

Law

Transnational Judicial Dialogue on International Law in Central and Eastern Europe

edited by
Anna Wyrozumska



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edited by
Anna Wyrozumska

Anna Wyzomska – University of Łódź, Faculty of Law and Administration
Department of European Constitutional Law, 90-232 Łódź, 8/12 Kopcińskiego St.

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Introduction

This book analyses the impact of Polish courts and the courts of the Czech Republic, Lithuania, Hungary, Russia and Ukraine on international law and on strengthening of the rule of law through international law. It examines the place, which is accorded to international law in domestic legal systems of these Central and Eastern European States and seeks to understand whether their courts enter a dialogue with international courts or domestic courts of other jurisdictions. It surveys how often, in which circumstances and for what purposes the courts refer to other jurisdictions and whether this practice may potentially develop international law. The key concept of the book – the judicial dialogue – is understood broadly as a practice of using any kind of cross-references to reasoning and interpretation of law conducted by other judges.

The book is based on the results of the EUROCORES research project 10-ECRP-028 *International Law through the National Prism: the Impact of Judicial Dialogue*. The research involved the inquiry into domestic settings for application of international law and judicial dialogue. At the beginning of the project the country reports following a set template were prepared.¹ The reports showed that in all the States under examination there exist legal norms, often of constitutional character, determining the relationship between domestic and international law, however, the methods with a help of which the international law regulations are introduced into internal law differs (e.g. Hungary is a dualistic State while Poland's or Lithuania's legal systems display chiefly monistic characteristics). There are also different traditions in the CEE States of the courts' application of law. The research detected the most serious problems in this respect in Ukraine where judges do not habitually refer to case law in their own judgments. The book reveals as well that the quality of references varies according to the country and according

¹ The country reports are published as e-book accompanying this volume and available at the University of Lodz Repository (RUŁ) website <http://repozytorium.uni.lodz.pl:8080/xmlui/>.

to the characteristics of courts: be it administrative, criminal or ordinary courts, or to their place in judicial hierarchy (lower or highest courts).

The first chapter of the book titled *The Central and Eastern European Judiciary and Transnational Judicial Dialogue on International Law* (by Wyrozumska) has an introductory character; it gives the overview of the legal setting in all the States under the review and the most characteristic examples of judicial dialogue recalling i.a. the judgments in *Natoniewski*, *the Slovak Pension Rights*, *the Abortion and Status of Foetus*, *Paksas*, *Markin and Anchugov*, and *Crimea*. This chapter formulates general conclusions, which are developed in the subsequent contributions.

The second chapter deals with interactions between Constitutional Courts (*The Dialogue of CEE Constitutional Courts in the Era of Constitutional Pluralism* by Skomerska-Muchowska). It emphasizes both – the special role of these courts as guardians of national constitutions (based in all these countries on principles of democracy and the rule of law) – and the environment in which Constitutional Courts act – the globalised world. Given the special role and position of these courts, they can no longer ignore the international context, especially the international protection of human rights as granted by the European Convention on Human Rights nor the legal order of the EU, to which the Czech Republic, Lithuania, Hungary and Poland belongs. On the contrary, the Constitutional Courts are continuously confronted with other constitutional orders, not only that of the ECHR or of the EU but also the constitutional orders of other States. The Constitutional Courts often consider and draw inspirations from the case law of foreign constitutional or other highest courts, especially while adjudicating on human rights or EU law. The Chapter relies on the concept of ‘constitutional pluralism’ and studies the most important cases of judicial dialogue e.g. *Burdov* saga or the case law on EU Data Retention Directive stemming from various EU countries.

The protection of human rights and the interactions with the European Court of Human Rights is the most important area of judicial dialogue. Almost each contribution in this book investigates its manifestations, yet the chapter by Górski is specifically dedicated to explore various forms of dialogue on human rights (*The Dialogue between Selected CEE Courts and the ECtHR*). Górski defines dialogue broadly underling its different functions, especially conflict resolution and classifies dialogue in regard to the accuracy of the referring court’s reasoning seeking or failing to involve references to other courts’ case law. The author recalls normative framework for dialogue with the ECtHR (with special emphasis on Poland) and carefully studies the practice of CEE courts within which he distinguishes proper, decorative (fake), failed or veiled dialogue. However, some cases, he finds, belong to more than one category. The author provides a general assessment of the practice, explains reasons of occasional failures and suggests the instruments for improvement.

The chapter by Czaplińska deals also with the dialogue in a specific area and with involvement of a specific court, namely the Court of Justice of the European Union (*The Preliminary Reference Procedure as an Instrument of Judicial*

Dialogue in the EU – the CEE Perspective). Czaplińska presents the selection of preliminary rulings on questions referred by the Czech, Hungarian, Lithuanian and Polish courts and assesses their participation in this form of institutionalised dialogue.

The Chapter by Krzemińska-Vamvaka, on the other hand, explores the practice of administrative courts concerning international law, which the author finds sometimes spontaneous and superficial but underlines the structured form of their cooperation allowing for exchange of experiences and best practices, including a web-based dialogue (*Administrative Courts and Judicial Comparativism in Central and Eastern Europe*). This chapter is complemented by the study of practice of administrative bodies, including courts, under refugee law (Kowalski, *International Refugee Law and Judicial Dialogue from the Polish Perspective*). Kowalski focuses on Polish practice and his diagnosis on the state of the dialogue is rather severe. He finds that the Polish contribution to judicial dialogue on refugee law is very modest. Polish courts, contrary to the Polish Refugee Board, almost do not refer to foreign judgments and only rarely refer to international courts' decisions. The latter clearly possesses the deeper expertise on refugee law, yet this does not excuse the limited involvement of the judges in the dialogue between courts.

Four studies are devoted to the practice of Polish, Lithuanian, Hungarian and Ukrainian courts. Matusiak-Frączczak looks more closely at Polish ordinary courts practice and finds that in most cases the courts are quoting the decisions without their detailed examination, mostly to support their own reasoning (the author similarly to Górski distinguishes proper, decorative and failed dialogue). This conclusion can be drawn in respect to Lithuanian, Hungarian and Ukrainian courts as the other chapters show. The chapter by Kuzborska on Lithuania emphasises that since the country regained independence only in 1990, Lithuanian courts had no experience in applying international law. In that context, the progress, especially in relation to human rights standards of protection is immense (*Lithuanian Courts in Dialogue on International Law*).

As far as Ukrainian practice is concerned, both studies by Kolisnyk and by Tsymbivsky are very critical of the situation in this country (respectively: *Ukrainian Courts in Dialogue on International Law* and *Problems with Application of International Law in Ukraine: Theoretical and Practical Issues*). They underline decorative character of the references and practical challenges to dialogue such as access to foreign judgments, lack of translations, foreign language skills, commentaries, expertise on international law etc. It must be emphasised that the existing Ukrainian legislation on application of international law is rather ambiguous. The legislation itself brings about specific problems concerning its application and interpretation by domestic courts.

The last chapter of the book contributes to a better understanding of the Hungarian dualistic approach to international law, and especially to the implementation of the ECtHR decisions. Csatlós depicts the problems faced by the administrative organs and the courts on the canvas of famous *Vajnai* and *Fratanoló* cases

concerning the Hungarian prohibition of the use of totalitarian symbols in public life. She tracks down the reaction to these ECtHR decisions both on the part of the judiciary and the executive posing the question as to with whom the actual responsibility of implementation lies (*Who is to Give Effects to the ECtHR Decisions? The Vajnai Saga*).

Even though, Csatlós's conclusion is critical, the general conclusion of the book is more optimistic. In all the countries under review it was possible to identify the court's decisions which influence the development of international law (cf. Czech administrative courts decisions on refugee law), including those creating customary international law as part of State practice or *opino iuris* (cf. Polish Supreme Court *Natoniewski* case or the decision of the Lithuanian Constitutional Court on genocide). The courts of CEE countries contribute to the development of the EU law, which is similarly evident upon the examination of the quantity and the quality of issues submitted to the CJEU under the preliminary rulings procedure.

Lodz, September 2016

I. The Central and Eastern European Judiciary and Transnational Judicial Dialogue on International Law

Anna Wyrozumska*

1. Judicial Dialogue as a Means of Application of International Law

Some time ago scholars started to study domestic judicial decisions concerning international law hoping to find in them traces of a comparative method. The practice of using cross-references to reasoning and interpretation of law made by other judges became known as ‘judicial dialogue’.¹ Obviously, the notion itself is elusive and gives rise to the conceptual confusion. Judicial dialogue may mean an exchange of ideas in judicial networks; it may refer to the meetings of judges on

* Professor of International and European Union Law, Chair of European Constitutional Law Department, Faculty of Law and Administration, University of Lodz, Poland.

¹ On ‘transnational judicial dialogue’, ‘a global community of courts’ or ‘constitutional comparativism’ see e.g.: A.M. Slaughter, ‘A Global Community of Courts’ (2003) 44, *Harvard International Law Review*, pp. 191–219; Ch. McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ (2000) 20, *Oxford Journal of Legal Studies*, pp. 499–532; S. Choudry, ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1999) 74, *Indiana Law Journal*, pp. 819–892.

a formal and an informal basis to discuss the law and the process of adjudication; it may denote instances when judges of national or international courts quote each other's decisions when resolving cases before them; or when international and national courts enter into a formalised dialogue (which could be an institutionalized one like in the case of the preliminary reference procedure in the EU which is a formal process through which courts can co-operate with the CJEU).² Despite these approaches, the term 'judicial dialogue' reflects a basic idea according to which the courts communicate with one another, judges know their colleagues' decisions and use them for inspiration, concur or dissent with them, both in an open and silent manner.

Some authors, such as e.g. A.M. Slaughter, offer sophisticated typologies of a 'transjudicial communication'. According to Slaughter, judicial dialogue can be classified on the basis of criteria of its form, function, and reciprocity of communication.³ As to the form, a dialogue can be vertical, horizontal, and a mixed vertical-horizontal (depending on the form of subordination between courts).⁴ As far as its functions are concerned, the dialogue could be attitudinal, strategic and normative. It, finally, may enhance the effectiveness of supranational or national courts, enhance the persuasiveness, legitimacy or authority of individual judicial decisions or assure and promote acceptance of reciprocal international obligations. A dialogue may vary also as to the degree of reciprocity.

It may be also argued that it is possible for a court to 'communicate' with other courts without necessarily being explicit about doing so and without drawing attention to the dialogue itself.⁵ That is the case not only in situations of a conflict

² Torres-Pérez enumerates six prerequisites for dialogue. In addition to the 'common enterprise', dialogue also requires competing viewpoints, common ground for understanding, an absence of competence authority for either party, equal opportunity to participate, and a conversation over time. See: A. Torres-Pérez, *Conflicts of Rights in the European Union: A Theory of Transnational Adjudication* (Oxford University Press 2009), pp. 97–140.

³ A.M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29, *University of Richmond Law Review*, pp. 99–138.

⁴ E.g. N. Krisch, 'The Open Architecture of European Human Rights' (2008) 71, *Modern Law Review*, pp. 183–216. The author analysed German, Austrian, Spanish and French courts' approach to the jurisprudence of the ECtHR. He concluded that national courts seek to set limits on the interpretive authority of the ECtHR. He therefore portrays the relationship as one that is more 'horizontal' than 'vertical'. However, the different judiciaries adopt an approach of mutual accommodation to ensure that the practice of human rights law in Europe is more or less harmonious.

⁵ Similarly, Murphy introduces the distinction between 'implicit' and 'explicit' judicial dialogue. In implicit judicial dialogue, the courts engage in transnational judicial communication without being open or explicit about it. In explicit judicial dialogue, the courts openly acknowledge that communication and the role it plays in resolving conflicting claims to authority. See: C.C. Murphy, 'Human Rights Law and the Challenges of Explicit Judicial Dialogue' Jean Monnet Working Paper 10/12. Similarly, Martinico refers in the EU context to the 'hidden dialogue'. See: G. Martinico, 'A Matter of Coherence in the Multilevel Legal

between interpretations of norms. It is thus possible to distinguish indirect or 'silent' dialogue and a direct one.

In the research conducted within the framework of the project 'International Law through National Prism' we wanted to examine whether and in what way the Eastern and Central European courts engage in a dialogue on international law. In this publication we are going to look at various instances of references to foreign and international courts decisions of the Central and Eastern European judiciary to see what form they take or function they fulfil and whether there is a degree of reciprocity.

In this contribution we use the concept of judicial dialogue as a tool to examine how courts of new European democracies apply international law. When we started the research few years ago, it seemed that the Central and Eastern European judges who, in most cases, have started to apply international law are, in fact, not so open or prepared to adjudicate on international law and especially to discuss foreign and international courts' decisions. It was thus necessary to look at the judgments containing any kind of reference to foreign or international courts' decisions, independently of the level of involvement in the discussion.

In our research we focused on the examples of Poland, the Czech Republic, Hungary, Lithuania, Russia and Ukraine; all of them are former communist countries.⁶ All of these States are now the members of the Council of Europe, share its values and have become the parties to the European Convention of Human Rights (ECHR) and so are subject to the compulsory jurisdiction of the European Court of Human Rights (ECtHR), and, last but not least, have become parties to the 1969 Vienna Convention on the Law of Treaties (VCLT).

After the collapse of the Eastern Bloc, the legal orders of all the States under examination have experienced the immense transition to a liberal rule of law and market economy. One of the important elements of this transition was a progressive openness to international law. In some countries these processes have started earlier in the eighties of the 20th century, in other in the nineties, and they are much deeper in the countries which later acceded to the EU (Poland, the Czech Republic, Hungary and Lithuania) than in Russia or Ukraine.

The transition necessitated the elaboration of entirely new constitutions. The subsequent integration of States within the EU and within other international organizations has sometimes required further amendments to

System: Are the "Lions" Still "Under the Throne"?' Jean Monnet Working Paper 16/08, New York University, New York.

⁶ The study is based on country reports prepared in the initial phase of this research project by P. Mikeš (the Czech Republic), N. Chronowski, E. Csatlós, T. Hoffmann (Hungary), V. Vaičaitis (Lithuania), M. Górski, I. Skomerska-Muchowska (Poland), E. Ivanov (the Russian Federation, with collaboration of A. Belyachenkova), and R. Khorolsky (Ukraine; report distributed among the authors and included in the project files, not published). The country reports are published as e-book accompanying this volume and available at the University of Lodz Repository (RUŁ) website <http://repozytorium.uni.lodz.pl:8080/xmlui/>.

the constitutions. Nowadays the constitutions of all the States under examination provide, however in different forms and to a varied extent, for the binding force of international law within the domestic sphere and sometimes explicitly recognize the primacy of international law over domestic law. Yet, that does not mean that international law is applied in an identical way in all these countries. Constitutional authorisation for the binding force of international law is only one of the prerequisites for domestic enforcement of international law, as well as for the use of comparative method or further for judicial communication. This contribution starts with the assumption that judicial dialogue depends primarily on a legal system, a legal basis for the application of international law in a domestic legal order and on a legal culture of a country. This includes the education of the judges, their judicial habits, independence from political authorities etc.

The structure of the contribution follows a simple scheme. We present according to the State by State order the most important features of a legal context in which international law is applied (generally, we do not discuss the EU law)⁷ and on this ground we discuss some patterns of judicial dialogue characteristic for each country and the most interesting identified examples of judicial dialogue.

2. Poland

2.1. The Legal Setting for Judicial Dialogue

The Polish modern history of international law application in the domestic legal order begins with the regaining of independence after the World War I. The judges started to apply treaties, which, under the Constitution of 1921, were ratified by the President upon the consent of the Parliament granted in a form of a statute. The Supreme Court based its reasoning on the concept of transformation when in 1928 it indicated that “a treaty, when ratified and duly published [...] becomes a statutory instrument and gains a binding force in the domestic legal relations.”⁸

⁷ On the transformation of the Central European judiciary under the EU law see: M. Bobek (ed.), *Central European Judges Under the European Influence. The Transformative Power of the EU Revisited*, (Hart Publishing, 2015); see also idem, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013); G. Martinico, O. Pollicino, *The Interaction between Europe’s Legal Systems Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar 2012).

⁸ Judgment of the Supreme Court of 14 December 1928; similarly, judgment of the Supreme Court of 23 October 1929.

On the date of publication any ratified treaty started to function in a domestic legal system as a statute. This meant that a subsequent treaty prevailed only over legislative acts earlier in date (*lex posterior derogat legi priori*). This dualistic approach was confirmed in several judgments of ordinary courts and continued until 1952.⁹ On several occasions, also after 1952, in disputes on diplomatic immunities and State immunity, the courts grounded their decisions on customary international law.¹⁰

The Constitution of 1952 was silent on international law, reflecting the model developed in the Soviet Union and imposed on all countries of Central and Eastern Europe where international law was not binding within the domestic legal order.

Since the Constitution lacked the provision requiring the consent of the Parliament for ratification, it was difficult to argue that a ratified treaty was transformed into domestic law. There were thus divergent views within the academia on the legality of the direct application of treaties in Polish law with many scholars rejecting such a possibility. On the other hand, some scholars advanced the idea that ratified international treaties entered the domestic legal system through the process of ratification and official publication and should be applied *ex proprio vigore*.¹¹ The concept was implemented by the Supreme Court only in two cases but without success for the applicants since the treaties they had invoked, however binding upon Poland, were neither ratified, nor officially published.¹² The dominant position of the judiciary was that the direct application of a treaty requires special authorization in a statute applicable to the subject matter of a treaty (e.g. Art. 1 of the Law on private international law of 1965 referred to international treaties as applicable law). Since there were not so many statutes with such endorsements, international law was in this period almost not applied

⁹ L. Garlicki, M. Masternak-Kubiak, K. Wójtowicz, 'Poland', [in:] D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement, A Comparative Study* (Cambridge University Press 2013), pp. 370–409. Cf. A. Wyrozumska, 'Poland', [in:] D.L. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011), pp. 468–499; eadem, 'Umowy międzynarodowe. Teoria i praktyka' [International Treaties. Theory and Practice] *Prawo i Praktyka Gospodarcza* (2006), p. 538; R. Kwiecień, *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego*, [The Position of International Treaties in the Legal Order of the Polish State] (Wydawnictwo Sejmowe 2000), p. 101. For an overview of monistic, dualistic or other models see J. Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press 2012), pp. 48–59.

¹⁰ Cf. judgments of 22 October 1925 on diplomatic immunities, Orzecznictwo Sądów Polskich 1926-V, no. 342; and of 2 March 1926 (against Czechoslovakia) Orzecznictwo Sądów Polskich 1926-V, no. 418, cases CR 1272/57 (Supreme Court, 15 May 1959), ICR 58/70 (Supreme Court, 18 May 1970), III CRN 139/79 (Supreme Court, 10 October 1979).

¹¹ S. Rozmaryn, 'Skuteczność umów międzynarodowych PRL w stosunkach wewnętrznych', [The Effectiveness of International Treaties in Poland's Internal Relations], *Państwo i Prawo* (1962), 12, p. 954.

¹² *Bug river claims* case, 2 CZ 70/61 (Supreme Court, 12 June 1961), *Pannonia* case, III CZP 71/73 (Supreme Court, 5 October 1974).

by the courts. In 1987 in highly politicized judgment, the Supreme Court held that under the 1952 Constitution there are no grounds to recognise the transformation of a treaty into the domestic legal order. The treaty, which is binding upon Poland has to be implemented by the law, but is not binding as such on the courts.¹³ The position of the Supreme Court reflected an extreme version of the dualistic approach.

In 1989 the process of democratic changes in the Polish legal system has begun. One of its important features was the acceptance of direct application of international law, especially human rights treaties, in the domestic legal order. This facet is characteristic for the democratization processes in all the other States of our concern.

The present Polish Constitution was adopted in 1997. It contains several provisions concerning the relation between international and domestic law.¹⁴ First of all, the Constitution refers to international treaties. It distinguishes between two general categories of treaties: the treaties ratified by the President and the other treaties concluded by the Government.¹⁵ The Constitution clearly declares that all the treaties, which are ratified by the President are a part of the law of the land and are generally binding.¹⁶ According to Art. 91(1) of the Constitution, they shall be applied directly, unless its application depends on the enactment of a statute. The position of a ratified treaty in the Polish legal order depends upon the procedure of ratification. In brief, the Constitution differentiates between treaties ratified upon prior consent of both Chambers of the Parliament given in a form of statute (Art. 90, Art. 89(1) of the Constitution) and treaties, which are ratified without the consent of the Parliament (Art. 89(2) of the Constitution). The Constitution is clear as to the position of the treaties ratified upon prior consent of the Parliament. In case of a conflict with domestic law, the treaty prevails over statutes but not over the Constitution which, pursuant to its Art. 8, is the supreme law of Poland (Art. 91(2) of the Constitution). Further, Art. 188 of the Constitution stipulates for the competence of the Constitutional Court with reference to international law. Pursuant to this provision, the Constitutional Court adjudicates on the conformity of statutes and international treaties to the Constitution, the conformity of a statute to ratified treaties, which required a prior consent granted by

¹³ Case I PRZ 8/87 (Supreme Court, 25 August 1987). The Supreme Court refused to apply the provisions of ILO Convention No. 87, which was ratified by Poland to the legalisation request of the "Solidarity" trade union and refused to assess whether the domestic legislation on exclusion of trade unions pluralism was consistent with the international obligations of Poland.

¹⁴ There are also the references to international law (treaties or customary international law) in various statutes or acts of Government. Taking into account general rule enshrined in the Constitution, they are superfluous.

¹⁵ Under Art. 146(4)(10) of the Constitution the Council of Ministers may conclude agreements of an executive nature.

