise way and to stipulate more clearly the powers of the governmental bodies while performing execution.¹²⁴

And of course, as it was already mentioned in Chapter 3, a major problem is the lack of the allocated in the state budget money for the needs of execution of judicial decisions. This problem makes inefficient recently adopted Law “On the State’s Guarantees on the Execution of the Judicial Decisions”.¹²⁵

The issue of the excessive length of the civil proceedings is another huge and complex problem that reveal a large number of smaller problems. First of all this issue is complicated by the inability of the ECtHR to force the state to consider particular case in shorter terms. Moreover, in Ukrainian legislation there is no provision that determine what the extensive

¹²² Interview with Oksana Pokalchuk, Court’s Registry, March 2015;

¹²³ Law of Ukraine "On the State’s Guarantees on the Execution of the Judicial Decisions" [Pro harantiyi derzhavy shchodo vykonannya sudovykh rishen]. entered into force on 16 June 2013; accessed in March 2014; <http://zakon3.rada.gov.ua/laws/show/4901-17>;

¹²⁴ Human rights advocates: the non-execution of the judicial decisions has become a national tradition in Ukraine, 8 December 2013, [Pravozakysnyky: nevykonannya rishen sudiv v Ukraini stalo natsionalnoyu tradytsiyeyu]; accessed in March 2015: <http://helsinki.org.ua/index.php?id=1418036630>;

¹²⁵ Law of Ukraine "On the State’s Guarantees on the Execution of the Judicial Decisions" [Pro harantiyi derzhavy shchodo vykonannya sudovykh rishen]. entered into force on 16 June 2013; <http://zakon3.rada.gov.ua/laws/show/4901-17>;

length of the proceedings is as well as the possibility to challenge it before the court. In this case tight cooperation with the Committee of Ministers and the Court is very important for finding the solution. At the same time, as a general practice during the judicial proceedings the process is very often hampered by the unreasonably slow pace of providing the responses to the courts inquiries by different state bodies. There is an obvious lacuna in the regulation of providing the timely responses to the inquiries between the state bodies. Quite often late responses are caused by not up-to-date computer software that provides the workflow of such state body, lack of sufficient amount of the qualified specialists in such state bodies.¹²⁶ It seems that more precise and transparent legislative regulation of providing by one state body the responses to the inquiries of other state bodies could be one of the tools for improvement of situation with the excessive length of judicial proceedings.

The situation with the **ill-treatment in various detention facilities**, as it was already mentioned in the previous chapter, was significantly improved after the adoption of the new Criminal Procedure Code of Ukraine, however the problems are far from being completely removed. For instance Ukrainian human rights activists point out on a complexity with the consideration by the State Penitentiary Service, a body dealing with the execution of the criminal violations, of the complaints. This problem was repeatedly risen by the ECtHR as well as the Committee of Ministers which required the state to ensure the proper mechanism of responding on the complaints.¹²⁷

¹²⁶ Interview with Oksana Pokalchuk, Court's Registry, March 2015;

¹²⁷ Vadym Chovhan, Problems of execution of the ECtHR judgments in the penitentiary system [Problemy vykonannya rishen IeSPL v penitentsiarniy sferi], of 08 June 2013, accessed in March 2015: <http://khpg.org/index.php?id=1370666586>;

Quiet complicated is situation with removing the sources of violation of Article 18 of the ECHR, namely the issue of the **unlawful restriction of the ECHR rights by the state**. The most famous recent cases related to this issues are *Lutsenko v. Ukraine*¹²⁸ and *Tymoshenko v. Ukraine*.¹²⁹ In these cases apart from Article 18 of the ECHR the Court found the unmotivated deprivation of the right to liberty under Article 5. Probably the only effective solution that can prevent further similar violations can be achieved by the substantive and direct legislative amendments that would prevent involvement of the political factor into the judicial considerations.