¹⁶ Art. 87 of the Constitution.

a statute, and the conformity of the legal acts of the Government to the Constitution, ratified treaties and statutes.

If taken literally, treaties ratified without a prior consent of the Parliament do not prevail over statutes. As the Constitution contains in its first “Chapter on general principles on which the State is based”¹⁷ Art. 9, which states that “The Republic of Poland shall respect international law binding upon it”, the courts begun to understand the hierarchy differently, i.e. all ratified treaties prevail over statutes.¹⁸ Over the years Art. 9 has been filled with substance by the courts. The judges used to invoke it as a legal basis for domestic effects of all binding treaties other than the ratified ones, for the provisional application of treaties under Art. 25 VCLT,¹⁹ treaties which are ratified but do not satisfy other conditions of Art. 91 of the Constitution,²⁰ customary law,²¹ and the decisions of international organizations or international organs established under the treaties.²² The Polish Constitutional Court confirmed in the 2005 judgment on the constitutionality of the EU Accession Treaty, that “Art. 9 expresses an assumption of the Constitution that on the territory of Poland, a binding effect should be given not only to the acts (norms) enacted by national legislature, but also to the acts (norms) created outside the framework of national law-making authorities. The Constitution accepts that the Polish legal system consists of multiple components/elements.”²³ Consequently, Polish authorities, including the judges, should give full effect to international law, i.a. they should develop an interpretation of national law as ‘friendly’ to international law as possible.²⁴

¹⁷ The Constitution provides for more stringent conditions for amendment of this Chapter as provided for by its Art. 235(5–6).

¹⁸ Cf. e.g. case GSK 56/04 (Supreme Administrative Court, 21 April 2004). Some judges opposed to this effect e.g. the Warsaw Administrative Court held that the freedom of economic activity may not be restricted by a treaty which was ratified in a simplified procedure, i.e. without the consent of the Parliament. Such a treaty may not be invoked for imposing penalties on individuals (case II SA 4156/03, 16 November 2004).

¹⁹ Cf. case I SA/Łd 1707/02 (Supreme Administrative Court, 26 March 2003), in which the Court found that because Poland and Estonia, the parties to the free trade agreement, agreed for its provisional application, to refuse to apply lower custom tariffs provided therein, would infringe upon Art. 9 of the Constitution.

²⁰ For example treaties or the amendments to the treaties which were not officially published in the *Dziennik Ustaw* (Journal of Laws). See to this effect e.g. case III SA/Lu 16/13 (Lublin Administrative Court, 30 April 2013).

²¹ See e.g. *Natoniewski*, III CSK 293/07 (Supreme Court, 13 March 2010).

²² E.g. cases I SA/Sz 414/07 (Szczecin Administrative Court, 3 October 2007) concerning the effects of the decision of the Mixed Commission EC/EFTA; I SA/Go 559/06 (Gorzow Administrative Court, 22 March 2007); I GSK 813/07 (Supreme Administrative Court, 22 July 2008).

²³ Case K 18/04 (Constitutional Court, 11 May 2005) on the EU Accession Treaty of 2003, para. 2.2.

²⁴ Art. 9 of the Constitution became the basis of the consonant (friendly) interpretation (indirect application of treaties), see to this effect e.g. case II PK 100/05 (Supreme Court, 29 November 2005) in which the Court recognised its obligation stemming from Art. 9 of the Constitution to interpret domestic law as far as possible in concordance with the terms of the non-ratified treaty which is binding on Poland; case V SA 859/99 (Supreme Administrative

The clear and complete provisions contained in the treaties, which are ratified and officially published may be directly applicable (Art. 91(1) of the Constitution). The concept of 'directly applicable' or 'self-executing' treaty provisions had been well established by the Polish courts long before the 1997 Constitution was adopted.²⁵ The judges obviously drew from experiences of the US Supreme Court (the 1829 landmark decision in *Foster & Elam v Neilson*)²⁶ but they had not mentioned the relevant cases. Similarly, when Poland became the member of the EU, they started to follow the formula devised by the Court of Justice of the European Union (CJEU) for conditions of direct applicability of EU law established in 26/62 *Van Gend en Loos* and subsequent cases without references to these sources (silent dialogue). For example, in the judgment of 2006 the Supreme Administrative Court found Art. 33 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to be a clear, unconditional and a complete provision, which may be invoked by an individual against the State.²⁷

The treaties concluded in any other procedure than ratification cannot be directly enforced by courts. They bind only the State organs and to impose obligations on individuals they have to be implemented by universally binding acts of the Parliament or the Government. However, the courts found several other effects these treaties may produce owing to the fact that they bind upon the State.²⁸ For example, if a treaty is inaccurately or not fully implemented, it may give rise

Court, 1 February 2000) where the Court inaccurately assumed that since Poland acceded to the Refugee Convention of 1951, the Convention was not a ratified treaty under the Constitution (the document of the President which was officially published had not referred to ratification but to accession). Consequently, it was not possible to apply it directly. However, the Court assured effectiveness to the provisions of the Convention invoking Art. 9 of the Constitution and interpreting domestic law consistently with the Convention.

²⁵ Cf. cases K 8/91 (Constitutional Court, 7 January 1990); I PRN 54/93 (Supreme Court, 15 June 1993); II KRN 274/91 (Supreme Court, 17 October 1991).

²⁶ Case 27 U.S. (2 Pet.) 253 (1829), p. 254: "In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the Political, not the Judicial, Department, and the Legislature must execute the contract before it can become a rule for the Court."

²⁷ Case II GSK 54/05 (Supreme Administrative Court, 8 February 2006); cf. A. Wyrozumska, 'Poland' (n. 10), p. 483. The provision of TRIPS reads: "The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date."

²⁸ E.g. if a treaty had been executed, its legal effect could be irreversible, see to this effect case SK 31/99 (Constitutional Court, 24 October 2000) concerning the 1960 compensation agreement concluded by Poland with the USA. Poland paid the US government in order to compensate for financial claims of the US citizens linked to expropriation from land located on the Polish territory. According to the agreement, to obtain the compensation from the US government it was necessary to renounce property rights. The Constitutional Court found that the effect produced by this act is now irreversible. Cf. case II CSK 456/13 (Supreme Court, 24 July 2014).

to legitimate expectations of individuals. In the 2002 judgment concerning the so-called Bug River claims the Constitutional Court held that although the treaties concluded by Poland after the World War II with the Soviet Republics (Lithuania, Belarus and Ukraine) providing i.a. for compensation for a loss of property left by repatriates on the former Polish territories beyond the Bug river, though not ratified treaties, gave rise to legitimate expectations of the Polish citizens that internal law would regulate relevant financial settlements.²⁹ The Court observed that the Parliament has been for many years trying to establish specific compensation mechanisms but has not completely succeeded. Individuals therefore have still valid compensation claims against the State. The judgment goes in hand with the position taken later by the ECtHR in the landmark *Broniowski* decision in which the ECtHR found a systemic problem connected with the malfunctioning of the Polish legislation and practice and applied for the first time the pilot-judgment procedure.³⁰

Some courts gave effect to non-ratified treaties on the basis of a general clause in a statute pertinent to the subject matter of a treaty. The clause enumerated as applicable law international treaties, not specifying that they have to be ratified or concluded under a different procedure. Those courts argued that such clause is redundant if understood to encompass only ratified treaties since the same result stems from the Constitution. For the clause to be effective, it has to be treated as authorization to apply treaties which otherwise would not be used. It then incorporates a treaty into a statute. In consequence, the legal force of a non-ratified treaty is equal to a statute.³¹

These few examples show that there is a good legal environment for application of international law in Poland and that many judges are open to international law.

2.2. Deference to International and Foreign Courts Decisions

2.2.1. References Prompted by Applicants or Made *Proprio Motu*

In majority of cases the judges, especially of ordinary courts, apply international law without any reference to foreign or international courts' decisions. However, sometimes they find it necessary to discuss such judgments, mostly to support or to distinguish their own argumentation. This practice, except for the ECHR and EU law, is not common probably because it requires a much better expertise on international law of both the judges and the parties to the dispute, than an application of a treaty provision.³² This volume contains comprehensive analysis

²⁹ Case K 33/02 (Constitutional Court, 19 December 2002).

³⁰ *Broniowski v Poland*, App. no. 31443/96 (ECtHR, 22 June 2004).

³¹ See to this effect e.g. case OSA 2/98 (Supreme Administrative Court, 17 May 1999).

³² On application of the ECHR and EU law see e.g. K. Kowalik-Bańczyk, 'Report on Poland', [in:] G. Martinico, O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU*

of the Polish practice, it seems thus enough to signal some problems and present few representative decisions here (see contributions by Skomerska-Muchowska, Górski, Matusiak, Czaplińska in this study).

In contradictory court proceedings a lot depends on arguments of parties. If experienced lawyers represent them, the arguments based on international law are better substantiated. This happens frequently in the area of human rights. However, such approach cannot guarantee success as the example of the 2014 Warsaw Administrative Court judgment confirms. It concerned deportation of a foreigner on the basis of a classified report prepared by the Internal Security Agency.³³ The applicant claimed that he was refused access to the case files since they were confidential; therefore, his right to court was infringed. He invoked and discussed several relevant judgments of the ECtHR³⁴ and the CJEU decision of 3 September 2008 in C-402/05 P and C-415/05 P *Kadi v Council and Commission* to support the claim to the right to know the reasons of the decision issued against him. The Warsaw Administrative Court concluded from the judgments presented by the applicant that the right to court, which includes the principle of contradictoriness and as an essential element the possibility to get acquainted with the information in possession of the authority or the court is not a value overriding other values protected by the national legal order. Disclosing information gathered by a specialised agency responsible for State security enables identification of the source of information, so it can pose a threat to other persons or even exclude the possibility of obtaining any further relevant information. In such situation the limitations on procedural rights of a person are justifiable on account of public interest.

The Court made itself familiar with the classified case files and decided that the deportation decision was justified. This cannot be questioned, as the Court noted, neither by the applicant nor his legal representative because they cannot get acquainted with the said case files. At the same time the Court cannot include full argumentation in the reasons of the judgment because of the need to protect classified information. The Court finally observed that the present case does not concern fundamental issues such as protection of life or health, long-term deprivation of liberty or property rights. It concerns the possibility to limit the freedom of movement for a defined period (5 years) and for a defined geographic area (Schengen area, were neither the foreigner nor his family are citizens of any of the countries covered by it). Of course such a ban can impact upon an applicant's private or professional life, but it has to be weighed against the public interest – protection of State security.

Laws, A Comparative Constitutional Perspective, (Groningen: Europa Law Publishing, 2010), pp. 329–349.

³³ Case IV SA/Wa 1074/14 (Warsaw Administrative Court, 7 October 2014).

³⁴ *C.G. v Bulgaria*, App. no. 1365/07 (ECtHR, 24 July 2008); *Lupsa v Romania*, App. no. 10337/04 (ECtHR, 8 June 2006); *Liu v Russian Federation*, App. no. 42086/05 (ECtHR, 6 December 2007); *Chahal v the UK*, App. no. 22414/93 (ECtHR, 15 November 1996).

It is a pity indeed that the Court did not refer to other judgments in *Kadi* saga issued after 2008, i.e. to the decisions of the General Court of 2010 and the EU Court of Justice of 2013.³⁵ It must be acknowledged that even if they were not mentioned, the Warsaw Administrative Court did try to take part in a judicial dialogue pointing to specific circumstances of the case at issue.³⁶ In a similar case, the same Court, albeit in different composition, did not recognise such a need. It only made a general remark (without giving any details of specific decisions) that in any of the judgments invoked by the applicant the CJEU neither condemned the use of classified information nor afforded to the applicants an unrestricted right to have access to the files.

The second exemplary decision was authored by the Supreme Administrative Court and demonstrates that judges refer to the judgments from other jurisdictions also if not prompted by the applicants. The case at stake is interesting, since it addresses the problems concerning the legal effect of various international law acts or instruments, which are not formally treaties. In the 2010 Supreme Administrative Court judgment, the Court had to answer the question whether the Administrative Regulations of the International Telecommunication Union may be directly applied in Poland if they had not been officially published.³⁷ Poland, at the same time did ratify and publish the 1992 Constitution and the Convention of the International Telecommunication Union. Pursuant to Art. 54 of the Constitution, the Administrative Regulations (adopted by the conference of all the members, the supreme organ of the Union) are binding. Moreover, the consent to be bound by the Constitution and the Convention is tantamount to the consent to be bound by the Administrative Regulations adopted by the competent world conferences prior to the date of their signature. The specific issue in the case at hand was whether it is possible to impose taxes on individuals in accordance to the principles (more lenient than in the Polish tax law) elaborated by the ITU Administrative Regulation, which was not published. The Supreme Administrative Court did not fully concur with the reasoning of the first instance administrative court that the acts of international organisation, which under the treaty establishing that organisation are binding on its members, if not published in the Journal of Laws, may bind Poland only in external relations (as they do not satisfy the criteria established in Art. 91 of the Constitution). Such regulations may produce internal effects merely to the extent they were implemented in the domestic law. Contrary to this finding, the Supreme Administrative Court distinguished between two situations: where such provisions grant rights to individuals and when they provide for obligations. While it is not possible to impose obligations on individuals on the basis

³⁵ Respectively, T-85/09 *Kadi v Commission* (GC, 30 September 2010); Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and the United Kingdom v Kadi* (CJEU, 18 July 2013).

³⁶ Case IV SA/Wa 1260/14 (Warsaw Administrative Court, 23 October 2014).

³⁷ Case I FSK 92/09 (Supreme Administrative Court, 11 March 2010).

of such an act, individuals may rely on it against the State when their rights are concerned. To come to this conclusion the Court referred to the similarities of the dispute before the CJEU in C-161/06 *Skoma-Lux*³⁸ in which the Court found that the obligations contained in the Community legislation, which has not been officially published, cannot be enforced on individuals, even though those persons could have learned of that legislation by other means. The Supreme Administrative Court concurred with that reasoning and underlined that it may be applied also to the situation, which is not covered by EU law. Since the applicant (the company) relied on rights, the Court held that it may invoke the provisions of the relevant Administrative Regulation even if it had not been published.³⁹

2.2.2. Identification of Customary International Law – *Skrzypek, Natoniewski and Nigerian Embassy*

There are several judgments of the Polish ordinary courts under the Constitution of 1997 grounded in customary international law. In the majority of cases they determine customary law in a general (simplified) way referring to the conventions codifying custom or the opinions of scholars. The decision of the Warsaw Provincial Court in *Skrzypek v Germany* is special since the Court (in that case the lower court) referred to other jurisdiction, to the judgment of the CJEU: C-292/05 *Lechouritou*.⁴⁰ It thus supported the finding that State immunity covers as an act *de jure imperii* – a legal action brought by natural person in one State against another State (namely Germany) for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare (World War II) on the territory of the first State. The Court observed that also the CJEU found the situation at issue to be a ‘civil

³⁸ C-161/06 *Skoma-Lux sro v Celní ředitelství Olomouc* (CJEU, 11 December 2007).

³⁹ It is not the first judgment of that kind, distinguishing between different effects in respect of rights or obligations, but probably the first one to refer to rights and to support the argument by the judgment from other jurisdiction. See e.g. *Karin Galstyan*, V SA 726/99 (Supreme Administrative Court, 7 December 1999) concerning unpublished diplomatic note of Armenia declaring discontinuation of the Soviet Union treaties after succession and the consequences of the lack of publication of official statement on termination towards Armenia of the treaty between Poland and the Soviet Union on visa-free movement of persons. The Court based its reasoning on the Constitution finding that Mrs Galstyan could not have been obliged to possess visa if she had not been duly informed of this duty by the State. In I GSK 813/07 (Supreme Administrative Court, 22 July 2008) the Court referred to *Skoma Lux* as well but the case concerned obligations of individuals and only partly EU law, cf. case II GSK 640/13 (Supreme Administrative Court, 24 June 2014). In this context it is worth to note the case I SA/Bd 275/05 (Bydgoszcz Administrative Court, 20 July 2005) dealing exactly with a *Skoma Lux* type of a situation. The Court did not refer to the CJEU for preliminary ruling but on the ground of the principle of certainty of law came to the same conclusion as the CJEU.

⁴⁰ C-292/05 *Irini Lechouritou et al. v Dimosio tis Omospondiakis Demokratias tis Germanias* (CJEU, 15 February 2007).

matter' (*acta de jure gestionis*). In the opinion of the Polish Court, even if the judgment of the CJEU refers to a concrete dispute on the application of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, it also expresses a general idea which is applicable likewise to the case at hand.

Skrzypek concerns the same issues as *Natoniewski v Germany*⁴¹ discussed elsewhere in this volume (see Matusiak, para. 2. B). The difference is that Mr. Skrzypek probably did not argue for the exception to State immunity in respect of *acta de jure imperii* and the Court did not detect the issue by itself. The plaintiff in *Natoniewski* maintained in the cassation procedure that Germany is not entitled to immunity applicable to the case before the Polish courts for two reasons. First, immunity as to *acta de jure imperii* does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State. Secondly, irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of peremptory character for which no alternative means of redress was available.

The Supreme Court took up the challenge to discuss timely and highly controversial questions. To come to the same conclusion as in *Skrzypek*, the Court did not invoke one case, but carefully discussed various opinions expressed by the judges of international and foreign courts. The Supreme Court judgment in *Natoniewski* was subsequently discussed by other courts, the International Court of Justice (ICJ) in *Germany v Italy*⁴² and by the ECtHR in *Jones and Others v the United Kingdom*.⁴³ No doubt owing to its English translation in Polish Yearbook of International Law it took part in exchange of ideas and opinions on important issues of international law.

The judgment of the 2014 Warsaw Appellate Court on immunity from execution (*Nigerian Embassy* case) was not yet translated into English but it is equally worth mentioning. The Court repealed the judgment of the lower court rejecting the possibility of the execution of the judgment against the Embassy of Nigeria in an employment dispute providing for the renewal of employment contract under the threat of financial penalty and ordered the reconsideration of the case. The main reason was that the lower court inaccurately viewed the case in the light of the 1961 Vienna Convention on Diplomatic Relations instead of relying on customary international law on State immunity. The Warsaw Appellate Court tried then to indicate that the claim against embassy of a foreign State is the claim against

⁴¹ Case IV CSK 465/09 (Supreme Court, 29 October 2010).

⁴² *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (ICJ, 3 February 2012) paras 68, 74, 85, 96, citing English translation in (2010) XXX Polish Yearbook of International Law 299.

⁴³ *Jones and Others v the United Kingdom*, App. no. 34356/06 and 40528/06 (ECtHR, 14 January 2014) para. 144, citing English translation in (2010) XXX Polish Yearbook of International Law 299.

a State and has to be viewed in the light of the rules determined i.a. in the 2010 decision of the ECtHR in *Cudak*⁴⁴ and in the 2012 CJEU judgment in C-154/11 *Mahamdia*.⁴⁵ Both *Cudak* and *Mahamdia* are premised on the idea that under international customary law State immunity does not cover acts *de jure gestionis* such as contracts of employment with persons who do not perform functions which fall within the exercise of public powers. As concerns the immunity from enforcement, for general rules, the Appellate Court referred to the judgment of the ICJ in *Germany v Italy*. But the most interesting are the arguments developed by the Warsaw Court on the ground of three decisions of the courts of Germany, the United Kingdom and France concerning the execution from the embassy's bank account.⁴⁶ The Court observed:

Having regard to the development of international law and the recent case law, as the CJEU judgment mentioned above, in which the need to protect the rights of employees was strongly emphasised, it is crucial to consider the possibility of execution from the embassy bank account, used for payments for employees who are the citizens of a State forum, which have not carried out sovereign activities. If the embassy decides to employ workers and routinely uses its bank account to pay them salaries, it cannot be categorically held that their claims cannot be satisfied from such bank account. It is obviously a sensitive issue, which has to be analysed in the circumstances of each case but – in the opinion of the Appellate Court – such a solution may not be *a priori* rejected.⁴⁷

The suggestion of the Appellate Court addressed to the lower court to look for a possibility for execution from a bank account seems controversial. It is disappointing that the Court based itself on three judgments only and did not take into account the specificity of the judgment of the CJEU (which interpreted the relevant EU regulation). The other problem with the decision of the Appellate Court is that the Court said nothing about the renewal of employment and referred simply to the threat of financial penalty. The Court found it to be 'questionable', "since it directly interferes in the principle of respect of States equality"⁴⁸ but instructed the lower court to study this issue carefully.

The case proves that at least some judges, when confronted with issues not regulated by domestic law or new problems, are capable of making an effort to look for an answer or inspiration to other jurisdictions. The extent and the depth of the study of international or foreign judicial decisions pose a real problem as well as the accuracy of conclusions drawn from the relevant case law.

⁴⁴ *Cudak v Lithuania*, App. no. 15869/02 (ECtHR, 23 March 2010).

⁴⁵ C-154/11 *Ahmed Mahamdia v People's Democratic Republic of Algeria* (CJEU, 19 July 2012).

⁴⁶ *Philippinische Botschaft*, 2 BvM 1/76 (German Constitutional Court, 13 December 1977) 46, p. 342; *Alcom Ltd. v Republic of Colombia* (House of Lords, 12 April 1984); *Islamic Republic of Iran v Société Eurodif and others*, 82-12462 (French *Cour de Cassation*, 14 March 1984).

⁴⁷ Case XXI Pz 95/14 (Warsaw Appellate Court, 26 June 2014).

⁴⁸ *Ibidem*.

3. The Czech Republic

3.1. The Legal Setting for Judicial Dialogue

The history of application of international law and the relevant provisions of the 1991 Czech Constitution (as amended in 2002) bear many similarities to the Polish case study.⁴⁹

As in Poland under the communist regime, the 1949 Constitution of Czechoslovakia (similarly to the previous Constitution of 1920) was silent on a relation between international and national law (except for the final two years of the existence of the country).⁵⁰ The scholars diverged in opinions as to the application of a treaty *ex proprio vigore* and international law was not applied if specific statutes had not contained provisions authorising the application of a treaty or customary law. After the Velvet Revolution in November 1989 the country opened significantly to international law, became a party to the ECHR and recognised the jurisdiction of the ECtHR. The Constitution was amended to incorporate human rights treaties⁵¹ and the Constitutional Court of the Czech and Slovak Federal Republic established in 1991 started to invoke the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. After the dissolution of Czechoslovakia (in effect of 1 January 1993) the Constitution of the Czech Republic retained the same formula incorporating to domestic law only human rights treaties.⁵² In 2001 the Constitution of 1993 was amended. The 1997 Polish Constitution inspired this so-called Euro-amendment. Article 19(2) of the Czech Constitution corresponds to Art. 9 of the Polish Constitution stating that “[t]he Czech Republic shall observe its obligations resulting from international law.” There are also similarities between Art. 10 of the Czech Constitution and Art. 91 of the Polish Constitution. The former states that “[p]romulgated treaties, to the ratification of which the Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than

⁴⁹ See P. Mikeš, ‘Czech Courts and International Law’ (2011) 2, Czech Yearbook of International Law 290; A.J. Bělohávek, ‘The Czech Republic’, [in:] D.L. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011) pp. 195–206.

⁵⁰ The Constitutional Act No. 23/1991 Coll. of 9 January 1991 adopted by the Federal Assembly of the Czech and Slovak Federal Republic introduced the Charter of Fundamental Rights and Freedoms as a constitutional law, entered into force on 8 February 1991.

⁵¹ The Constitutional Act No. 23/1991 Coll., section 2 reads: “International treaties on human rights and fundamental freedoms that the Czech and Slovak Federal Republic ratified and promulgated are generally applicable on its territory and take precedence over the law.”

⁵² The Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic – enacted on 16 December 1992, with effect as off 1 January 1993.

that which a statute provides, the treaty shall apply.”⁵³ The specific provision addressed to the judges of Art. 95(1) declares in a novel manner that “[in] making their decisions, judges are bound by statutes and international treaties which form a part of the legal order; they are authorized to judge whether enactments other than statutes are in conformity with statutes or with such international treaties.” The Euro-amendment removed from the Constitution the provision on human rights treaties.

There are also provisions in specific statutes authorising the application of international law, some of them are relicts of the previous system and refer only to human rights treaties, obsolete after the constitutional amendment. Occasionally they may create confusion.⁵⁴

From the perspective of judicial dialogue on international law it is worth to mention that the Constitution gives the Constitutional Court the power to enforce international courts’ decisions. In practice, however, it is rarely used.⁵⁵ Under Art. 87(1)(i) of the Constitution, the Constitutional Court has jurisdiction to decide on the measures necessary to implement a decision of an international court which is binding on the Czech Republic, in the event that it cannot be otherwise implemented.⁵⁶ The Constitutional Court Act in paras 118 and 119 specifies that the Constitutional Court may adjudicate upon the petition proposing the annulment of the provisions found by an international court as violating international law or the petition of rehearing if the Constitutional Court “have decided in a matter in which an international court found that, as the result of the encroachment of a public authority, a human right or fundamental freedom was infringed in conflict with an international treaty”. The term ‘international court’ was defined in para. 117 of the Act on the Constitutional Court as “any international body whose decisions are binding for the Czech Republic pursuant to an international treaty which forms a part of the legal order”. The present formula of para. 117 however referring not to the court but to any body, still could be interpreted as excluding the views adopted by the quasi-judicial body like the UN Human Rights Committee (HRC).⁵⁷

International treaties are a part of the legal order of the Czech Republic and can be directly applied by the courts. Czech courts distinguish between different categories of treaties and give them different position in the hierarchy of legal acts

⁵³ Art. 10a of the Czech Constitution resembles Art. 90 of the Polish Constitution, Art. 49 – Art. 89 of the Polish Constitution etc.

⁵⁴ See P. Mikeš, ‘Country Report Czech Republic’, para. I.2.

⁵⁵ The examples are the Constitutional Court cases: Pl. ÚS 28/11 (24 April 2012); Pl. ÚS 13/06 (6 May 2008); Pl. ÚS 1/07 (6 May 2008); Pl. ÚS 1/09 (28 July 2009); Pl. ÚS 19/12 (18 December 2012).

⁵⁶ The provisions were amended in 2012 with the effect off 1 January 2013, they are inserted in part 8 of the Constitutional Court Act (no. 182/1993 Coll.) para. 117–119b.

⁵⁷ In the General Comment No. 33 (2008), the HRC noted that even though it is not a judicial body, its Views “exhibit some important characteristics of a judicial decision.”

(different position than the same treaties have in Poland). The highest place is granted to treaties, which transferred certain powers of public authorities to an international organization or institution (ratified under Art. 10a of the Constitution with a prior consent of the Parliament given by qualified majority of 3/5 in both chambers of the Parliament – 3/5 of all MP and 3/5 of present senators). These treaties take precedence even over the Constitution except for the so-called hard core of the Constitution.

The second category is made up of human rights treaties. They are not distinguished by the wording of the Constitution but their special position of acts having constitutional character originates in the doctrine developed by the Constitutional Court.⁵⁸ The Constitutional Court observed also that direct application of international treaties includes the obligation of Czech courts and other public authorities to take into account the interpretation of these treaties by international tribunals as authorities called upon to pronounce authoritatively on the interpretation of international treaties. This, of course, also applies to interpretation of the ECHR by the ECtHR. Moreover, “the relevance of the ECtHR jurisprudence achieved constitutional law quality in the Czech Republic.”⁵⁹ Since 2002 the Constitutional Court tried to put itself in a stronger position in relation to ordinary courts by obliging them to submit the case to the Constitutional Court, if they find a conflict between a human rights

⁵⁸ Case I. ÚS 310/05 (Constitutional Court, 15 November 2006): “A special position among them [international treaties] have international treaties on human rights and fundamental freedoms which form part of the Czech constitutional order with all the resulting consequences [...]”

⁵⁹ *Ibidem*: “The immediate applicability of international treaties also includes the obligation of Czech courts and other public authorities to take into account the interpretation of these treaties by international tribunals as authorities called upon to pronounce authoritatively on the interpretation of international treaties. This of course also applies to the interpretation of the ECHR by the ECtHR. The relevance of the ECtHR jurisprudence achieved constitutional law quality in the Czech Republic. ECtHR decisions are for the Czech Republic and for public authorities on its territory binding in an individual case, which also comes from Article 46, paragraph 1 of the ECHR [...]. For the reasons mentioned above, however, have public authorities a general duty to take into account the interpretation of the ECHR carried out by the ECtHR. [...] Public authorities, in the first place then the courts, are therefore obliged to take into account the case law of the ECtHR as well as in the cases where decisions concerned the Czech Republic as well as in the cases that concerned another Member State of the ECHR when these cases were, by its nature, significant also for the interpretation of the ECHR in the Czech context. This duty is of special importance if a party before a Czech court points out to such case law. If such an argument is omitted by a court then the court commits a misconduct, which could lead to the infringement of the fundamental right to judicial protection under Article 36 paragraph 1 of the Czech Charter of Fundamental Rights and Freedoms, Article 6 paragraph 1 of the ECHR, eventually of the respective fundamental right guaranteed by the ECHR. In any case also Article 1 paragraph 2 of the Czech Constitution is affected.”

treaty and domestic law.⁶⁰ The Constitutional Court will then have an exclusive competence to adjudicate upon such conflict and repeal domestic norm if relevant.⁶¹ This doctrine was, however, opposed to. The Supreme Administrative Court refused to apply it on several occasions and adjudicated on the conflict giving precedence of application to a treaty norm.⁶² The Supreme Administrative Court observed “that the conclusion of the Constitutional Court was stated *obiter dictum* without any connection with the decided case. The conclusion was not justified in detail and in the following scholarly discussions strong critique was voiced against the judgment. In this situation, the Supreme Administrative Court finds it impossible to give regard to the clear wording of the constitutional guideline.”⁶³

In its practice the Constitutional Court considered obligations under the human rights treaties as prevailing over any other treaty obligations. These cases concerned extradition resulting in a risk that the person concerned would be exposed to torture, inhuman or degrading treatment.⁶⁴ For example, in the decision of 2013, referring to its jurisprudence, the Constitutional Court observed that if the *non-refoulement* principle under the 1951 Convention relating to the Status of Refugees collides with the obligation to extradite, the conclusion expressed earlier that “the respect and protection of fundamental rights are defining elements of the substantively understood state governed by the rule of law” shall apply. “[T]herefore, in a case where a contractual obligation protecting a fundamental right and a contractual obligation which tends to endanger that same right exist side by side, the first obligation must prevail.”⁶⁵

The third category of international treaties encompasses those, which were ratified upon a prior consent of the Parliament and promulgated in the Czech Official Journal (Art. 10 of the Constitution). Their norms are directly applicable and have a priority over conflicting statutory provisions (laws).

All the other treaties, concluded under other procedures, ratified without a consent of the Parliament or concluded by the Government, may be directly applicable, if a statute provides for their direct application and only if this application would not be contrary to the Constitution. This restriction refers to the constitutional requirement that only statutes may determine certain matters. As it is the case in Poland, a treaty norm, in order to be directly applicable, has to fulfil formal

⁶⁰ Cf. P. Mikeš, ‘Czech Courts and International Law’ (2011) 2 Czech Yearbook of International Law, pp. 294–296.

⁶¹ Case Pl. ÚS 36/01 (Constitutional Court, 25 June 2002).

⁶² E.g. cases 2 Azs 343/2004 (Supreme Administrative Court, 4 August 2005); 9 Azs 23/2007 (Supreme Administrative Court, 14 June 2007).

⁶³ Case 6 As 55/2006 (Supreme Administrative Court, 11 July 2007).

⁶⁴ Cases of the Constitutional Court: I. ÚS 752/02 (15 April 2003); I. ÚS 733/05 (20 December 2006); III. ÚS 534/06 (3 January 2007).

⁶⁵ Case III. ÚS 665/11 (Constitutional Court, 10 September 2013).

and substantive conditions. A treaty/or a treaty norm, which is not directly applicable, may be still applied indirectly to interpret domestic law.⁶⁶

Similarly as in the Polish legal system, customary international law could be applied either on the basis of the authorisation of a concrete act or under the general clause of Art. 1(2) of the Constitution. Cases adjudicated on the basis of customary law are, however, extremely rare. They concern citizenship,⁶⁷ State succession,⁶⁸ diplomatic immunity,⁶⁹ State immunity,⁷⁰ status of refugees and other persons.⁷¹ It is evident from this practice that the judges do not identify customary norms through reference to *usus* and *opinio iuris*. They do not even explain why they consider a specific rule a customary one or they base their determination on an opinion of only one scholar.⁷² Occasionally, the courts refer to norms of the treaties codifying customary law as customary norms for a sole purpose only: to underline their exceptional nature (e.g. norms of the Refugee Conventions).

⁶⁶ E.g. the Supreme Administrative Court found the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters not self-executing, however, it interpreted relevant domestic law as far as possible in concordance with the Convention: Cases 1 Ao 1/2006 (18 July 2006), 2 As 12/2006 (29 March 2007), 1 As 39/2006 (14 June 2007), 1 As 13/2007 (29 August 2007).

⁶⁷ Cases of the Constitutional Court: Pl. ÚS 9/94 (13 September 1994) on the State power to grant citizenship under international law, IV. ÚS 580/06 (3 April 2007) on discrimination regarding granting of citizenship, II. ÚS 120/2000 (31 May 2000) on military service of a person holding dual citizenship.

⁶⁸ Cases of the Constitutional Court: II. ÚS 214/98 (30 January 2001) on succession of the Czech Republic to the international obligations of former Czechoslovakia, I. ÚS 420/09 (3 June 2009) on succession to treaties between former USSR and Czechoslovakia.

⁶⁹ Cases 11 Tcu 95/2003 (Supreme Court, 17 July 2003) on privileges and immunities of a person holding diplomatic passport but not being a member of a diplomatic mission, 11 Tcu 167/2004 (Supreme Court, 16 December 2004) on privileges and immunities of a member of a wider royal family on private trip, I. ÚS 173/04 (Constitutional Court, 4 May 2004) on a duty of an ambassador of the Sovereign Order of the Knights of Malta to serve as witness in a criminal proceedings.

⁷⁰ In case 21 Cdo 2215/2007 (Supreme Court, 25 June 2008) on employment in Polish embassy in Prague, the Court briefly described the historical development of State immunity referring to the book of Czech scholar J. Malenovský and the Report of the Working Group on Jurisdictional Immunities of States and Their Property (UN Doc. A/CN.4/L.576, Annex at p. 58). The Court concluded that Poland had not acted as a sovereign (*de jure imperii*). *Acta de jure gestionis* are not covered by State immunity. The Supreme Court confirmed its understanding of the exception to State immunity in 30 Cdo 2594/2009 (24 March 2011) on non-admission to the readings held at the Austrian Cultural Institute in Prague.

⁷¹ Cases of the Supreme Administrative Court: 9 Azs 23/2007 (14 June 2007); 1 Azs 40/2007 (19 September 2007); 6 Azs 215/2006 (24 October 2007); 5 Azs 28/2008 (13 March 2009).

⁷² P. Mikeš, 'Country Report Czech Republic', para. III.2.

3.2. Deference to International and Foreign Courts Decisions

3.2.1. General Remarks

Since the ECHR and the decisions of the ECtHR acquired constitutional status in the Czech Republic,⁷³ the Constitutional Court often relies on the Convention and often finds Czech law or Czech courts decisions contrary not only to the Constitution but also to the Convention.⁷⁴ In these cases the Court looks to the decisions of the ECtHR to support its own argumentation (concurring dialogue). However, there are many, especially earlier judgments, where the case law is only briefly or superficially mentioned. The same refers to ordinary or administrative courts.

Exceptionally, the Czech courts refer to other international courts decisions than the ECtHR. Mikeš points to the judgment of the Supreme Administrative Court in which the court discussed the decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Court of Justice, the opinions of the International Committee of the Red Cross, and the decision of the Special Court for Sierra Leone in order to define the term ‘internal armed conflict’ in the Czech Asylum Act.⁷⁵

Sometimes the courts, mostly the Constitutional Court, look up to the decisions of foreign courts for guidance in interpreting domestic law or to determine the standard of protection of certain rights.⁷⁶ The citation is usually very short and often not direct but through literature that analyses foreign jurisprudence.⁷⁷

⁷³ Case I. ÚS 310/05 (Constitutional Court, 15 November 2006).

⁷⁴ Cf. recent decisions of the Constitutional Court e.g. 1 ÚS 860/1520 (27 October 2015) on expulsion of a foreigner and ill-treatment; 3 ÚS 1136/13 (8 December 2015) on indirect discrimination of Roma children – special schools; I. ÚS 2482/13 (26 May 2014) on joint custody; II. ÚS 3626/13 (18 January 2016) on the right to effective investigation in cases of human trafficking. Cf. P. Mikeš (n. 61), p. 296.

⁷⁵ Case 5 Azs 28/2008 (Supreme Administrative Court, 13 March 2009). P. Mikeš, ‘Country Report Czech Republic’, para. II.6.

⁷⁶ For a general overview see: Bobek M., *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013) 152–173.

⁷⁷ P. Mikeš, ‘Country Report Czech Republic’, para. II.6., gives following examples. In case Pl. ÚS 19/93 (Constitutional Court, 21 December 1993): “From among the European judicature, we can refer to the same point of view of the Federal Constitutional Court of the FRG, which in 1969 ruled that the prohibition on the retroactivity of statutes did not apply to the statute of limitations: the subsequent designation of criminality or of a higher possible punishment fall under this prohibition, but not the limitation of actions, governing the period of time during which an act which is declared to be criminal may be prosecuted and leaving the criminality of an act unaffected. (Volume 25, page 269 and following, Collection of Decisions).” In case I. ÚS 453/03 (11 November 2005): “The requirement that the critic himself prove the claimed facts is a European constitutional standard (e.g. decision of the House of Lords of 28 October 1999 in the matter *Reynolds v Times News Papers Limited*, or the decision of the

Recently the analysis of foreign judgments seems to be more insightful, e.g. in case concerning the producers of removable energy.⁷⁸ There the Court referred to the jurisprudence of the courts in Germany, Poland, Spain, Italy, Austria, Croatia and the United States of America. Another example is the judgment of the Supreme Administrative Court in which the Court discussed thoroughly the jurisprudence of the ICJ, ICTY, ICTR, CJEU and domestic courts of the United Kingdom, Canada, New Zealand, and the United States of America i.a. to interpret Art. 1F(c) of the Geneva Convention Relating to the Status of Refugees and the possibility to exclude a refugee seeker from protection if he had been guilty of acts contrary to the purposes and principles of the United Nations. In the mentioned case the asylum seeker informed in 1980s Cuban authorities of suspicious activities of other Cubans living in Czechoslovakia.⁷⁹

The Czech judges quote mostly the German Constitutional Court but there are also many references to the Polish Constitutional Court, as e.g. in cases concerning wages of judges,⁸⁰ to the Austrian Constitutional Court,⁸¹ or to the Supreme Court of the United States.⁸² The Constitutional Court sometimes refers to the jurisprudence of the Slovak Constitutional Court, e.g. in the judgment on the judicial review of security clearances in which the Court studied carefully also the case law of the ECtHR and of the Polish Constitutional Court.⁸³

German Constitutional Court (BVerfG) of 3 June 1980, 1 BvR 797/78 in the case of *Böll*, which is also confirmed by the case law of the European Court of Human Rights – the ECHR – e.g. decision of the Grand Chamber of 17 December 2004 in the matter *Pedersen and Badsgaard v Denmark*.” In case Pl. ÚS 19/98 (3 February 1999) the Constitutional Court referred to two decisions of the German Constitutional Court on refusal of mandatory military service and civilian alternative service. In case 23 Cdo 888/2011 (31 January 2013), the Supreme Court briefly referred (three sentences) to two judgments of the Austrian Supreme Court and the German Supreme Court on interpretation of Art. 13 of CMR Convention, excerpts of which were published in Czech commentary to the CMR Convention.

⁷⁸ Case Pl. ÚS 17/11 (Constitutional Court, 15 May 2012).

⁷⁹ Case 6 Azs 40/2010-70 (Supreme Administrative Court, 29 March 2011). Mikeš P., ‘Country Report Czech Republic’, para. VIII.3.

⁸⁰ Cases of the Constitutional Court: Pl. ÚS 11/04 (26 April 2005); Pl. ÚS 34/04, Pl. ÚS 43/04 and Pl. ÚS 9/05 (passed on the same day, 14 July 2005), Pl. ÚS 33/11 (3 May 2012), Pl. ÚS 28/13 (10 July 2014).

⁸¹ E.g. case 8 Ob 657/87 (Supreme Court, 28 June 1988).

⁸² E.g. cases of the Constitutional Court: I. ÚS 367/03 (15 March 2005) on freedom of speech, Pl. ÚS 17/11 (15 May 2012) on retroactivity of taxation of solar power plants, Pl. ÚS 39/01 (30 October 2002) on sugar quotas.

⁸³ Case Pl. ÚS 6/02 (Constitutional Court, 27 November 2002) in which the Slovak court decision was only mentioned; for broader discussion see Pl. ÚS 11/04 (26 April 2005). In case Pl. ÚS 33/11 (3 May 2012) the Court observed: “The comparative arguments include a reference to the case law of European constitutional courts. The Constitutional Court of the Polish Republic permits interference in judges’ salaries only in a situation when the Polish Constitution forbids general indebtedness of a State [that is, a situation when the public debt exceeds ⅓ of the annual gross domestic product (decision file no. K 12/03)]. The Constitutional Court of the Slovak Republic, in judgment file no. Pl. ÚS 12/05, pronounced unconstitutional

3.2.2. The Foreigner Requesting Asylum in a Transit Area Case

The 2014 decision of the Czech Supreme Administrative Court concerning the possibility of expulsion of a foreigner who was kept by the police in a transit area is possibly one of the most interesting cases from the point of view of this study. The foreigner in question was heading for a connecting flight and allegedly had used the passport belonging to another person. When stopped, he asked for asylum.⁸⁴ The answer whether such foreigner could be expelled relied on the interpretation of Art. 31(1) of the Geneva Convention relating to the Status of Refugees, which reads:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The Supreme Administrative Court analysed two judgments of the UK courts for clarification of the term ‘present themselves without delay to the authorities’. The first was the decision of the High Court of Justice concerning the detention of foreigners having false passports.⁸⁵ The UK Court found that the protection of Art. 31 of the Refugee Convention extends to those foreigners who applied for asylum after their detention if they had been detained during a trip to another country where they wanted to apply for asylum. The Czech Court explained that the High Court based its conclusion on the premise that the main purpose of the Convention is to provide protection to refugees. Foreigners are basically allowed to choose the country where they want to seek protection; they cannot be deprived of this right just because they were detained during a short stop in the trip.⁸⁶ The second one was the decision of the House of Lords⁸⁷ in which the UK Court

of a statute (statutes) that for several years (2003–2006) postponed the entry into effect of a statute under which judges were entitled to remaining salary. In the opinion of that Constitutional Court, with reference to the principle of legitimate expectation, clarity, stability, and legal certainty, arising from the general principle of a state governed by the rule of law, it is not possible to speak of measures being ‘temporary’ if they last several years. These arguments were also used by the Constitutional Court of the Latvian Republic (file no. 2009-11-0), in an economic situation substantially worse than in our country, and in a situation where the relationship of a judge’s salary at the beginning of his career and the average salary showed a more positive trend than in the Czech Republic [per the report from the Council of Europe – the European Commission for the Efficiency of Justice (CEPEJ) 2010 – appendix no. 8].⁸⁷

⁸⁴ Case 9 Azs 107/2014-43 (Supreme Administrative Court, 29 May 2014).