Similar approach can be applied for the resolution of the problem in *Naydyon v. Ukraine*¹³⁰ case, which deals with the problem of providing to the prisoner a possibility to access and to make copies of the materials of his case. Court indicated that the state should not deprive individuals from the rights for the individual complaint. Apparently, only clear stipulation in the legislation of the provisions that would allow the prisoners to have an access to the materials of the criminal case would be an effective solution.

4.2. Can Polish experience of the ECtHR judgments execution be implemented in Ukraine?

Success of the Polish experience in coping with the structural problems found in the ECtHR judgments is definitely worth attention for the Ukrainian authorities. The institutional transition in Poland that played the most crucial role in the improvement of the situation with

¹²⁸ Case of Lutsenko v. Ukraine of 19 November 2012; accessed in March 2015:
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112013#{\"itemid\":\[\"001-112013\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112013#{\)

¹²⁹ Case of Tymoshenko v. Ukraine of 30 April 2013; accessed in March 2015;
[http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-119382#{\"itemid\":\[\"001-119382\"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-119382#{\)

¹³⁰ Case of Naydyon v. Ukraine of 14 October 2010, accessed in March 2014;
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100941#{\"itemid\":\[\"001-100941\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100941#{\)

the execution of the ECtHR judgments demonstrate how important is the well-established coordination of the different governmental bodies as well as the different branches of power in the execution process.

In my opinion creation of the Inter-Ministerial committee within the Ukrainian Cabinet of Ministers would be an extremely efficient step forward. Firstly, it would require involvement in the discussion on the most efficient ways of implementation of the general measures arising from the ECtHR judgments. Secondly, and most importantly, execution of every particular case would be guided by the minister relevant to the sphere which requires the action directed to removal of the source of the Convention violation. All the responsibilities that are taken by the Polish Inter-Ministerial Committee in Ukraine are conducted only by one ministry – Ministry of Justice, in addition to the numerous other competences of this body.

Regarding the creation of the separate parliamentary committee that would deal exclusively with the ECtHR judgments, in my opinion, sooner or later such committee will be created in Ukrainian Parliament in a response to the recently adopted Protocol 15. This protocol, as was already mentioned in Chapter 1, was drafted as a result of adoption of the Brighton Declaration, among others stipulate the necessity to increase the involvement of the national legislative bodies in the execution process and cooperate more closely with the ECtHR in regards the removal of the structural problems.

Another Polish peculiarity that is worth attention for the Ukrainian authorities is more active involvement of the Human Rights NGOs in the process creation of the frameworks for the general measures execution. The Polish experience shows that without involvement of the NGOs the process of the institutional framework creation would not be so successful. Active

involvement in this case may mean participation of the NGO representatives on the meetings and discussions with the officials from the Ministry of Justice as well with the representative of the Council of Europe on creation of the effective mechanism for every particular case which reveals structural problems.

Concluding remarks

This chapter sheds a light on the main structural problems and the reasons why they cannot be removed as well as possible solutions to those problems. The analysis reveal that one of the biggest obstacles for the effective execution of judgments – is the lack of the effective coordination between the state bodies and lack of regulation of the authorities of different bodies.

During the process of improvement of the ECtHR judgments execution framework, Polish experience may be a good example to follow.

Conclusion

The present paper have provided a description as well as the assessment of the legislative and institutional framework of the ECtHR judgments in Poland and Ukraine. The research also analyzed the main structural problems in the national legislations of Poland and Ukraine, the actions the governments of these countries are taking to remove those problems and the efficiency of those steps.

Chapter 1 analyzes the legal nature of the state's obligation to abide with the judgments of the Court, as well as it showed the established by the Council of Europe procedure which regulates the execution of the ECtHR judgments by the member states. It also pointed out on the issue of the recent challenges on the functionality of the Court, problem with the caseload which has a negative impact on the efficiency of the Court as the institution, and the changes that were suggested to the structure of the Court in order to increase its efficiency.