⁸⁵ *Adimi, R v Uxbridge Magistrates Court & Anor* (High Court of Justice, Queen’s Bench Division, 29 July 1999), EWHC Admin 765.

⁸⁶ Case 9 Azs 107/2014-43 (Supreme Administrative Court, 29 May 2014) para. 25.

⁸⁷ *R v Asfaw* (House of Lords, 21 May 2008).

carefully examined the drafting history and the function of Art. 31 of the Convention and observed that the drafters of the Convention did not expect the massive development of air transport (refugees were originally only those persons who met the definition of a refugee as a result of events occurring before 1 January 1951) and could not have foreseen the difficulties associated with transfers during international flights. It is therefore necessary to ensure the protection of Art. 31 also to those foreigners who were detained in the transit country in order to enable them to continue their journey to the destination country where they intended to apply for asylum.⁸⁸ The Czech Supreme Administrative Court concurred with the opinion of both courts.

The case is interesting also on account of the Supreme Administrative Court observations on judicial dialogue. The Court noted that nowadays when interpreting treaties more and more frequently the courts look for inspiration to the decisions of the courts of other contracting parties. It is even required by the basic principle of interpretation enshrined in Art. 31(1) VCLT that the parties to a treaty should give the same meaning to the terms of the treaty and apply them uniformly. Thus, if a high court of a State party to a given treaty interprets certain provisions of a treaty, the courts of another State party should take it into account, provided that they know about it. This is especially true when the conclusions of high courts of another State party to a given treaty are based on reasonable interpretation of the relevant treaty provisions.

3.2.3. A Dissenting Dialogue

The Czech courts sometimes disagree with the opinions of foreign or international bodies. For instance in several judgments the Constitutional Court refused to follow the Human Rights Committee decisions against the Czech Republic, invoking the ECtHR case law on the same issues or applied the Human Rights Committee's own jurisprudence on discrimination but reaching a result different to that the Committee itself had reached.⁸⁹ The cases seem to illustrate common practice of not precise but simplified, general references or quite free accommodation of the ruling to the needs of the domestic court argumentation.

The cases concerned sensitive issues of recovery of the property confiscated by the communist government. In the decision of 1997⁹⁰ the Constitutional Court found Extrajudicial Rehabilitation Act (Law no. 87/1991) compatible with the Constitution and the Czech Charter on Human Rights which was contrary to the findings of the HRC in *Šimůnek et. al v The Czech Republic*⁹¹ and *Adam*

⁸⁸ Case 9 Azs 107/2014-43 (Supreme Administrative Court, 29 May 2014) para. 26.

⁸⁹ Cf. Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, International Law Association, Berlin Conference (2004) paras 51–56.

⁹⁰ Case Pl. ÚS 33/96 (Constitutional Court, 4 June 1997).

⁹¹ *Simunek, Hastings, Tuzilova and Prochazka v The Czech Republic*, Communication No. 516/1992 (Human Rights Committee, 19 July 1995).

v The Czech Republic.⁹² In line with this Act the right to restitution of property expropriated by the communist regime was granted only to Czech citizens. The HRC had concluded that the differentiation between non-citizens and Czech citizens in the legislation was arbitrary and infringed upon the prohibition of discrimination under Art. 26 ICCPR. The Constitutional Court argued that in analogous cases the European Commission on Human Rights had come to different conclusions. These references, however, are not compelling since the Constitutional Court indicated the decisions on admissibility in which the Commission had not examined the violation under Art. 14 ECHR – the prohibition of discrimination.⁹³ The Constitutional Court invoked as well the HRC opinion in *Zwaan de Vries v Netherlands*⁹⁴ for authority that a differentiation in treatment, if based on reasonable grounds, does not necessarily have to violate Art. 26 ICCPR. Consequently, the Court considered the restriction in question to be justified.

In the decision of 1998⁹⁵ the Constitutional Court adjudicating on the provisions of the same Act which made the restitution of property contingent upon the relevant nationalisation having taken place between 25 February 1948 (the date of the Communist take-over) and 1 January 1990, referred to the HRC opinion in *Šimunek et. al v The Czech Republic*⁹⁶ as holding that the national legal order could not differentiate between former and later victims of nationalisation (though the opinion said nothing on the issue). The Court emphasized that the setting of the time limits had an objective and reasonable basis, and any other approach could lead to a chain of restitution claims.⁹⁷

In the 2003 decision the Constitutional Court mentioned the views of the HRC only in general terms and referred to the “numerous decisions of the control organs” existing under international human rights instruments on principle of equality. The Court held that the preferential treatment of miners in the

⁹² *Josef Frank Adam v The Czech Republic*, Communication No. 586/1994 (Human Rights Committee, 23 July 1996).

⁹³ Cases of the European Commission on Human Rights: *Brežný v Slovak Republic*, App. no. 23131/93 (4 March 1996); *Pezoldová v Czech Republic*, App. no. 28390/95 (11 April 1996); *Nohejl v Czech Republic*, App. no. 23889/93 (13 May 1996); *Jonas v Czech Republic*, App. no. 23063/93 (13 May 1996).

⁹⁴ *Zwaan de Vries v Netherlands*, Communication No. 182/1984 (Human Rights Committee, 9 April 1987) para. 13.

⁹⁵ Case Pl. ÚS 45/97 (Constitutional Court, 25 March 1998).

⁹⁶ *Simunek, Hastings, Tuzilova and Prochazka v The Czech Republic*, Communication No. 516/1992 (Human Rights Committee, 19 July 1995).

⁹⁷ Cf. the other judgments of the Constitutional Court on constitutionality of the precondition of holding the Czech citizenship for the restitution of nationalised property of those persons whose property had been expropriated under the communist regime on the basis of criminal proceedings and who had been rehabilitated by the courts on the basis of the Act on Judicial Rehabilitation of 1991. See e.g. case Pl. ÚS 24/98 (22 September 1999) on the limited to citizenship eligibility for restitution of the land by the Act No. 229/1991 Coll. on the Regulation of the Property Relations to Land and Other Agricultural Property, case Pl. ÚS 9/99 (6 October 1999).

legislation is justified, since for years they had performed work, which was physically and mentally extremely demanding and conducted under very harsh conditions.⁹⁸

The most famous Czech example of a dissenting judicial dialogue is the Constitutional Court decision on *Slovak pension rights* concerning the obligations in international law and EU law.⁹⁹ The case was broadly commented upon,¹⁰⁰ also in this volume (see the contribution by Skomerska-Muchowska). The commentators underline the internal conflict between the Supreme Administrative Court and the Constitutional Court, which led to a curious judgment of the latter, based on emotions rather than reason, proclaiming disobedience towards the CJEU preliminary ruling. Ironically, the CJEU decision to a large extent supported previous findings of the Constitutional Court. The case provides an example of a situation where the occurrence of a horizontal dialogue (the discourse between domestic courts) may subsequently lead to a vertical dialogue between international and domestic courts.

⁹⁸ Case Pl. ÚS 15/02 (Constitutional Court, 21 January 2003).

⁹⁹ *Slovak Pensions*, Pl. ÚS 5/12 (Constitutional Court, 31 January 2012).

¹⁰⁰ A. Dyevre, 'Domestic Judicial Non-Compliance in the European Union: A Political Economic Approach' (2013) 2 LSE Law, Society and Economy Working Papers, pp. 1–34; R. Zbírál, 'A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires' (2012) 49 Common Market Law Review, p. 1457; J. Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' (2012) 8 European Constitutional Law Review, p. 323; G. Anagnostaras, 'Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court' (2013) 14(7) German Law Journal, pp. 959–973; P. Molek, 'The Court that Roared: The Czech Constitutional Court Declaring War of Independence against the ECJ' (2012) 6 European Law Reporter, pp. 162–170. Molek observes that: "After the ECJ's judgment in *Marie Landtová*, the Czech legal doctrine as well as practitioners interested in social security law were eagerly expecting the CCC's reaction. Accepting its own mistake in Czech-Slovak Agreement's interpretation and admitting that its previous case-law was discriminating against non-Czech EU citizens did not seem feasible. Nonetheless, the CCC could try to keep face while obeying the ECJ by distinguishing the new cases from its previous case-law, on the basis that it did not apply to cases in which a pension was granted after the Czech Republic had entered the EU. A second option would be to enter into a real dialogue with the ECJ treating it as an equal partner and thereby fulfilling the dream of constitutional pluralists of the mutual respect of courts at different levels. The CCC showed that there is 'a third way', this third option resembling a declaration of war of independence (or ignorance?) against the ECJ, forgetting that the Czech Republic limited its sovereignty, as the CCC would supposedly define it, voluntarily on 1 May 2004" (166). See also: K. Wójtowicz, *Constitutional Courts and European Union Law* (Wrocław 2014), p. 98.

3.2.4. The *Slovak Pensions Rights Case* – Horizontal and Vertical Dialogue

The case was resolved against the background of dissolution of Czechoslovakia and unclear provisions of the Agreement between the Czech Republic and the Slovak Republic on social security of 29 October 1992 which determines the State that would be responsible for the payment of old age benefits corresponding to the periods of insurance under the previous legal regime. Pursuant to Art. 20 of the Agreement the applicable scheme and the authority with competence to grant old age benefits would be linked to the State of residence of the employer at the time of dissolution of Czechoslovakia. Consequently, Czechs whose employer had had residence in the Czech part acquired Czech old age pensions and Czechs whose employer had had residence in the Slovak part acquired Slovak old age pensions. Since Slovak pensions were significantly lower than Czech ones, the question arose whether they should not be supplemented by the Czech authorities to the level corresponding to that of other Czech citizens' pensions.

The Czech Social Security Administration, supported by the Supreme Administrative Court, adopted a rather literal interpretation of Art. 20 of the Agreement.¹⁰¹ People who were not satisfied with this approach addressed the Constitutional Court. The Constitutional Court (for the first time in the judgment of 2003) found that the right to adequate material security in old age and the principle of equality guarantee similar pensions to all Czech citizens.¹⁰² Therefore, Art. 20 of the Agreement must be applied in such a way that the amount of the retirement pension paid by the other contracting party be supplemented to be equivalent to the higher entitlement set by national legislation.¹⁰³ In subsequent decisions the Constitutional Court concluded that the supplements are reserved only for Czech citizens residing on the Czech territory.¹⁰⁴ The series of decisions found no acceptance on the part of the Supreme Administrative Court. In the opinion of this Court the supplements were incompatible with the Agreement and EU law and, in particular, with the Council Regulation 1408/71 on the application of social security schemes to employed persons moving within the Union. The Czech Constitutional Court rejected these arguments without having referred for a preliminary ruling to the CJEU, although the interpretation of EU law was also at stake.¹⁰⁵ When the Supreme Administrative Court asked the CJEU for the ruling, the Constitutional Court warned that it is its interpretation of the Regulation that would prevail in the case at stake regardless of the ruling of the CJEU. The Constitutional Court held, furthermore, that suspending the proceedings before the administrative court to await the judgment

¹⁰¹ Case 6 Ads/2003 (Supreme Administrative Court, 23 February 2005).

¹⁰² Case II. ÚS 405/02 (Constitutional Court, 3 June 2003).

¹⁰³ Case III. ÚS 252/04 (Constitutional Court, 25 January 2005).

¹⁰⁴ Case I. ÚS 294/06 (Constitutional Court, 24 June 2008) paras 25, 33.

¹⁰⁵ Case Pl. 4/06 (Constitutional Court, 20 March 2007).

of the Luxemburg Court violated the right to a fair trial.¹⁰⁶ In C-399/09 *Landtová*, the CJEU held that the payment by the Czech Republic of a supplement to old age benefit is not contrary to EU law, however, it is contrary to EU law to pay it solely to Czech nationals residing on the territory of the Czech Republic.¹⁰⁷ The Court added that it does not necessarily follow, under EU law, that persons benefiting from supplementary social protection (satisfying these two requirements) should be deprived of it.¹⁰⁸

Whilst the Parliament adopted an act, which excluded the future payment of supplements, the reaction of the courts to the CJEU decision is rather surprising.¹⁰⁹ The Supreme Administrative Court which asked for a preliminary ruling instead of awarding Mrs. Landtová with the supplement held that as the Constitutional Court created this special supplement in violation of EU law (also by not referring the case to the CJEU), the decisions of the Constitutional Court cannot be binding on the Supreme Administrative Court. The only possibility to resolve the case at stake lied in the Constitutional Court finding relevant provisions of EU law incompatible with the Constitution. In the decision, the Supreme Administrative Court referred as well to the judgments of the Constitutional Court (cases Pl. ÚS 50/04 and Pl. ÚS 19/08), in which the Constitutional Court concurred with the *Solange* doctrine developed by the judgments of the German Constitutional Court and emphasized that the Constitutional Court has the undoubted authority, not questioned by anyone at the national level, arising from its role as the guardian of the constitutionality and the sovereignty of the Czech Republic. The Constitutional Court is, therefore, free to review again a disputed legal issue, which had been the subject matter of a preliminary ruling of the CJEU. Such a judgment would be directly binding as a precedent both for the Czech pension insurer, and for all ordinary courts.¹¹⁰

The Constitutional Court, provoked by the Supreme Administrative Court, answered with a highly emotional, 'revolutionary' judgment, finding for the first time in the history of the EU, the ruling of the CJEU to be *ultra vires*.¹¹¹ Without

¹⁰⁶ Case III. ÚS 1012/10 (Constitutional Court, 12 August 2010).

¹⁰⁷ C-399/09 *Marie Landtová v Česká správa sociálního zabezpečení* (CJEU, 22 June 2011) paras 40 and 54.

¹⁰⁸ *Ibidem*, para. 54.

¹⁰⁹ Para. 106a of the Act No. 155/1995 Coll., as amended by the Act No. 428/2011 Coll.

¹¹⁰ Case 3 Ads 130/2008-204 (Supreme Administrative Court, 25 August 2011).

¹¹¹ The Constitutional Court held that: "[f]ailure to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships arising for social security from the free movement of persons in the European Communities, or the European Union, is a failure to respect European history, it is comparing things that are not comparable" and "that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was *ultra vires*." *Slovak Pensions*, Pl. ÚS 5/12 (Constitutional Court, 31 January 2012).

entering into deep discussion of the judgment, we confine ourselves to the expression of the doubts concerning the reasoning of the Constitutional Court. The Court seems to have based its judgment on a false assumption that the situation at stake is purely internal, i.e. that EU law is not applicable to the legal relations regulated by the Agreement between Slovakia and the Czech Republic. In fact, however, the argumentation should be contrary, since the Agreement became a part of EU law following the accession of both States to the EU. It was listed in the third Annex of the Regulation 1408/71 as still applicable but interpreted in accordance with the general principles of EU law (there is another Annex in the Regulation enumerating agreements that may introduce measures of unequal treatment of certain groups, the Czech-Slovak Agreement is not listed there). For the Constitutional Court this only means that the Agreement falls entirely outside the scope of the Regulation.

The case has some other aspects as well. One is an evident opposition of the government to the Constitutional Court judgments (before the CJEU the government clearly stated that the Constitutional Court violated EU law). The other is a doubtful behaviour of the CJEU whose judicial office returned the statement of the Constitutional Court sent to the CJEU explaining the Constitutional Court standing on the issues under the consideration of the European court. The note of the CJEU reminded the Constitutional Court that “pursuant to established customs, members of the ECJ do not correspond with third persons regarding cases that have been submitted to the ECJ.”¹¹²

The Constitutional Court ruling certainly is not legally compelling. It illustrates a mistaken use of *ultra vires* argument and will not serve as a precedent. But, on the other hand, the CJEU, having probably in mind to force constitutional courts to ask for preliminary rulings instead of sending informal letters to the Court, missed the opportunity to keep friendly relations with the Czech Court. All this shows that judges are only humans and they are subject to competition, and are neither devoid of emotions nor of judicial egoism.¹¹³

¹¹² As recorded by the Constitutional Court, *ibidem*.

¹¹³ G. Anagnostaras, ‘Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court’ (2013) 14 German Law Journal, pp. 959–973, 972.

4. Hungary

4.1. Dualistic Approach to International Law

Similarly as in the other countries under our review, the Hungarian Constitution refers to international law.¹¹⁴ Since 1 January 2012 Hungary has had a new Fundamental Law.¹¹⁵ The new Constitution replaced the Constitution of 1949.¹¹⁶ Both acts contain similar provisions on international and EU law, especially as to their purpose and function. Article Q(2) of the Fundamental Law, which replaced Art. 7(1) of the Constitution of 1949 declares that in order to comply with obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law (the so-called ‘harmony clause’). Article Q(3) states that “Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations.” Adjudicating in the context of the 1949 Constitution, the Constitutional Court underlined that Art. 7 regulates the relations between national and international law, and that it is a special constitutional provision that follows from the principle of the rule of law.¹¹⁷ In the opinion of the Constitutional Court, this also means that the participation of the Republic of Hungary in international community is a constitutional imperative for domestic law. In the 2013 decision, which confirmed the relevance of its previous case law based on the 1949 Constitution to the present context, the Constitutional Court explained that every obligation of Hungary under international law is an ‘assumed’ or an ‘undertaken’ obligation. International law is a distinct legal system (dualistic approach)¹¹⁸ and has to be somehow introduced into domestic law. Article Q of the Constitution regulates the relations between the two systems. According to this provision, the universally recognised rules of international law are transformed into domestic law (assumed) in a general way by the Constitution, while “other sources of international law” need to

¹¹⁴ For general overview, see: N. Chronowski, T. Drinóczy, I. Ernszt, ‘Hungary’, [in:] D.L. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011), pp. 288–327. On judicial dialogue in Hungary see e.g. K. Kovics, ‘Cooperative Decision-making: The Relation between Hungary and Strasbourg’ (2011) 5(2) *Vienna Journal on International Constitutional Law*, pp. 188–199; L. Blutman, N. Chronowski, ‘Hungarian Constitutional Court: Keeping Aloof from European Union’ (2011) 5(2) *Vienna Journal on International Constitutional Law*, pp. 329–348; N. Chronowski, E. Csatlós, ‘Judicial Dialogue or National Monologue? The International Law and Hungarian Courts’ (2013) 1 *ELTE Law Journal*, pp. 7–28.

¹¹⁵ The Fundamental Law of Hungary was adopted on 25 April 2011.

¹¹⁶ The Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989–1990.

¹¹⁷ Case 7/2005 (III. 31.) AB (Constitutional Court, 29 March 2005).

¹¹⁸ See N. Chronowski, E. Csatlós (n. 115) 9, 12.

be transformed individually with a use of special legal acts. The Constitutional Court observed that:

3.2. According to Article Q) para. (3) of the Fundamental Law, Hungary shall accept the generally recognised rules of international law. The first part of Article 7 para. (1) of the previous Constitution contained a rule with the same essential content, and the Constitutional Court attributed special importance to it, with consequences on the interpretation of the law as well: “The first sentence of Article 7 para. (1) of the Constitution, according to which the legal system of the Republic of Hungary accepts the generally recognized rules of international law, states that the generally recognized rules are part of Hungarian law, even without separate (further) measure of transformation. An act of general transformation – one without a definition or enumeration of those rules – was performed by the Constitution itself. According to it, the generally recognized rules of international law are not part of the Constitution but they are assumed obligations. The fact that the assumption and transformation is contained in the Constitution does not affect the hierarchical relationship of the Constitution, international and domestic law. [...] Article 7 para. (1) of the Constitution also means that by the Constitution’s order, the Republic of Hungary participates in the community of nations; this participation, therefore, is a constitutional command for domestic law. It follows therefrom that the Constitution and domestic law must be interpreted in a manner whereby the generally recognized international rules are truly given effect” [Decision 23/1993 (X. 13.) AB, ABH 1993, 323, 327].¹¹⁹

¹¹⁹ Case 1/2013 (I. 7.) AB on the unconstitutionality of certain provisions of Act on Election Procedure (Constitutional Court, 4 January 2013) para. III.3.2. The Decision 23/1993 (X. 13.) AB cited in this judgment belongs to fundamental judgments of the Hungarian Constitutional Court on the relationship between international and Hungarian law, between international criminal law and national criminal law, and the non-applicability of statutory limitations to international crimes under customary and treaty law. The Constitutional Court was requested by the President to review the constitutionality and compatibility with international law of a law enacted by the Parliament in order to extend the non-applicability of statutory limitations to offences committed during the 1956 revolution. The Court concluded that the Constitution requires the non-applicability of statutory limitations to be used only to offences, which were not subject to statutory limitations under the law in force at the time the offences were committed, unless those offences were regarded as war crimes or crimes against humanity under international law. In the latter case, the application of Hungarian law would be precluded. Grave breaches of the Geneva Conventions and violations of common Article 3, as crimes against humanity, were not subject to statutory limitations under the New York Convention of 1968 and thus precluded the application of statutory limitations under Hungarian law in force at the time when the offences were committed. Finally, the Constitutional Court held that provisions under its review were unconstitutional. In 1996, the Constitutional Court dealt with an amended law. The Court held that the law was unconstitutional because it was contrary to international law (case 36/1996 (X. 13.) AB, 4 September 1996). Cf. T. Hoffman, ‘Trying Communism through International Criminal Law? The Experiences of the Hungarian Historical Justice Trials’, [in:] K.J. Heller, G. Simpson, *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013), pp. 229–247.

As the generally recognised rules of international law are directly transformed, they are equal to constitutional norms in the hierarchy of sources of Hungarian law and even prevail over the Constitution since the Constitution has to be interpreted in concordance with these rules.¹²⁰

The concept of the generally recognised rules of international law encompasses customary international law and general principles of law.¹²¹ There are no examples of the determination of customary international law by reference to State practice and *opinio iuris* by Hungarian courts. Chronowski and Csatlós observed that customary international law is rarely applied and if so, the Constitutional Court relies on codifying treaties.¹²²

It is interesting to note that under the heading of the generally recognized principles of international law, the Constitutional Court referred to *jus cogens*. It defined the term according to the Vienna Convention on the Law of Treaties.¹²³ Adjudicating upon the constitutionality of the draft amendment of the Criminal Code and its conformity with international norms relating to the prescription of crimes committed in violation of common Articles 2 and 3 of the 1949 Geneva Conventions, the Constitutional Court derived the legal basis for punishability of crimes against humanity and war crimes without time limit from the fact that the prohibition of these crimes is considered to be *jus cogens* as they threaten the whole mankind. The Court emphasised that “national law shall not be applied as against an explicit peremptory norm of international law contrary to it.”¹²⁴ The Constitutional Court enumerated as *jus cogens* also the principles *nullum crimen sine lege*¹²⁵ and *pacta sunt servanda*.¹²⁶

¹²⁰ Case 53/1993 (X. 13.) AB (Constitutional Court, 13 October 1993).

¹²¹ The Constitutional Court explained that the term “generally recognised rules of international law” covers universal customary international law, peremptory norms (*jus cogens*) and general principles of law recognized by civilized nations – case 30/1998 (VI. 25.) AB (Constitutional Court, 22 June 1998). It also observed that “[t]he constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law” (case 45/2012 (XII. 29.) AB (28 December 2012) on the unconstitutionality and annulment of certain provisions of the Transitional Provisions of the Fundamental Law of Hungary, para. IV.7). In case 5/2001 (II. 28) AB of 12 March 2001 the Constitutional Court qualified the provisions of the UN Charter as reflecting generally accepted principles of international law. Cf. M. Dezső et al., *Constitutional Law in Hungary* (Kluwer Law International 2010), p. 57.

¹²² N. Chronowski, E. Csatlós (n. 115), pp. 19–20.

¹²³ Case 30/1998 (VI. 25.) AB (Constitutional Court, 22 June 1998). Cf. case 45/2012 (XII. 29.) AB (Constitutional Court, 28 December 2012).

¹²⁴ Case 53/1993 (X. 13.) AB (Constitutional Court, 13 October 1993).

¹²⁵ *Ibidem*.

¹²⁶ Case 4/1997 (I. 22.) AB (Constitutional Court, 22 January 1997).

Other sources of international law (the most obvious ones are treaties ratified or approved by the Government)¹²⁷ have to be separately transformed by the appropriate legal act (promulgated) into domestic law.¹²⁸ For example, the Vienna Convention on the Law of Treaties was promulgated in Law: Decree 12 of 1987, the ECHR, on the other hand was promulgated in Act XXXI of 1993. Their provisions can be directly applicable. The courts recognised in practice that promulgation is a formal condition of direct applicability while the substantive condition is whether the rights, duties and sanctions enshrined in the provisions of a treaty are sufficiently defined for judges to apply them in a case at hand.¹²⁹ The position of a treaty in the hierarchy of legal acts depends on the legal character of the transformation act (whether it is an act of the Parliament or of the Government).¹³⁰ These rules apply to all treaties, including to the treaties containing self-executing norms. Whether the norm is self-executing, that is whether it may be applied in Hungarian law without separate implementing norm, is a question of interpretation.¹³¹

Article E(1) and (2) of the Fundamental Law (Art. 6(4) of the Constitution of 1949) provides for Hungarian participation in the European cooperation, including the membership in the EU. What is interesting from our perspective is the novel Art. E(3), which authorizes the application of EU law in the domestic context. The formula is rather general. The provision states that EU law “may stipulate a generally binding rule of conduct.” There exists no other provision on application of EU law in domestic legal system. It is understood that the rules of primacy of application of EU law or the rights and duties of domestic courts stem from the EU founding treaties and they should be applied as such.¹³²

The Fundamental Law has not solved the uncertainties concerning international law, moreover, certain constitutional provisions, permitting exceptions to democracy, the rule of law and the protection of fundamental rights, could come

¹²⁷ The rules on procedure concerning the conclusion, modification, suspension, termination of treaties etc. are regulated by the Act L of 2005 (*2005. évi L. törvény a nemzetközi szerződésekkel kapcsolatos eljárásról*).

¹²⁸ Under Art. 10(1) of the Act L of 2005 the promulgating act should contain all the relevant data for application of a treaty, e.g. the date of coming into force, reservations, declarations, statements, indication of the organ which is responsible for the execution, and, if necessary, amendments to existing Hungarian regulations or any other implementing provisions necessary to harmonize international and national law.

¹²⁹ E.g. case 7/2005 (III. 31.) AB (Constitutional Court, 29 March 2005); 116/B/2006 AB (Constitutional Court, 2007) ABH 2007, 1936, 1938; Fejér County Court 25.P.22.432/2008/61; 25.P./2008/80. Cf. case 116/B/2006 AB (Constitutional Court) ABH 2007, 1936, 1938.

¹³⁰ The Constitutional Court did not declare the priority of treaties over domestic law but only held that international law is not to be adjusted to the conditions of domestic law, but rather domestic law should be adjusted to comply with international law. Case 53/1993 (X. 13.) AB (Constitutional Court, 13 October 1993).

¹³¹ Case 7/2005 (III. 31.) AB (Constitutional Court, 29 March 2005). Cf. M. Dezső et al., *Constitutional Law in Hungary* (Kluwer Law International 2010), p. 56.

¹³² N. Chronowski, E. Csatlós (n. 115), p. 10.

into conflict with international obligations.¹³³ Especially, the Fourth Amendment to Fundamental Law of 2013¹³⁴ was highly criticized, e.g. by the Venice Commission,¹³⁵ the European Parliament and the European Commission.¹³⁶ The Amendment i.a. restricts the power of the Constitutional Court, enables the criminalization of homelessness, restricts the definition of family, and upholds the arbitrary registration process for churches. It has to be emphasized that the Fourth Amendment excluded the application of the previous case law of the Constitutional Court to the new Constitution. Art. 19 of the Fourth Amendment reads: “[d]ecisions and their reasoning of the Constitutional Court prior to the coming into force of the Fundamental Law cannot be used for interpreting the Fundamental Law.” Furthermore, under Art. 24(3)(c) of the Fundamental Law the conflict between a domestic provision and an international treaty need not be solved by the annulment of the former. The Constitutional Court is not obliged to annul the domestic legislation (only ‘may’). The provision certainly weakens the effects of the treaties and gives rise to doubts as to the harmony between two legal orders. Much depends thus on judges of the Constitutional Court and judges of other courts. It is up to them to continue the tradition or to develop new interpretations.

In fact, the Constitutional Court gave the first signals of continuity in its judgment of 2012. The Court observed that “[i]n the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution.”¹³⁷ According to this decision, the Constitutional Court’s statements made on

¹³³ Ibidem.

¹³⁴ The Fourth Amendment was adopted on 11 March 2013, entered into force on 1 April 2013. It was the response to the Constitutional Court Decision 45/2012 (XII. 29.) AB (n. 1) which invalidated all the provisions of the Transitional Provisions of Fundamental Law not having the character of provisional regulations. The Fourth Amendment incorporated majority of the quashed provisions into the Constitution.

¹³⁵ Opinion 720/2013 of the Venice Commission on the Fourth Amendment of the Fundamental Law of Hungary, Strasbourg 17 June 2013, <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e>> (access: 17 June 2013).

¹³⁶ On constitutional crisis in Hungary see A. von Bogdandy, P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area, Theory, law and Politics in Hungary and Romania* (Hart Publishing 2015) 5; R. Uitz, ‘The illusion of the constitution in Europe: The Hungarian Constitutional Court after the Fifth Amendment of the Fundamental Law’, [in:] J. Bell, M.-L. Paris (eds), *Right-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing 2016), pp. 374–408.

¹³⁷ Case 22/2012 (V. 11.) AB on the interpretation of paras (2) and (4) of Article E) of the Fundamental Law (Constitutional Court, ‘without specified date’) paras 40–41. Confirmed in case 1/2013 (I. 7.) AB on the unconstitutionality of certain provisions of Act on Election Procedure (Constitutional Court, 4 January 2013) para. III.4.

the fundamental values, human rights and freedoms and on the constitutional institutions that have not been changed essentially by the Fundamental Law remain valid. In 2013 the Constitutional Court indicated that the obligations of Hungary that arise from international treaties, the EU membership, the generally recognized rules of international law and the fundamental principles and values compose such a coherent system that cannot be left out of consideration during the law-making process (including constitution-making) and the constitutional review of the Constitutional Court.¹³⁸ Against this background, the literal interpretation of Art. 19 of the Fourth Amendment seems inaccurate. However, we cannot verify the practice of the Constitutional Court after the entry into force of the Fourth Amendment since the new decisions of the Constitutional Court are not available in English.

4.2. 'International Legal Comparisons' of Hungarian Courts

It seems that Hungarian courts broadly refer to international law instruments¹³⁹ and this tendency will be probably retained despite present constitutional problems. As in the other EU countries, the European Convention of Human Rights is the most frequently invoked treaty.¹⁴⁰ Naturally, when applying the Convention, the courts, even if not all of them, refer to the ECtHR case law and the decisions of foreign courts. Just as in other countries there is a difference in regularity and quality of references between the Constitutional Court and the other courts.¹⁴¹ The practice of the latter was found to be "neither unambiguous nor consistent"¹⁴² (see also in this volume the contribution by Górski).

4.2.1. The *Abortion and the Status of a Foetus Case*

In order to illustrate the practice of inserting legal comparisons by the Hungarian courts, we would like to highlight three judgments of the Constitutional

¹³⁸ Case 12/2013 (V. 24.) AB (Constitutional Court, 21 May 2013), cf. 13/2013 (VI. 17.) AB (Constitutional Court, 11 June 2013).

¹³⁹ N. Chronowski, E. Csatlós (n. 115), pp. 7–28.

¹⁴⁰ Cf. P. Sonnevend, 'Report on Hungary', [in:] G. Martinico, O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws, A Comparative Constitutional Perspective* (Groningen: Europa Law Publishing 2010), p. 258.

¹⁴¹ J. Bóka, 'Use of the Comparative Method by the Hungarian Constitutional Court – Conceptual and Methodological Framework for an Ongoing Research Project', [in:] A. Badó, W.B. Detlev, J. Bóka, P. Mezei, *Internationale Konferenz zum zehnjährigen Bestehen des Instituts für Rechtsvergleichung der Universität Szeged* (Acta Iuridica Universitatis Potsdamiensis, Universitätsverlag Potsdam 2014), pp. 93–107. See in the same volume E. Csatlós, 'The Application of International Law as an Instrument of Interpretation in Hungary – The Practice of the Constitutional Court and Ordinary Courts in a Comparative Approach', <https://publishup.uni-potsdam.de/opus4.../S127-142_aiup01.pdf> (access: 25 September 2016), pp. 127–142.

¹⁴² N. Chronowski, E. Csatlós (n. 115), p. 17, 16. The authors quote the decisions refusing application of the ECtHR case law, decisions wrongly invoking cases or invoking cases only for decoration etc. (see e.g. 18).

Court. The first decision, issued in 1998, concerns the highly controversial issues of abortion, the status of a foetus, the right to dignity and the right to life.¹⁴³ To answer the question whether abortion should be permitted in exceptional situations the Court broadly discussed the ECHR and the case law of the European Human Rights Commission, foreign legislation and decisions of German, Polish and the United States courts. The Hungarian Court distanced itself from the Polish Constitutional Court judgment on the constitutionality of the Polish 1997 abortion law,¹⁴⁴ borrowing instead in some respects from the US Supreme Court¹⁴⁵ and the German Constitutional Court's decisions on abortion adopted between 1975 and 1993.¹⁴⁶ Yet, in fact, the judgment is based on the assessment of the Hungarian legislation and the previous judgments of the Constitutional Court.

The Hungarian Court i.a. observed that the right to life and human dignity is ranked at the top in the hierarchy of constitutional fundamental rights. The State has an objective duty to protect life, which includes also that of a conceived individual human life. In other legal systems, as the Court noted, the special individual fundamental rights are distinguished as the human dignity of an unborn human life and the unborn man's own right to life. For example, the German Constitutional Court found that a foetus has its own individual right to life.¹⁴⁷ However, this does not mean that a foetus can be declared a legal person (subject of law), since any special legal status not reaching the legal status of a human would practically offer only a relative protection to a foetal life. Furthermore, "among the rights to be weighed against the State's duty to give increased protection to foetal life,

¹⁴³ Case 48/1998 (XI. 23.) AB (Constitutional Court, 18 November 1998). Cf. case 21/B/2008, 154/2008 (XII. 15.) AB concerning the constitutionality of the Act of 2007 No. CLXXXIV on registered partnerships (Constitutional Court, 15 December 2008).

¹⁴⁴ The Constitutional Court of Hungary indicated the case only by the date of the judgment: 5 May 1997. It seems that the Court meant the case K 26/96 (Polish Constitutional Court, 28 May 1997).

¹⁴⁵ The judgment refers generally to the jurisprudence of the Supreme Court on the right to privacy as a constitutional ground for the right to abortion and mentions the recognition of the use of contraceptives falling under the right to privacy in *Griswold v Connecticut* 381 U.S. 479 (1965).

¹⁴⁶ The German Constitutional Court Cases *Schwangerschaftsabbruch I* 1 BvF 1, 2, 3, 4, 5, 6/74 (25 February 1975) BVerfGE 39, 1 and *Schwangerschaftsabbruch II* 2 BvF 2/90 and 4, 5/92 (28 May 1993) BVerfGE 88, 203. For discussion of comparisons between Hungarian and German approach see Ch. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law*, pp. 655–724. C. Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart 2003).

¹⁴⁷ Case 48/1998 (XI. 23.) AB (Constitutional Court, 18 November 1998) para. III.1.a. The Court referred to the German Constitutional Court decision *Schwangerschaftsabbruch II* 2 BvF 2/90 and 4, 5/92 (28 May 1993) BVerfGE 88, 203.

the mother's right to self-determination – as a part of the right to human dignity is the most important one.”¹⁴⁸

The Court concluded that a provision permitting abortion in case the pregnant woman is in a situation of a serious crisis is not unconstitutional. The reasoning is certainly grounded in the former decisions from other jurisdictions, but not identical with them. For example, by contrast to the German Constitutional Court's abortion decisions it does not link the woman's right to self-determination and the foetal right to life to the protection of human dignity.¹⁴⁹

4.2.2. The *Election Rights Case* – the Limits of International Comparisons

The second example is the 2013 judgment of the Constitutional Court¹⁵⁰ concerning the constitutionality of certain provisions of the Election Procedure Act. The decision is interesting from our perspective, since it explains the use of – as the Court called it – ‘international legal comparison’ in practice of the Court. Firstly, the Constitutional Court enumerated all previous decisions in which the method was applied¹⁵¹ and observed that “[t]he constitutionality of a specific legal institution in another country depends on the constitution of a given State, the fitting into the legal system, and on the historical and political background. Therefore, the Constitutional Court – though acknowledging that taking into account foreign experiences may help to evaluate certain regulatory solutions – does not consider the example of any foreign country in itself as a determining factor with regard to the review of constitutionality (compliance with the Fundamental Law).”¹⁵² The Constitutional Court did not invoke any foreign judgments but referred broadly to the ECtHR case law. It started by general observance:

According to the electronic search engine (HUDOC) of the judicial practice of the European Court of Human Rights [...], 82 cases out of the 15 thousand judgements on the merit were connected to Article 3 of the Amending Protocol to the European Convention on Human

¹⁴⁸ *Ibidem*, III.3.B.

¹⁴⁹ S. Halliday, *Autonomy and Pregnancy, A Comparative Analysis of Compelled Obstetric Intervention* (Routledge 2016) 113.

¹⁵⁰ Case 1/2013 (I. 7.) AB on the unconstitutionality of certain provisions of Act on Election Procedure (Constitutional Court, 4 January 2013).

¹⁵¹ The Court enumerated following decisions in which it discussed foreign regulations and examined their usefulness in constitutionality review at hand: “Decision 13/2000 (V. 12.) AB on the symbols of the State, Decision 57/2001 (XII. 5.) AB on the right of reply, Decision 22/2003 (IV. 28.) AB on euthanasia, Decision 50/2003 (XI. 5.) AB on investigative committees, Decision 6/2007 (II. 27.) AB on the questions 8 related to the prohibition of the publication of opinion poll results, Decision 20/2007 (III. 29.) AB on the radio and TV broadcasting of the sessions of the Parliament, Decision 53/2009 (V. 6.) AB on domestic violence and restraining order”, *ibidem*, para. III.3.4.

¹⁵² *Ibidem*, para. III.3.4.

Rights. Some of the complaints were related to active suffrage, but most of them concerned exercising the passive right to vote. In assessing the complaints, the European Court of Human Rights [...] used a well-elaborated set of criteria, applied in almost all the election cases in the past years.¹⁵³

In the ensuing passages the Court carefully determined the standards used by the ECtHR for the obligation of the State to guarantee the conditions for exercising the right to vote and registration of voters.¹⁵⁴ The Court took these standards into account but underlined that its competence is limited by the scope of the petition.

4.2.3. The Status of the Decisions of Foreign and International Courts

The third example is the case decided in the same year as in the previous example, 2013, involving the constitutionality of the criminalization of the display of totalitarian symbols – ‘five-point red star’.¹⁵⁵ The case is the example of the accommodation of the European standard in spite of the contrary ruling of the Constitutional Court. In the previous decision issued in 2000 the Constitutional Court held that the relevant provisions of the Criminal Code do not restrict the freedom of expression unnecessarily and disproportionately.¹⁵⁶ In the meantime the ECtHR found in several cases that Hungary violated Art. 10 ECHR.¹⁵⁷ The Constitutional Court agreed to accept the ECtHR decision against Hungary as ‘a new circumstance’ under Art. 31(1) of the Act on the Constitutional Court and ultimately found the contested provisions unconstitutional (on this case see in this volume contribution by Csatlós).

The Court observed that the judgments of the ECtHR have a declaratory character; they do not change the existing law. Viewed from this perspective, the findings of the ECtHR may help to clarify the content and the meaning of constitutional rights. The level of the constitutional protection should never fall below the standards provided by the ECHR, as interpreted in the case law of the ECtHR. Nevertheless, a national constitution may provide a higher level of protection than the ECHR. To establish this proper level the Constitutional Court referred to the laws of Slovakia, Germany, Italy, Lithuania, Latvia, Romania, Poland and Ukraine and shortly referred to the decisions of the constitutional courts of Germany, Italy and Poland.¹⁵⁸

¹⁵³ Ibidem, para. III.3.5.2.

¹⁵⁴ Ibidem, III.3.5.3–3.5.4.

¹⁵⁵ Case 4/2013 (II. 21.) AB (Constitutional Court).

¹⁵⁶ Case 14/2000 (V. 12.) AB (Constitutional Court).

¹⁵⁷ The leading case is *Vajnai v Hungary*, App. no. 33629/06 (ECtHR, 8 July 2008).

¹⁵⁸ Cases of the German Federal Constitutional Court: 1 BvR 680/86 (3 April 1990); 1 BvR 204/03 (23 March 2006); 1 BvR 150/03 (1 June 2006); 2 BvR 2202/08 (18 May 2009); case 74/1958 (Italian Constitutional Court, 20 December 1958); case K 11/10 (Polish Constitutional Court, 19 July 2011). It is interesting to note that the Polish Constitutional Court in its judgment on

The reasoning concerning the effect of the judgments of the ECtHR displayed by the Court is in concordance with its previous 2003 ruling on effects of the judgment of the ICJ. The case concerned the complaint of the Member of the Parliament against the Government on the legislative omission: failure to implement the 1992 Convention on Biological Diversity and the ICJ decision in the famous *Gabčíkovo-Nagymaros*¹⁵⁹ in which the ICJ found Hungary in breach of the treaty with Slovakia and obliged both States to negotiate. The Constitutional Court, referring to its constitutional powers, held that the judgment of the ICJ cannot be considered “a generally recognized principle of international law” or compared to the obligations stemming from the treaties that had become Hungarian law. Even though the jurisdiction of the International Court is based on the consent of the States parties to the treaty establishing the Court, its decision is neither a norm, nor a contract, but the resolution of a specific dispute, even if some of its statements are of significant general value. The International Court has no competence to annul domestic laws or to oblige the States to enact new laws even if this is the only way to fulfil the obligation.¹⁶⁰ The Hungarian Court continued that also the Constitutional Court has no competence to force the Parliament or the Government to enact a law or conclude a treaty.