Chapter 2 analyzes the legislative and institutional framework of the ECtHR judgments execution in Poland. In this Chapter I came to the conclusion that notwithstanding existing structural problems in Polish legislation, the performance of Poland in the process of execution of the ECtHR judgments is quite successful, and it has dramatically increased during last 2-3 years. The main reasons that boosted the progress in the execution are the creation in 2007 of the specific governmental body within the Polish Council of Ministers – the Inter-Ministerial Committee, which require deep involvement of all the ministers of Polish Council of Ministers into the process of execution of the ECtHR judgments This step helped to mobilize a big number of the high officials who are occupying high offices in the executive power around the problem of the need to execute comply with the demands of the Council of Europe to execute the judgments of the ECtHR.

Another significant step – is the creation of the Parliamentary Subcommittee activity of which is completely devoted to the issue of the execution of the ECtHR judgments. The active involvement of the Parliament in the process of the execution is particularly important since the Parliament, as the only legislative body of the state is responsible for the adaptation of the Polish legislation with the requirements arising from the ECtHR judgments.

Chapter 3 deals with the analysis of the legislative and institutional framework of the execution of the ECtHR judgments in Ukraine. I came to the conclusion that nevertheless that the legislative framework is quite clearly stipulated in the Ukrainian statutes, this cannot be said about the institutional framework. The practice shows, what looks perfect in theory does not always work on practice.

The main structural problems that are pending for years awaiting for the resolutions – are non-enforcement of the domestic judicial decisions, excessive length of civil and criminal proceedings; ill-treatment in various detention facilities; unlawfulness and excessive length of detention on remand. Ukrainian authorities unfortunately are unsuccessful with their long-lasting tries to overcome those structural problems, even though quite a lot of efforts were put on that.

The problems are coming out while executing both kinds of measures: individual and general. While the individual measures can be not executed due to the lack of allocated in the state budget money for the execution, the obstacles for the execution of the general measures are much more complicated.

The practice shows that the state is demonstrating really high inefficiency with the finding solutions for removal of such structural problems as the non-enforcement of the domestic judicial decisions, excessive length of the detention on remand, excessive length of the judicial proceedings, and others. Probably one of the reasons of high inefficiency of execution of the general measures is a very low level of cooperation between different governmental bodies of Ukraine in the sphere of execution of the ECtHR judgments. Low parliamentary involvement in the process results in a really slow legislative reaction on the systemic problems which causes even larger number of applications against Ukraine submitted to the ECtHR.

The two systems, Polish and Ukrainian, have quite different approaches towards the execution process. While in Ukraine the legislative framework is more clearly structured than in Poland, institutional structure as well as the performance is incomparably laid out better in Poland. Moreover, in Ukraine all responsibilities for the execution of the ECtHR judgments are delegated to the Ministry of Justice of Ukraine, unlike in Poland, where the institutional framework is formed within the Ministry of foreign affairs.

Chapter 4 sums up the main structural problems in Ukraine as well as analyses whether the Polish experience can be used for Ukraine. As it turns out, the most complicated structural problem in Ukraine – is non-execution of the national judicial decision, that a complex issue and it requires a number steps in order to remove this structural problem.

From the assessment of different factors I made a conclusion that taking similar measures, especially creation of the governmental body which would require active involvement of members of the government in the issues related to control of the execution process, may significantly improve the cooperation between the state bodies, which remains one of the

biggest problems of the efficient execution. Involvement of the parliament is extremely important. There are particular hopes that Ukraine would execute the requirements of Protocol 15 to the Convention and would increase the role of the Parliament in the execution process.

Taking into account current unstable situation in Ukraine, including a military conflict in the Eastern part of the country, the issues of execution of the ECtHR judgments are probably put aside in favor of more vital for the country issues, but at the same time compliance with the ECHR obligations would be of a great help for Ukraine to build a background for a further reforms.

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