N. Chronowski and E. Csatlós observe that since the decisions of international courts are not recognised in Hungary as sources of international law they can be regarded only as reflecting interpretation of relevant treaties and as such can be taken into account by Hungarian courts.¹⁶¹ The authors invoke the decision of the Constitutional Court mentioned above (988/E/2000) and the decision of the Constitutional Court 18/2004 (V. 25.) AB in which the Court declared that the jurisprudence of the ECtHR “crafts and obliges the Hungarian practice” in a sense that Hungarian courts are bound by interpretation of the Convention, not a judgment as such.¹⁶² They also note that the Act on international treaties (Act L 2005) clearly states that the decisions of the international court rendered against Hungary are binding and shall be executed in Hungary. Such judgments have to be published in the Hungarian Official Journal (*Magyar Közlöny*). But it does not follow that the courts are bound by the judgment. In their opinion, the status of international courts decisions defined by the judgments of the Constitutional Court and the 2005 Act on international treaties determines the way

fascist, communist and totalitarian symbols discussed broadly the judgments of the Hungarian Constitutional Court, the German Constitutional Court and also the ECtHR *Vajnai v Hungary* case (para. 3).

¹⁵⁹ *Gabčíkovo-Nagymaros Project, Hungary v Slovakia* (ICJ, 25 September 1997).

¹⁶⁰ Case 988/E/2000 (Constitutional Court, 7 October 2003) para. 3.3.

¹⁶¹ N. Chronowski, E. Csatlós (n. 115), p. 26.

¹⁶² Similarly, the Constitutional Court in case 61/2011 (VII. 13.) AB emphasised that the principle of *pacta sunt servanda* obliges the Constitutional Court to follow the ECtHR practice and its level of fundamental rights protection even if it is contrary to the previous practice of Hungary.

the domestic courts refer to these decisions. They conclude, citing relevant judgments of Hungarian courts, that ordinary courts frequently cite international courts decisions (mainly the ECtHR), but they rarely really use them in their own argumentation. In many cases, the citation is only decorative or general without invoking *expressis verbis* the relevant judgment or indirect through the judgments of the Constitutional Court (common practice of the Municipal Court of Budapest).¹⁶³ This technique seems to result from the specificity of Hungarian law, which does not allow the courts other than the Constitutional Court to adjudicate on constitutionality of a treaty or on a conflict between international and national law norms. Domestic courts have to refer in such cases to the Constitutional Court.¹⁶⁴

5. Lithuania

5.1. The Legal Setting for Judicial Dialogue

Three other countries under our review: Lithuania, Russia and Ukraine share a common past of the former Soviet republics and the common legal culture. Post-1991 they have started to function in a new environment and have undergone

¹⁶³ N. Chronowski, E. Csatlós (n. 115), pp. 27–28.

¹⁶⁴ The Act on the Constitutional Court of 2011 Section 32(2): “Judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty.” Under Section 42: “(1) If the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in whole or in part – annul the legal regulation that is contrary to the international treaty. (2) If the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in consideration of the circumstances and setting a time-limit – invite the Government or the law-maker to take the necessary measures to resolve the conflict within the time-limit set.” This is the official translation of the Act (<<http://www.mkab.hu/rules/act-on-the-cc>>, access: 25 September 2016), the Hungarian text more clearly shows that the two situations are distinct. Paragraph 1 refers to a conflict between a treaty promulgated by the act of the Parliament and the act of government while para. 2 – to the conflict between a treaty promulgated by governmental decree and the act of government. The Act of 2011 does not answer the question of the same rank sources collisions, i.e. if a treaty is promulgated by the act of Parliament, and the domestic legal act conflicting with it is also the act of Parliament. N. Chronowski, E. Csatlós, Hoffmann T., ‘Country Report Hungary’ para. IV.1; N. Chronowski, E. Csatlós (n. 115) 25, n. 107.

the process of adaptation. Lithuania has experienced the deepest and the fastest changes striving hard to become the member of the Council of Europe and, later, the member of the EU.

The first constitutional Act “On re-establishment of independence” adopted on 11 March 1990 declared Lithuania’s commitment to democracy, human rights and the rule of law by stating that “Lithuania stresses its adherence to universally recognised principles of international law.” In the 1992 Constitution Art. 135 repeated: “in implementing its foreign policy, the Republic of Lithuania shall follow the universally recognized principles and norms of international law.” According to Art. 138 of the Constitution, “international treaties which are ratified by the Seimas of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania.” In 1999 Lithuania adopted the Law “On international treaties”. The Law explains that ratified international treaties and agreements may be directly applicable and in a case of conflict prevail over national law.¹⁶⁵ The Constitutional Court confirmed the primacy of ratified international treaties, stressing, nevertheless, “the legal system of the Republic of Lithuania is based on the fact that no law or other legal act as well as international treaties (in this case the European Convention on Human Rights) may contradict the Constitution.”¹⁶⁶ The 2004 Constitutional Act “On membership in the EU” (which is a part of the Constitution) declared the primacy of EU primary law and secondary law over domestic legislation maintaining the superior position of the Constitution in the determined hierarchy.¹⁶⁷ In 2006

¹⁶⁵ A treaty is ratified by parliament in a form of ratification act (statute) and published later in the official gazette (*Valstybės žinios*). There are delays lasting in some cases for several years. The international treaties and agreements, which were not ratified, but approved by the Government – have a status lower than statutes and higher than governmental decrees and should also be applied directly by the courts. Cf. V. Vaičaitis, ‘Country Report Lithuania’ para. 1.

¹⁶⁶ Case 22/94 (Constitutional Court, 24 January 1995) on the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court added: “This general requirement is directly connected with the relation between the international law and domestic (national) laws of the states in general and with respect to separate problems, specifically to the problem of human rights and freedoms. Nowadays, the system of the so-called parallel adjustment of international and domestic law is perhaps the most widely spread in Europe; it is based on the rule that international treaties are transformed in the legal system of a state (i.e. are incorporated in it). Such a way of the realisation of international treaties, the Convention among them, is established in the Constitution of the Republic of Lithuania.” Cf. 8/95 (Constitutional Court, 17 October 1995).

¹⁶⁷ In case 17/02-24/02-06/03-22/04 (Constitutional Court, 14 March 2006) on the limitation on the rights of ownership in areas of particular value and in forest land the Court recalled its previous case law confirming that the treaties ratified by the Seimas “acquire a force of a law”. “This doctrinal provision cannot be construed as meaning that, purportedly, the Republic of Lithuania may disregard its international treaties, if a different legal regulation is established in its laws or constitutional laws than that established by international treaties. Quite to the contrary, the principle entrenched in the Constitution that the Republic of Lithuania observes international obligations undertaken of its own free will and respects universally

the Constitutional Court summed up that “the observance of international obligations undertaken on its own free will, respect to the universally recognized principles of international law (as well as the principle *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania.”¹⁶⁸

The references to international law are not only in the Constitution but they could be found likewise in some statutes, e.g. Art. 33 of the Law on Courts¹⁶⁹ under the heading “Sources of law for adjudicating cases”, stipulates that the courts are to follow the Constitution, national laws, “international treaties of the Republic of Lithuania”, acts of the Government and other acts, under the condition that they do not contradict with the laws. Article 4(1) of the Administrative Proceedings Act¹⁷⁰ lays down a general rule that the court must not apply any law, which contradicts the Constitution. Article 4(3) of the Law on Administrative Proceedings states that the administrative courts are bound by the judgments and preliminary rulings of the CJEU and obliges them in cases provided for by law to refer to the CJEU for a preliminary ruling on questions of application and validity of EU law. The same Law in Art. 6(6) in cases of lack of relevant legislation authorises the courts to rely on general principles of law (including international law principles) and the principles of fairness and reasonableness.¹⁷¹ The similar technique of specific authorisations for the courts to apply international law, which function aside the Constitution, is practiced in other States as well. However, in Lithuania, Russia and Ukraine the technique is used probably more frequently than in Poland or in the Czech Republic. The reason could be that their courts before 1990s have not applied international law at all and they were used to follow binding guidelines of the higher courts.

After the experience of the Soviet totalitarian regime, Lithuania had to change not only its political or judiciary system, but the judges had also to adjust their legal thinking. The Constitutional Court of Lithuania established in 1993 played

recognised principles of international law implies that in cases when national legal acts (*inter alia*, laws or constitutional laws) establish a legal regulation which competes with that established in an international treaty, then the international treaty should be applied” (para. III.9.2). The Court further added: “Thus, the Constitution consolidates not only the principle that in cases when national legal acts establish the legal regulation which competes with that established in an international treaty, then the international treaty should be applied, but also, in regard of European Union law, establishes *expressis verbis* the collision rule, which consolidates the priority of application of European Union legal acts in the cases where the provisions of the European Union arising out of the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal force is), save the Constitution itself” (para. III.9.4).

¹⁶⁸ Ibidem, para. III.9.1.

¹⁶⁹ The Law on Courts (Lietuvos Respublikos teismų įstatymas), Official Gazette, 1994, no. 46–851; 2002, no. 17–649.

¹⁷⁰ The Law on Administrative Proceedings (Lietuvos Respublikos administracinių bylų teisenos įstatymas), Official Gazette, 1999, no. 13–308; 2000, no. 85–2566.

¹⁷¹ V. Vaičaitis, ‘Country Report Lithuania’ para. 2.

in that process a vital role. It adapted many concepts from other jurisdictions, especially from the ECtHR and the CJEU case law, e.g. to substantiate the principle of the rule of law (*teisinės valstybės principas*), enshrined in the Preamble to the Constitution, the principle of certainty of law, proportionality or the protection of legitimate expectations. In the majority of cases, this was done without invoking any foreign or international decisions (silent dialogue).

For example in the 2002 judgment *on state social insurance pensions* the Constitutional Court found the provisions of Lithuanian law reducing the amount of elderly pensions after so called 1999–2000 “Russian economic crises” to be contrary to the rule of law which encompasses, according the Court, the respect of human rights and the protection of legitimate expectations.¹⁷² The Court made the reference as well to Art. 9 of the International Covenant on Economic, Social, and Cultural Rights as the basis for the right to social security including social insurance.¹⁷³

In the 2010 judgment “*on the right of the persons, who sustained damage due to genocide, to demand that the natural persons who committed this crime compensate such damage*” the Court observed that “[d]uring the occupations of Lithuania carried out both by the USSR and by the Nazi Germany, not only democracy was denied, but also crimes against the residents of an occupied State were committed, *inter alia* genocide was perpetrated. It is obvious that, during the years of the occupation, the persons who had suffered from crimes of genocide perpetrated by the natural persons who were serving the occupation regimes were unable to implement their right to demand that the natural persons who had perpetrated the crimes of genocide compensate the damage.”¹⁷⁴ The Court determined the claimed right referring for support of its argumentation to international law instruments and the concept of the rule of law.¹⁷⁵

The Constitutional Court made also important contribution in clarifying the way the international treaties have to be applied. It distinguished various kinds of treaties and their different legal effects relying strongly on the VCLT. In the ruling “*On the Law ‘On International Treaties of the Republic of Lithuania’*” the Constitutional Court, even the priority over the Constitution, explained referring to the Convention:

The legal system of the Republic of Lithuania is grounded on the fact that any law or other legal act, as well as international treaties of the Republic of Lithuania, must not contradict the Constitution, because Paragraph 1 of Article 7 of the Constitution prescribes: “Any law or other statute which contradicts the Constitution shall be invalid.” This constitutional provision of itself cannot invalidate a law or an international treaty but it requires that

¹⁷² Case 41/2000 (Constitutional Court, 25 November 2002) para. II.2.1.

¹⁷³ *Ibidem*, para. II.1.4. See also e.g. for the concept of democracy case 19/94 (Constitutional Court, 20 April 1995).

¹⁷⁴ Case 09/2008 (Constitutional Court, 29 November 2010) para. III.7.

¹⁷⁵ *Ibidem*, para. III.5.

the provisions thereof would not contradict the provisions of the Constitution. Otherwise the Republic of Lithuania would not be able to ensure legal defence of the rights of the parties of international treaties, which arise from those treaties, and this in its turn would hinder from fulfilling obligations according to the concluded international treaties. This would contradict the 1969 Vienna Convention on the Law of International Treaty, which was undertaken to respect and execute by the Republic of Lithuania according to the 29 January 1991 Declaration of the Supreme Council “On the Obligations of the Republic of Lithuania Arising out of International Treaties in the Spheres of Diplomatic and Consular Relations.” At the same time the most important principles of said Convention would be also violated, namely: *pacta sunt servanda*, i.e., “every treaty is binding to be performed” (Article 26 of the Convention) and “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (Article 27 of the Convention). It is important therefore that consecutive order of concluding, implementing and terminating international treaties would be established and that it would be in conformity with the provisions of the Constitution concerning international treaties as well as principles and norms of this sphere of international law.¹⁷⁶

In the same ruling the Constitutional Court made a distinction between the ratified and the not ratified treaties. According to the Court, only the ratified treaties have the status of a parliamentary statute and they have to comply with the Constitution, while the non-ratified treaties have to comply with laws and the Constitution.¹⁷⁷ The Court defined also the notion of a treaty (relying on the VCLT) to distinguish treaties and other agreements of ministries or institutions of the Government, which are not governed by international law.¹⁷⁸

5.2. Deference to International and Foreign Courts Decisions

There are many judgments of all kinds of courts, the ordinary courts, the administrative courts or the Constitutional Court applying international treaties directly or for the purpose of interpretation of domestic law.¹⁷⁹ But the references to the decisions of the courts of other jurisdictions are not frequent and in majority of cases they concern case law of the ECtHR¹⁸⁰ and the CJEU.

¹⁷⁶ Case 8/95 (Constitutional Court, 17 October 1995), English translation <<http://www.lrkt.lt/en/court-acts/search/170/ta983/content>> (access: 25 September 2016).

¹⁷⁷ Ibidem, para. II.3.

¹⁷⁸ Ibidem, para. II.4.

¹⁷⁹ See e.g. cases reproduced in Republic of Lithuania Materials on International Law contained in Baltic Yearbook of International Law volumes 6/2006, 449–478; 7/2007, 453–473; 8/2008, 347–384; 9/2009, 295–349; 10/2010, 457–506; 11/2011, 517–598; 12/2012, 377–462.

¹⁸⁰ See e.g. case 1/2013 (Constitutional Court, 26 February 2013) on the prohibition on correspondence between convicts.

5.2.1. The *Judges Salaries Case*

In the judgment of 2001 concerning the reduction of the salaries of judges the Constitutional Court made an inquiry into international documents on the independence of judiciary (i.a. UN GA resolution of 13 December 1985 which adopted the Basic Principles on the Independence of the Judiciary, the Council of Europe Recommendation on the Independence, Efficiency and Role of Judges of 13 October 1994, the European Charter on the Statute for Judges of 10 July 1998)¹⁸¹ and the decisions of the constitutional courts of democratic States dealing with the salaries of the judges as an element of their independence. The Court observed:

It needs to be noted that the principle that the salary of the judge during his continuance in office may not be diminished was entrenched as far back as in the 1787 USA Constitution (Section 1 of Article III). Later on it was taken over by constitutional law of other democratic countries. In some countries it is directly stated in the texts of basic laws, while in others it is considered an integral element of the principle of independence of judges and courts established in the Constitution. In the constitutional doctrine various aspects of the element of the principle of independence of judges and courts have been disclosed. For instance, in its decision of 15 September 1999, the Constitutional Court of the Czech Republic emphasised the inalienable right of the judge to undiminished salary and the prohibition against the categorisation of judges as public servants. In its decision of 17 September 1997, the Supreme Court of Canada noted that it is impermissible to diminish salaries of judges in an attempt to evade the budget deficit. In the decision of 4 October 2000 of the Constitutional Tribunal in Poland it is held that the salaries of judges must be especially protected against unfavourable fluctuations in case of difficulties in the area of state budget, etc.¹⁸²

The ruling is certainly one of the examples of the concurring dialogue.¹⁸³

5.2.2. The Concept of Family in State Policy Case

In the 2011 judgment on the State family policy concept the Constitutional Court dealt with a sensitive issue of the modern notion of family. To construct the constitutional conception of family the Constitutional Court relied *inter alia* on international law commitments of Lithuania, especially on the ECHR. The Court analysed *Marckx v Belgium*, *Kroon and others v The Netherlands*,

¹⁸¹ Case 13/2000-14/2000-20/2000-21/2000-22/2000-25/2000-31/2000-35/2000-39/2000-8/01-31/01 (Constitutional Court, 12 July 2001) on the reduction of judges' salaries, para. III.4.3.

¹⁸² *Ibidem*, para. III.4.5.

¹⁸³ The Constitutional Court like e.g. the Hungarian Court (cf. n. 139) referred to foreign decisions providing only dates, in this case the dates are correct. The Court referred to case *Provincial Judges Reference* (Supreme Court of Canada, 17 September 1997) 3 S.C.R.; case P/8/0 (Polish Constitutional Court, 4 October 2000).

*Keegan v Ireland, El Boujaïdi v France*¹⁸⁴ to conclude that “the concept of family analysed in the jurisprudence of the ECHR is not confined to the notion of the traditional family founded on the basis of marriage. The ECHR has held more than once that other types of the relationship of living together are also protected under Art. 8 of the Convention, as those, which are characterised by a permanence of the relationship between persons, the character of assumed obligations, common children, etc. It also needs to be noted that the ECHR jurisprudence does not provide any comprehensive list of the criteria defining the family.”¹⁸⁵ Moreover, the judgment contains a thorough inquiry into the decisions of the constitutional courts of the Czech Republic, Slovenia, Croatia, Hungary, France, and of Germany. The Constitutional Court observed that the practice of constitutional courts is not uniform, “the family is defined by taking into consideration the plurality of forms of family life prevailing in society at a particular period of time, as well as the demographic, economic and social changes in the life of society.”¹⁸⁶ On these basis the Constitutional Court determined the constitutional standard. It found that the concept of family under Lithuanian Constitution may not be reduced to “such notions of family under which only a man and a woman who are married or were married, as well as their children (adopted children), are regarded as a family” but it has to extend to “other family relations, *inter alia* those of the life of a man and a woman, who are not and were not married, as well as their children (adopted children) living together, that are based on the permanent bonds of emotional affection, reciprocal understanding, responsibility, respect, shared upbringing of the children and similar ones, as well as on the voluntary determination to take on certain rights and responsibilities, which are characteristic of the family as a constitutional institute.”¹⁸⁷

¹⁸⁴ *Marckx v Belgium*, App. no. 6833/74 (ECtHR, 13 June 1979), *Kroon and others v The Netherlands*, App. no. 18535/91 (ECtHR, 27 October 1994), *Keegan v Ireland*, App. no. 16969/90 (ECtHR, 26 May 1994), *El Boujaïdi v France*, App. no. 25613//94 (ECtHR, 26 September 1997).

¹⁸⁵ Case 21/2008 (Constitutional Court, 28 September 2011), English translation <http://www.lrkt.lt/data/public/uploads/2015/04/2011-09-28_n_ruling.pdf> (access: 25 September 2016), para. III.2.

¹⁸⁶ *Ibidem*, para. III.3.

¹⁸⁷ *Ibidem*, para. IV.14. In respect of the notion of family it is interesting to compare case *re Kostroma Region Law 987-AПГ 12-2* (Supreme Court, 7 November 2012) in which the Russian Court referred only to Art. 16(3) of the Universal Declaration of Human Rights and treaties that require to protect the family as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children (e.g., Art. 10(1) of the International Covenant on Economic, Social and Cultural Rights, preamble to the UN Convention on the Rights of the Child of 1989). It did not invoke any decisions of foreign or international courts noticing that pursuant to federal law, in accordance with the national traditions and subject to international law, the family values do not include homosexual relations, bisexuality and transgender. Therefore, by adopting the law in question the Kostroma region did not impose unreasonable restrictions on rights but acted within the scope of its competence as the disputed law prohibits the propaganda of homosexuality, bisexuality,

The decision of the Constitutional Court is largely grounded in domestic law. The references to international instruments or foreign jurisdictions have subsidiary character with the sole purpose, as it seems, to strengthen and support the findings of the Court.

5.2.3. The *Paksas* Case – the Status of the Decisions of Foreign and International Courts and the Dissenting Dialogue

In Lithuanian practice it is also possible to find the judgment opposing the ruling of the international court. The *Paksas* case is well known and studied elsewhere in this volume (see Skomerska-Muchowska). Therefore, in this introductory section we confine ourselves to a brief account.

In 2012 the Constitutional Court had an occasion to react to the 2011 ECtHR *Paksas v Lithuania*¹⁸⁸ judgment which evaluated Lithuanian law differently than it had been previously done by the Constitutional Court.¹⁸⁹ In 2004 the Constitutional Court held as constitutional the provisions of Lithuanian law prohibiting a person who had been removed from the office of the President for a gross violation of the Constitution or a breach of the oath to be again elected the President of the Republic or a member of the Seimas or hold an office for which it was necessary to take an oath.¹⁹⁰

Dealing with President Paksas, who had been removed from the office as a result of the impeachment proceedings, the ECtHR, taking account of the permanent and irreversible prohibition for the applicant to stand in elections to the parliament, recognised that this restriction was disproportionate and that Art. 3 of Protocol No. 1 of the Convention was violated.

transgender as relations negating the family values and imposes administrative liability for the propaganda thereof within the constituent entity of the Russian Federation, which is in compliance with the applicable federal laws.

¹⁸⁸ *Paksas v Lithuania*, App. no. 34932/04 (ECtHR, 6 January 2011).

¹⁸⁹ *Paksas* 8/2012 (Constitutional Court, 5 September 2012) on the prohibition for a person, who was removed from office under procedure for impeachment proceedings, to stand in elections for a Member of the Seimas, <<http://www.lrkt.lt/en/court-acts/search/170/ta1055/content>> (access: 24 September 2016).

¹⁹⁰ Case 24/04 (Constitutional Court, 25 May 2004) para. III.6: “The Constitution does not provide that, after a certain time has elapsed, a president whose actions have been recognised by the Constitutional Court as having grossly violated the Constitution, and who has been found to have breached the oath and has been removed from office by the Seimas [on that account] [...] may [subsequently] be treated as though he had not breached the oath or committed a gross violation of the Constitution [...]. [A person] [...] who has been removed from office by the Seimas, the body representing the people, will always remain someone who has breached his oath to the nation and grossly violated the Constitution, and who has been dismissed as President for those reasons [...]. [A person removed from the office of President] may never again [...] give an oath to the nation, as there would always exist a reasonable doubt [...] as to its reliability [...].” English translation: The Constitutional Court of the Republic of Lithuania on the Law on Presidential Elections, <<http://www.lrkt.lt/en/court-acts/search/170/ta1269/content>> (access: 24 September 2016).

In 2012 the Constitutional Court reviewed the constitutionality of the amendments to Lithuanian law implementing the ECtHR judgment. The Constitutional Court confirmed the doctrine in regard to the impeachment procedure and the consequences of the breach of oath. The Court insisted that it cannot change the doctrine firmly grounded in the Constitution on the basis of the ECtHR judgment.¹⁹¹ The doctrine could be changed only with an amendment of the Constitution.¹⁹² The Constitutional Court did not question the arguments of the ECtHR but discussed rather the potential legal consequences of the ECtHR judgment. The Court pointed first to the different roles of both Courts. The Constitutional Court is the guardian of the Constitution while the ECtHR is responsible for the effective implementation of the ECHR. However, the role of the ECtHR is subsidiary to that of a State party to the ECHR, which is primarily obliged to apply the Convention. The obligation is the one of result, so a State may choose the way of the implementation of the Convention or the judgment of the ECtHR taking into account its national law, and especially the Constitution. In a situation at hand, the Constitutional Court is obliged to respect the Constitution; therefore, the incompatibility between the Lithuanian law and the ECHR may be removed only by the adoption of the corresponding amendment(s) to the Constitution.¹⁹³ Despite several efforts, the Constitution has not yet been amended.¹⁹⁴

Paksas is certainly a political case and so a unique one as Judge Costa rightly emphasised in a partly dissenting opinion annexed to the ECtHR decision. Judge Costa found the ECtHR judgment ‘moderate and balanced’ and shared the conviction of the majority that the lifelong disqualification from standing for election

¹⁹¹ *Paksas* 8/2012 (Constitutional Court, 5 September 2012) para. III.5: “Consequently, in itself the judgment of the European Court of Human Rights may not serve as the constitutional basis for reinterpretation (correction) of the official constitutional doctrine (provisions thereof) if such reinterpretation, in the absence of corresponding amendments to the Constitution, changed the overall constitutional regulation (*inter alia* the integrity of the constitutional institutes – impeachment, the oath and electoral right) in essence, also if it disturbed the system of the values entrenched in the Constitution and diminished the guarantees of protection of the superiority of the Constitution in the legal system.” English translation available at <<http://www.lrkt.lt/en/court-acts/search/170/ta1055/content>> (access: 24 September 2016).

¹⁹² *Ibidem*, para. III.6: “In the context of the constitutional justice case at issue it needs to be noted that from Para. 1 of Art. 135 of the Constitution a duty arises for the Republic of Lithuania to remove the aforesaid incompatibility of the provisions of Art. 3 of Protocol No. 1 of the Convention with the Constitution, *inter alia* the provisions of Para. 2 of Art. 59 and Article 74 thereof. While taking account of the fact that, as mentioned, the legal system of Lithuania is grounded upon the principle of superiority of the Constitution, the adoption of the corresponding amendment(s) to the Constitution is the only way to remove this incompatibility.”

¹⁹³ *Ibidem*, para. III.2.

¹⁹⁴ See the Council of Europe information on the monitoring of the execution of judgments <

is excessive and unacceptable. However, he emphasised that the impeachment proceedings are rarely instituted not only in Europe but elsewhere in the world and are hardly ever carried through to completion. The allegations against President Pakšas were not trivial and he was removed from the office by the Parliament who followed the ruling of the Constitutional Court. “In such a specific and delicate field as electoral law, and in a case involving the complex relations between the different public authorities, subject to the ultimate scrutiny of the electorate, and thus the sovereign people” Judge Costa advocated restraint noting that the State has a wide discretion, and therefore “the legitimate European supervision in this case should be restricted or limited.”¹⁹⁵

6. The Russian Federation

6.1. The Legal Setting for Judicial Dialogue

Prior to the adoption of the Russian Constitution in 1993 both in Russian theory and in practice the issue of the relationship between international and national legal systems had been neglected.¹⁹⁶ International law was not taken into account by national law or it was treated similarly to national law without considering its peculiarity.¹⁹⁷ The idea of priority of national law dominated. It was understood that “[t]he national legal system is as sovereign as the State because on the territory of the country without the sanction (in one form or another) of national State power norms cannot operate created besides by the law-creation agencies thereof.”¹⁹⁸ Against this background, Art. 15(4) of the 1993 Russian

¹⁹⁵ *Paksas v Lithuania*, App. no. 34932/04 (ECtHR, 6 January 2011), the partly dissenting opinion of Judge Costa joined by Judges Tsotsoria and Baka, para. 12.

¹⁹⁶ Cf. L. Mälksoo, *Theory of International Law in Contemporary Russia* (Oxford University Press 2015), p. 111. On the specific attitude and its reasons of the Russian scholarship towards foreign and international courts practice see: L. Mälksoo, *Russian Approaches to International Law* (Oxford University Press 2015), p. 77. For a general overview see R. Tkatoва, ‘Russian spirit, soviet heritage and Western Temptation: “UN-‘Peaceful Coexistence” in Russia’s International Doctrine and Practice’ (2012), p. 12, *Baltic Yearbook of International Law*, pp. 1-28; S.Yu. Marochkin, ‘Contemporary Approaches of the Russian Doctrine to International Law: Identical to Western Ones?’ (2012) 12 *Baltic Yearbook of International Law*, pp. 29–56. L. Mälksoo, ‘International Law in Russian Textbooks: What’s in the Doctrinal Pluralism?’ (2009) 1 *Goettingen Journal of International Law*, pp. 279–290.

¹⁹⁷ N. Babai, V.S. Timoshenko, ‘General Principles and Norm of International Law in the Russian Legal System’ (2007) 1 *Russian Law: Theory and Practice*, p. 78, see also, pp. 77–82.

¹⁹⁸ A.M. Vasilev, ‘On the Systems of Soviet and International Law’ (1985) 1 *Sovietskoje gosudarstvo i pravo*, p. 69, cited by N. Babai, V.S. Timoshenko, ‘General Principles and Norm of International Law in the Russian Legal System’ (2007) 1 *Russian Law: Theory and Practice*, p. 77.

Constitution declaring priority of international law marks an important change.¹⁹⁹ The opening of the Constitution to international law was brought about not without a strong conceptual debate in Russian scholarship and opposition from scholars, politicians and judges.²⁰⁰ The majority view is that the provision provides the grounds for the application of international law in domestic sphere. It binds equally in law-creation as in law-application. Since the provision is located in the first Chapter of the Constitution, which is under more stringent conditions for amendment than the other provisions of the Constitution, it is perceived as one of the fundamental principles of the Russian constitutional legal order.²⁰¹ The provision reads:

¹⁹⁹ The Constitution of 1977 contained Art. 29 which i.a. expressed the intention to honour obligations stemming from generally recognized principles and norms of international law in good faith. The provision was understood only as enumerating the principles that the USSR intended to follow in its foreign policy. Cf. L. Mälksoo, *Theory of International Law in Contemporary Russia* (Oxford University Press 2015), p. 112. On general overview of constitutional bases for application of international law see W.E. Butler, 'Russian Federation', [in:] D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement, A Comparative Study* (Cambridge University Press 2014), pp. 410–447; S.Yu. Marochkin, 'International Law in the Courts of the Russian Federation: Practice of Application' (2007) 6(2) *Chinese Journal of International Law*, pp. 239–344.

²⁰⁰ L. See Mälksoo, *Theory of International Law in Contemporary Russia* (Oxford University Press 2015), p. 111. The relationship between international and Russia's domestic law is one of the main topics of debates in the post-Soviet Russian theory of international law closely linked to the question whether individuals can be subjects of international law. The author concludes that Russian theory of international law on such issues tends to have different accents and positions than what have become mainstream in the post-World War II 'liberal' west.

²⁰¹ Cf. A. Abashidze, 'The Relationship Between International Law and Municipal Law: Significance of Monism and Dualism Concepts' *Basic Concepts of Public International Law, Monism & Dualism*, Faculty of Law of Belgrade University (May 2013), p. 25. The author classifies the Russian system as monistic. However, the approach taken by the Constitutional Court in *Markin* case (n. 228) is rather dualistic. See case 27-П/2013 (Constitutional Court, 6 December 2013). Cf. O.V. Belianskaia, O.A. Pugina., 'Implementation of International Legal Norms in Russian Legislation' (2006) 1 *Russian Law: Theory and Practice*, pp. 82–89. For Russian scholarly discussion on the issue see L. Mälksoo, *Theory of International Law in Contemporary Russia* (Oxford University Press 2015), p. 112. The author observes i.a.: "Russia's constitution may be monist but conservative scholars continue to interpret the position of international law in Russia in a dualist fashion. Moreover, the more the Russian government has run into conflicts with norms of international law, the more audible has become the voice in the country's politics that demands amendment of the constitutional provision stipulating the priority of international law over domestic law. As the deputy Yevgeny Alekseevich Fedorov (b. 1963) from the governing 'United Russia' fraction argues populistically, currently the priority of 'international law' actually means the priority of 'American law'" *Ibidem*, p. 122. For general overview see Y. Tikhomirov, 'Russia', [in:] D.L. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011), pp. 517–525.

Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.²⁰²

This principle is elaborated in the Federal Law “On International Treaties of the Russian Federation” of 1995 which concerns the conclusion, implementation and termination of international treaties in Russia. It was repeated almost in all codes and Federal Laws.²⁰³

Additionally, the Constitution recognizes the special status of human rights norms stating in Art. 17(1) that: “In the Russian Federation recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally recognized principles and norms of international law and according to the present Constitution.” Moreover, the Russian courts recognized the obligation to apply the ECtHR case law (legal positions of the ECtHR).²⁰⁴

²⁰² Translation available at <http://archive.kremlin.ru/eng/articles/ConstEng1.shtml> (access: 20 June 2016). There is no single official translation of the Constitution of the Russian Federation in English.

²⁰³ E.g. E. Ivanov, A. Belyachenkova, ‘Country Report Russian Federation’ para. 1.2: “Pursuant to Article 3 of the Federal Constitutional Law No. 1-FKZ ‘On the Judicial System of the Russian Federation’ dated 31 December 1996, the integrity of the judicial system of the Russian Federation is ensured through the application by all courts of the generally recognised principles and rules of international law and the international treaties of the Russian Federation. As set out in Article 11.4 of the Russian Code of Civil Procedure, where an international treaty of the Russian Federation provides for the rules other than those provided for by law, the court in considering a civil case shall apply the rules of the international treaty. A similar provision is contained in the Civil Code. In criminal law, the rules of international treaties that require states to consider certain acts as criminal ones shall not be applied directly. In Russia, the crimes and the punishment for criminal acts are determined solely by the Criminal Code of the Russian Federation (Russian Criminal Code). New components of crime shall be included in the Russian Criminal Code based on the international treaties. Certain articles of the Russian Criminal Code contain references to the international treaties. For instance, Article 356 of the Russian Criminal Code establishes criminal liability for using the prohibited means and methods of warfare. The concept of the ‘prohibited means and methods of warfare’ is defined in the Geneva Conventions. Pursuant to Article 1.3 of the Russian Code of Criminal Procedure ‘the generally recognised principles and rules of international law and the international treaties of the Russian Federation shall form an integral part of the criminal procedure laws and regulations of the Russian Federation. If an international treaty of the Russian Federation sets out the rules other than those provided for by this Code, the rules of the international treaty shall apply’. Finally, as set out in Article 1.1(2) of the Russian Code of Administrative Offences, the Code is based on the generally recognised principles and rules of international law, and sets out the prevailing nature of the rules of international treaties over the provisions of law on administrative offences.”

²⁰⁴ See the Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 5 (10 October 2003) “On Application of the Universally Recognized Principles and Norms of International Law and International Treaties of the Russian Federation by the Courts of General

From the other provisions of the Constitution it is possible to infer that treaties do not prevail over the Constitution (Art. 15(1)²⁰⁵ and Art. 125(6)²⁰⁶). Some further restrictions concerning the application of the different kinds of treaties were elaborated in statutes and by the practice.²⁰⁷

It is important to note that the Russian Constitutional Court as early as in 1995 based the priority of international norms on the principle of the rule of law. The Court held that “In accordance with the principles of the rule of law State consolidated in the Constitution of the Russian Federation, the agencies of power are bound in their activity by both municipal and international law. Generally-recognized principles and norms of international law and international treaties should be complied with in good faith, including by means of taking them into account by municipal legislation.”²⁰⁸ In 1997 the same Court

Jurisdiction”, paras 10–15, the Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 23 (19 December 2003) para. 4, the Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 3 (24 February 2005) “On Judicial Practice in Cases of Protection of Honour and Dignity and Business Reputation of Citizens and Legal Entities”, the Preamble and paras 1 and 9. Cf. Vorontsova I.V., ‘Problems of International Law Interpretation (on the example of the Convention on the Protection of Human Rights and Fundamental Freedoms) in the lights of the ECHR judgment in the case of K. Markin’ (2015) 1 Russian Law: Theory and Practice 100. On the attitude of judges and of litigators towards the ECHR see A. Burkov, ‘Motivation for Direct Application of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts’ (2012) 12 *Baltic Yearbook of International Law*, pp. 229–247.

²⁰⁵ Article 15(1) of the Constitution provides for the primacy of the Constitution, it reads: “The Constitution of the Russian Federation shall have supreme legal force, direct effect and shall be applicable on the entire territory of the Russian Federation. Laws and other legal acts, which are adopted in the Russian Federation, must not contradict the Constitution of the Russian Federation.”

²⁰⁶ Art. 125(6) of the Constitution stipulates: “Acts or certain provisions thereof, which are recognized as unconstitutional, shall lose force; international treaties of the Russian Federation, which do not correspond to the Constitution of the Russian Federation, shall not be implemented or used.”

²⁰⁷ The Supreme Court stated in the Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 8 (31 October 1995) para. 5: “The court shall not apply the governing law in determining the case where an international treaty of the Russian Federation which has consented to be bound by the treaty by adopting the federal law and for which the treaty is in force sets out the rules other than those provided for by law. In these cases, the rules of the international treaty of the Russian Federation shall apply.” Paragraph 8 of the Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 5 (10 October 2003) explains the hierarchy. It states that the treaty ratified upon the consent in the form of a federal law, has priority of application over the laws of the Russian Federation. The treaty for which the consent was given in a form other than a federal law, shall prevail over the subordinate legislation and regulations issued by the State authority concluding a treaty.

²⁰⁸ Decree of the Constitutional Court (31 July 1995) cited by A.N. Babai, V.S. Timoshenko, ‘General Principles and Norm of International Law in the Russian Legal System’ (2007) 1 *Russian Law: Theory and Practice* 78. In the same token see e.g. O.A. Ishchenko, E.G. Ishchenko,

ruled that the Constitutional Court of the Russian Federation “is not entitled to either fill the gaps in the legal regulation or solve the problem of whether the international legal act can be applied to a specific case if any inconsistency is found in the domestic law – it is the responsibility of courts of general jurisdiction.”²⁰⁹

In Article 7 of the Russian Civil Code it is noted that international treaties apply directly.²¹⁰ The meaning of this term is developed in the Federal Law on International Treaties by reference to the concept of self-executing and non-self-executing treaties. A self-executing treaty does not require any clarification or implementation in internal law and it is thus directly applicable. Article 5 of the Federal Law on International Treaties specifies that only provisions of officially published treaties may be applied directly.²¹¹ Article 3 of the Criminal Code of the Russian Federation excludes direct applicability of international treaties in certain aspects of criminal law. This does not mean that the international treaties are not applied in other spheres of criminal law and criminal proceedings. The provision reads: “The criminality of an act, and also the punishability thereof and other criminal consequences, shall be determined only by the present Code.”

To ease the application of international law by general courts, in concordance with the Russian tradition, the plenary of the Supreme Court enacted the detailed Ruling no. 5 of 10 October 2003 (amended in 2013) on application of international law.²¹² The Ruling is addressed to the ordinary courts and its main objective is to ensure the correct and uniform application of international law by the courts. The resolution of the Supreme Court interprets relevant legislation and is binding for lower courts. It is a general interpretative ruling with obvious significance for the development of the courts practice.²¹³

‘Implementation of International Law in Russian Legislation’ (2008) 2 Russian Law: Theory and Practice 196.

²⁰⁹ Case 87-O (Constitutional Court, 3 July 1997) “On Refusal to Accept the Request of the Moscow Regional Court, Judge N.V. Grigorieva for Consideration.” Cited by Vorontsova I.V. (n. 205).

²¹⁰ O.A. Ishchenko and E.G. Ishchenko (‘Implementation of International Law in Russian Legislation’ (2008) 2 Russian Law: Theory and Practice 197) argue that the term ‘directly applicable’ does not mean direct operation of international law, but incorporation of international treaties into the Russian legal system.

²¹¹ *Ibidem*, 197.

²¹² The Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 5 “On the Application of Universally Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction” (10 October 2003) *amended by* the Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 4 (5 March 2013), available at <<http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801>> (access: 26 September 2016).

²¹³ It was referred to and followed in other resolutions of the Supreme Court on implementation of international law in specific fields, e.g. in cases concerning maritime law, labour law, honour and dignity of citizens, drug substances, adoption. The Supreme Arbitrazh Court

The Ruling no. 5 refers to Art. 15(4) of the Constitution and Federal Law No. 101-FZ of 15 July 1995 “On International Treaties of the Russian Federation” emphasizing that they confirm the commitment of the Russian Federation to the observance of treaties and customary norms, i.a. the principle of fulfilment of international obligations in good faith. It guides the courts and explains the terms “universally recognized principles and norms of international law”, “international treaties”, and requirements for direct application of a treaty norm²¹⁴ such as publication, entry into force, need of implementing measures etc.,²¹⁵ the specificity of the application of international treaties in criminal cases, diplomatic immunities, the scope of primacy of international norms, the interpretation of a treaty on the basis of Articles 31–33 of the VCLT, and the obligations of the Russian judiciary stemming from the ECHR.²¹⁶

followed the same pattern. The Court enacted several ‘circulars’ to render recommendations for lower Arbitrazh courts and general interpretative resolution “On the Implementation of the International Treaties of the Russian Federation Referring to the Questions of Arbitration Procedure” (11 June 1999). See S.Y. Marochkin, ‘International Law in the Courts of the Russian Federation: Practice of Application’ (2007) 6(2) Chinese Journal of International Law, pp. 331–332.

²¹⁴ The Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 5 (n. 213) para. 3: “When considering civil, criminal or administrative cases, a court should directly apply such international treaties of the Russian Federation that entered into force and became binding for the Russian Federation, if their provisions do not require the adoption of national acts for their application and are capable of giving rise to rights and obligations for the subjects of national law (Part 4 of Article 15 of the Constitution of the Russian Federation, Parts 1 and 3 of Article 5 of Federal Law «On International Treaties of the Russian Federation», Part 2 of Article 7 of the Civil Code of the Russian Federation).”

²¹⁵ These rules are quite detailed: “5. International treaties that have a direct and immediate effect in the legal system of the Russian Federation can be applied by the courts (including military courts) in the consideration of civil, criminal and administrative cases, in particular: in the consideration of civil cases, if an international treaty of the Russian Federation stipulates other rules than the law of the Russian Federation, regulating the relations that are the subject matter of proceedings; in the consideration of civil and criminal cases, if an international treaty of the Russian Federation stipulates other rules of judicial proceedings than the civil procedural or criminal procedural law of the Russian Federation; in the consideration of civil and criminal cases, if an international treaty of the Russian Federation regulates the relations, that are the subject matter of proceedings, including relations with foreign persons (e.g. in the consideration of cases listed in Article 402 of the Civil Procedure Code of the Russian Federation, motions for the enforcement of foreign court decisions, appeals against decisions on the extradition of individuals accused of committing a crime or convicted by a foreign court); in the consideration of cases on administrative offences, if an international treaty of the Russian Federation stipulates other rules than those stipulated in the legislation on administrative offences”, *ibidem*.

²¹⁶ See also the Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 21 “On the Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General

It must be noted that the Ruling no. 5 in its 2003 version defined the term “universally recognized principles and norms of international law” in Art. 15(4) of the Constitution as amounting to *jus cogens* norms. It emphasised that the generally recognised principles of international law should be understood as the basic imperative norms of international law, accepted and recognized by the international community of States as a whole, deviation from which is inadmissible.²¹⁷ Such norms include, but are not limited to, the principle of universal respect for human rights and fulfilment in good faith of obligations under international law. Other *jus cogens* norms may be found in particular in documents of the United Nations and its specialised agencies.²¹⁸

As the practice evolved, the concept appears now broader as encompassing the norms of international customary law.²¹⁹ For example, such conclusion may be drawn from the 2015 judgment in *Inpredserwis v The Consulate General of the Republic of Poland*²²⁰ where the St. Petersburg Arbitrazh Court adjudicated on the execution of a rent for a house hosting the seat of the Consulate and the request to leave the building. The Court recognized that the action against the Consulate constitutes the action against the State and consequently, the norms on State immunity apply. The Arbitrazh Court noticed that, however, according to general rules of Russian law, Poland is entitled to immunity from Russian jurisdiction, but since under Art. 15(4) of the Constitution, generally recognised rules and principles of international law and treaties of the Russian Federation are the part of the Russian legal system the Court has to apply customary international law.²²¹ The Court referred to the rules on

Jurisdiction” (27 June 2013), <<http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=9155>> (access: 25 September 2016).

²¹⁷ *Ibidem*, para. 1. Cf. O.A. Ishchenko, E.G. Ishchenko, ‘Implementation of International Law in Russian Legislation’ (2008) 2 Russian Law: Theory and Practice 200.

²¹⁸ According to para 16 of the Ruling: “[i]f courts encounter difficulties when interpreting the universally recognized principles and norms of international law or international treaties of the Russian Federation, it is recommended to them to use the acts and decisions of international organizations, including the United Nations and its specialized agencies, as well as to contact the Legal Department of the Ministry of Foreign Affairs of the Russian Federation and the Ministry of Justice of the Russian Federation (e.g. in order to clarify any issues regarding the duration of an international treaty, the list of states participating in the treaty, the international practice of its application).”

²¹⁹ Cf. S.Yu. Marochkin, V.A. Popov, ‘International Humanitarian and Human Rights Law in Russian Courts’ (2011) 2 International Humanitarian Legal Studies, pp. 216–249. The authors observed: “In spite of the fact that the Supreme Court did not word the definition ‘the generally recognized principles and norms’ quite correctly, it offers guidelines to lower courts [...]”, p. 230. See the literature and Russian case law cited therein.

²²⁰ Case A56-48129/2014 (3783/2015-44531(1)) (St. Petersburg Arbitrazh Court, 9 February 2015). The courts of arbitration deal in Russia with business and commercial matters.

²²¹ On the approach of the Russian academia to the doctrine of absolute or restrictive State immunity see: L. Mälksoo, *Theory of International Law in Contemporary Russia* (Oxford University Press 2015), pp. 130–131.

restrictive State immunity from jurisdiction in respect of commercial transaction enshrined in Art. 4 of the 1972 European Convention on State Immunity, Art. 2(1)(c) and Art. 10 of the 1991 ILC Draft Articles, and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (Art. 2(1)(c) and Art. 10) as well as the ECtHR decisions in *Oleynikov v Russia*, *Cudak v Lithuania*, *Sabeh El Leil v France* and *Wallishauser v Austria*. The latter were invoked to argue that the ILC Draft Articles now reflected in the 2004 UN Convention are applicable as customary international law even if the concerned State has not ratified the Convention, as long as this State had not protested against the content of the Convention. The case certainly is an interesting follow-up to the ECtHR case law illustrating the use of the same method of determination of customary law as employed by the ECtHR decisions. But what is curious about the case is the way it classifies as a commercial transaction the rent of a public building administered by a State-owned company specifically established for the diplomatic and consular service and performed on the basis of the international agreement with Poland as a part of a broader deal.²²²

Despite of the disappointing practice, there are certainly good legal basis for the application of international law in Russian legal system. But as it appears much depends on judges²²³ and on the general attitude of the broader public, including scholars²²⁴ and politicians. There is still the opposition in all those groups, growing, as it seems, with the number of decisions passed by the ECtHR against Russia where the violation of the ECHR is found.²²⁵

²²² See e.g. 'Rosyjski sąd zezwolił na udział komorników w eksmisji polskiego konsulatu' (Gazeta Wyborcza, 17 March 2015), <http://wyborcza.pl/1,75477,17582164,Rosyjski_sad_zezwolil_na_udzial_komornikow_w_eksmisji.html#ixzz3UezjHrrn> (access: 22 July 2016). On the basis of the same agreement the Russian Federation may use for diplomatic purposes several buildings situated mainly in Warsaw.

²²³ For example, the application of the ECHR by Russian courts in the period of 1998–2004 was very weak. Cf. A.L. Burkov, 'Implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts' (2006) 1 *Russian Law: Theory and Practice*, pp. 68–76. The author found that overall both the Supreme Court (there were 3,911 cases under scrutiny) and the Arbitrazh courts (38,068 cases) in practice have not invoked the ECHR at all (71). Out of the total of the Arbitrazh courts decisions, only 23 mentioned the ECHR, of which only 8 contained the specific reference to an Article of the Convention (there were no references to the ECtHR case law). In other 15 cases the courts only briefly cited the arguments of a party based on the ECHR. The worst examples, according to Burkov, were when a court stated that a particular act was not contrary to the ECHR as a whole (70–71); see also A. Burkov, 'Motivation for Direct Application of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts' (2012), p. 12, *Y.B. Baltic Int'l L.* pp. 229–247.

²²⁴ There is still quite a number of scholars (the sovereigntist school) hostile towards the idea of direct application of international law. Cf. L. Mälksoo, *Theory of International Law in Contemporary Russia* (Oxford University Press 2015) 112.

²²⁵ Cf. *ibidem*, p. 162. The reactions started to be more hostile towards the ECtHR after *Il-ășcu v Moldova and Russia* (App. no. 48787/99, 8 July 2004) where the ECtHR held Russia

6.2. Strong Dissenting Dialogue – the Answer to the ECtHR *Markin* and *Anchugov* Cases

The execution of the ECtHR judgments passed against Russia seems to constitute a peak of the opposition to the interference of international law in domestic matters mentioned above. In 2013 the Russian Constitutional Court marked the boundaries on the competence of the Russian courts to apply international law, specifically the ECtHR judgments.²²⁶ The Constitutional Court ruling is a response to the 2012 Grand Chamber judgment of the ECtHR in *Konstantin Markin v Russia*²²⁷ in which the ECtHR found that Russia violated Art. 8 and Art. 14 ECHR denying a military serviceman a three-year parental leave to take care of his three children because under Russian law such leave could only be granted to the female military personnel. Previously in 2009, the Constitutional Court, relying on national security, declared the Law on the Status of Military Personnel and related laws to comply with the Constitution, especially with its Art. 19 on non-discrimination.²²⁸ In the 2010 Chamber judgment in *Konstantin Markin v Russia* the reasoning of the Russian Constitutional Court was described as ‘unconvincing’²²⁹ and founded upon ‘gender prejudices’, that is on the perception of women as primary child-carers and men as primary breadwinners.²³⁰ Further, the ECtHR recommended to amend Russian law with a view to putting an end to the discrimination against male military personnel as far as their entitlement to parental leave is concerned.²³¹

responsible for the torture of a group of pro-Romanian Moldovan politicians in Transdnistria. The Russian Ministry of Foreign Affairs issued a statement condemning the ECtHR for a ‘double standard’ used against Russia. The statement reads: “In connection with the ruling on the ‘case of Ilascu’ Moscow expresses bewilderment at the inconsistency, contradictoriness, subjectivity and the obvious political engagement of the European Court of Human Rights in Strasbourg. Juridically this verdict, mildly speaking, is far from irreproachable.” Statement by the Russian Ministry of Foreign Affairs FA (8 July 2004), <http://www.mid.ru/bdomp/brp_4.nsf/0/aedaea734e366074c3256ecb0054ed80> (access: 13 June 2015). The other ‘difficult’ cases dealt with by the ECtHR are: *Catan and Others v Moldova and Russia*, App. no. 43370/04, 8252/05, 18454/06 (19 October 2012), *Kononov v Latvia*, App. no. 36376/04 (17 May 2010), *Janowiec and Others v Russia*, App. no. 55508/07 and 29520/09 (21 October 2013), *OAO Neftyanaya Kompaniya YUKOS v Russia*, App. no. 14902/04 (just satisfaction, 31 July 2014).

²²⁶ Cf. I.V. Vorontsova (n. 205); L. Mälksoo, ‘Casenote on Markin v Russia’ (2012) 106 *American Journal of International Law*, pp. 836–842; G. Vaypan, ‘Acquiescence Affirmed, Its Limits Left Undefined: The Markin Judgment and the Pragmatism of the Russian Constitutional Court vis-à-vis the European Court of Human Rights’ (2014) 11(3) *Russian Law Journal* 130 et seqq.

²²⁷ *Konstantin Markin v Russia*, App. no. 30078/06 (ECtHR, 22 March 2012).

²²⁸ Case 187-O-O/2009 (Constitutional Court, 15 January 2009).

²²⁹ *Konstantin Markin v Russia*, App. no. 30078/06 (ECtHR, 7 October 2010) para. 56.

²³⁰ *Ibidem*, para. 58.

²³¹ *Ibidem*, para. 67.

The reaction from the Constitutional Court followed. *Inter alia* the President of the Court, Valery Zorkin, in an emotional article argued that the decision does not respect Russia's sovereignty and its legislature, the Strasbourg Court had even crossed the red line of Russia's sovereignty.²³² Moreover, he warned that if Russia's "historical, cultural and social situation" were to be further ignored, Russia might be forced to bypass judgments of the ECtHR.²³³

In March 2012 the Grand Chamber of the ECtHR affirmed the Chamber judgment, however, it softened the rhetoric. In the atmosphere of strong reactions against the ECtHR decisions, the Supreme Court adopted on 27 June 2013 the Ruling no. 21 of the Plenary Session *On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by Courts of General Jurisdiction* which confirmed that the decisions of the ECtHR are binding on general courts and these courts have to take into account the case law of the ECtHR.

In 2013 the Constitutional Court had another occasion to deal with *Markin* case, this time the petition for the reopening of procedure in his case as a consequence of the ECtHR's judgment. The Circuit Military Court in St. Petersburg asked the Constitutional Court for reconciliation in the light of the contradicting judgments by the Constitutional Court and the ECtHR. The Constitutional Court found that the common courts are obliged to reopen proceedings in connection with the ECtHR judgment. If, however, the court is not capable to enforce a decision without, at the same time, disregarding provisions of domestic law in the form of a binding interpretation of the Constitution rendered by the Constitutional Court, it must request the Constitutional Court to assess the constitutionality of such provisions.²³⁴ The Court observed that since, basically, the same rights and freedoms are provided for in the Russian Constitution and in the ECHR, the court faces the question of constitutionality of relevant domestic law provisions. Solely the Constitutional Court under the established case law could decide such question.²³⁵

In 2013 in *Anchugov and Gladkov v Russia* the ECtHR found the norm of the Russian Constitution to be incompatible with the Convention. The case concerned two prisoners convicted to the death penalty i.a. for murder. Their death sentence was then commuted to fifteen years' imprisonment. The applicants complained in particular that their disenfranchisement had violated their right to vote and had prevented them from participating in a number of elections. The ECtHR in line

²³² V. Zorkin, 'The Limit of Giving In' ['Predel ustupchivosti'] Rossiiskaia gazeta (22 March 2010), <<http://www.rg.ru/2010/10/29/zorkin.html>> (access: 20 June 2016).

²³³ Cf. L. Mälksoo, 'Russia and European Human-Rights Law: Progress, Tensions and Perspectives', [in:] L. Mälksoo (ed.), *Russia and European Human Rights Law: The Rise of the Civilizational Argument* (Brill Nijhoff 2014), pp. 5–6.

²³⁴ Case 27-П/2013 (Constitutional Court, 6 December 2013), <<https://rg.ru/2013/12/18/ks-dok.html>> (access: 25 September 2016).

²³⁵ *Ibidem*, para. 3, 3.1.

with its previous decisions in i.a. *Hirst* and *Scopolla*²³⁶ held that Russia's blanket ban on convicted prisoners' voting rights enshrined in Art. 32(3) of the Russian Constitution²³⁷ was incompatible with the ECHR.²³⁸ Following *Markin* and *Anchugov* cases a group of deputies for the State Duma (the lower house of the Russian parliament) inquired the Constitutional Court on the enforcement of ECtHR judgments in Russia. In 2015 the Constitutional Court made it clear that the Constitution had a priority over the judgments, with the consequence that a decision from the ECtHR that contradicted the Russian Constitution could not be executed in Russia.²³⁹ The Constitutional Court stated that when the content of judgments of the ECtHR, including the part of prescriptions addressed to the respondent State and based on the provisions of the ECHR, interpreted by the ECtHR within the framework of a specific case, "unlawfully, from the constitutional-point of view, affect principles and norms of the Constitution of the Russian Federation, Russia may, as an exception, deviate from fulfilment of obligations imposed on it, when such deviation is the only possible way to avoid violation of fundamental principles and norms of the Constitution of the Russian Federation."²⁴⁰ The Constitutional Court observed that the Vienna Convention on the Law of Treaties, namely Art. 26 on *pacta sunt servanda* and Art. 31(1) on treaty interpretation, should be respected both by Russia and the ECtHR. The judgment of the ECtHR which applies the interpretation of the Convention exceeding the limits of the general rule of interpretation and diverging from imperative norms of customary law (such as the principle of sovereign equality and respect for rights inherent in sovereignty and the principle of non-interference with internal affairs of States) cannot be regarded as obligatory for execution.²⁴¹

Moreover, the Constitutional Court referred to Art. 46 VCLT for authority that a State may block operation of separate provisions of international treaty in its respect, referring to the fact that the consent to obligatory character of this treaty was expressed by it in violation of one or another provisions of its internal law with regard to the competence to conclude treaties, if this violation was obvious and concerned a norm of internal law of a particular importance. In view of the Constitutional Court, the provisions of Chapters 1 and 2 of the Russian Constitution belong to such norms. Their alteration by means of constitutional amendments is not allowed. It may be carried out exclusively by adopting a new Constitution.²⁴²

²³⁶ *Hirst v the United Kingdom (no. 2)*, App. no. 74025/01 (ECtHR, 6 October 2005); *Scopolla v Italy (no. 3)*, App. no. 126/05 (ECtHR, 22 May 2012).

²³⁷ The provision reads: "citizens detained in a detention facility pursuant to a sentence imposed by a court shall not have the right to vote or to stand for election."

²³⁸ *Anchugov and Gladkov v Russia*, App. no. 11157/04 and 15162/05 (ECtHR, 4 July 2013).

²³⁹ Case 21-П/2015 (Constitutional Court, 14 July 2015) paras 2.2, 3, 4.

²⁴⁰ *Ibidem*, para. 2.2.

²⁴¹ *Ibidem*, para. 3.

²⁴² *Ibidem*.

To support its findings the Constitutional Court referred to the well-known cases concerning other jurisdictions e.g. to the three decisions of the German Constitutional Court of 11 October 1985, 14 October 2004, 13 July 2010 indicating the limited legal force of the ECtHR judgments. The Russian Court emphasized that in particular when deciding on the execution of the ECtHR judgment in *Görgulu v Germany*²⁴³, the German Constitutional Court formulated the principle of priority of the national constitution over the decisions of the ECtHR. The German Court noted that the ECHR is a part of the German federal law and has to be used for the interpretation of the provisions of the German Constitution on fundamental rights.²⁴⁴ The decisions of the ECtHR are not always obligatory. Domestic judges have to consider and carefully apply them to the internal legislation. A similar attitude, according to the Russian Constitutional Court, was taken earlier by the German Constitutional Court in reference to EU law in *Solange-I* judgment.²⁴⁵ The Russian Court noted as well the judgments of the Italian Constitutional Court, the first of 2012 disregarding the decision of the ECtHR in *Maggio and others v Italy* (on trans-border pension payments)²⁴⁶ and the second one of 2014 regarding the ICJ judgment in *Jurisdictional Immunities of the State*.²⁴⁷ In both cases, as the Russian Court observed, the Italian Constitutional Court underlined that “the observance of international obligations may not be the reason of reduction of the level of protection of rights which has already been embedded in internal legal order.”²⁴⁸ Furthermore the Russian Constitutional Court discussed the Austrian case²⁴⁹ and the decision of the Supreme Court of the United Kingdom²⁵⁰ disregarding the ECtHR judgment – *Hirst v The UK (no. 2)* on the voting rights of prisoners.²⁵¹ They were invoked for the same authority that the decisions of the ECtHR are not perceived as binding in an absolute manner. They have only to be “taken into consideration”. “It is deemed possible to follow these decisions only in the event if they do not contradict fundamental material and procedural norms of the national law.”²⁵²

In the other parts of the judgment the Constitutional Court discussed its own cases especially *Markin* and *Anchugov*. The latter lead, in the view of the Court, to a real conflict between the Constitution and the ECtHR’s interpretation of the Convention. In a situation of a conflict the Constitutional Court feels entrusted

²⁴³ *Görgulu v Germany*, App. no. 74969/01 (ECtHR, 26 February 2004).

²⁴⁴ Case 2BvR 1481/04 (German Constitutional Court, 14 October 2004) para. 307.

²⁴⁵ *Solange I* 2 BvL 52/71 (German Constitutional Court, 29 May 1974) para. 271.

²⁴⁶ Case 264/2012 (Italian Constitutional Court, 19 November 2012); *Maggio and others v Italy*, App. no. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08 (ECtHR, 31 May 2011).

²⁴⁷ Case 238/2014 (Italian Constitutional Court, 22 October 2014); *Jurisdictional Immunities of the State*, *Germany v Italy: Greece Intervening* (ICJ, 3 February 2012).

²⁴⁸ Case 21-П/2015 (Constitutional Court, 14 July 2015) para. 4.

²⁴⁹ Case B267/86 (Constitutional Court, 14 October 1987).

²⁵⁰ Judgment of 16 October 2013 UKSC 62.

²⁵¹ *Hirst v the United Kingdom (no. 2)*, App. no. 74025/01 (ECtHR, 6 October 2005).

²⁵² Case 21-П/2015 (Constitutional Court, 14 July 2015) para. 4.

by the Russian Constitution to resolve it and “in the extremely rare cases deems it appropriate to use ‘the right to objection’ for the sake of making its contribution (following colleagues from Austria, Great Britain, Germany and Italy) to the formation of balanced practice of the European Court of Human Rights, but not for the sake of self-isolation from its decisions, which reflects consensus worked out by States-parties to the Convention, but proceeding from the need of constructive interaction and mutually respectful dialogue with it.”²⁵³

However, the Constitutional Court suggested also to the federal legislator to envisage a special legal mechanism of determination of the question of possibility or impossibility to execute the ECtHR judgment rendered against Russia.²⁵⁴

Following the decision of the Constitutional Court, the amendments to the 1994 Federal Constitutional Law “On the Constitutional Court of the Russian Federation” were adopted and entered into force on 15 December 2015.²⁵⁵ The amendments provide the Constitutional Court (which otherwise could only perform a constitutionality control over the treaties which have not yet entered into force)²⁵⁶ with a new power to declare the decisions of international bodies dealing with the protection of human rights and freedoms as unenforceable at the request of the federal executive authority which has a competence to protect the interests of the Russian Federation before such courts or other bodies.²⁵⁷

The solution adopted by Russia is unique. No other member of the Council of Europe has conferred such powers on a national court. Under the 2015 law, if the Constitutional Court declares a ruling unenforceable, no steps to implement

²⁵³ Case 21-П/2015 (Constitutional Court, 14 July 2015) para. 6. Venice Commission, English translation after Interim Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, CDL-AD(2016)005-e (106th Plenary Session, Venice, 11–12 March 2016), <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)005-e)> (access: 25 September 2016), para. 26.

²⁵⁴ Ibidem.

²⁵⁵ The Federal Law no. 7-KFZ (CDL-REF(2016)006 introducing amendments to the Federal Constitutional Law no 1-FKZ of 21 July 1994 “On the Constitutional Court of the Russian Federation” (CDL-REF(2016)007 was passed by the State Duma on 4 December 2015, ratified by the Federation Council on 9 December, signed by the President on 14 December and published the following day). The law entered into force on 15 December 2015. It was adopted a year after the ECtHR ordered Russia to pay 1.87 billion euro in compensation to shareholders of the oil company Yukos for violation of their property rights when the company went bankrupt (*OAO Neftyanaya kompaniya YUKOS v Russia*, App. no. 14902/04 (ECtHR, 24 June 2014)).

²⁵⁶ Article 125(2)(d) of the Constitution and Art. 3(1)(1)(d) of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” prohibits the constitutionality control of a treaty already in force for the Russian Federation.

²⁵⁷ The competence is based on Art. 79 of the Constitution, which authorizes the accession of the Federation to international organization only if the compliance with the constitutional rights and freedoms and the basic fundamental principles is ensured.

the ruling can be taken (both general and individual measures of execution) unless the Constitution is amended.²⁵⁸

The decision of the Constitutional Court and the new law of 2015 are not the only examples of the strong dissenting dialogue of the State organs with the ECtHR but certainly the strongest one. The saga is not over as in 2016 the Constitutional Court invoked its new powers deciding upon the request of the Ministry of Foreign Affairs that the ECtHR's ruling on *Anchugov and Gladkov v Russia* cannot be implemented with regard to the measures of general character contemplating the amendments to Russia's legislation which would allow to restrict electoral rights not of all prisoners. This would be contrary to the absolute ban enshrined in Art. 32(3) of the Constitution.²⁵⁹ The Constitutional Court's judgment is based on the arguments of State sovereignty, supremacy of the Constitution, control of the scope of the consent given by the State to be bound by the treaty and subsidiary role of the ECtHR. It contains detailed discussion of the relevant domestic decisions of the ECHR's State parties and the ECtHR case law. The Constitutional Court repeated that "if it deems it necessary to enjoy the right to objection as an exceptional case, it is only in order to make contribution to the crystallization of the developing practice of the European Court of Human Rights in the field of suffrage protection, whose decisions are called upon to reflect the consensus having formed among States Parties to the Convention."²⁶⁰ The Court assured that it recognizes the objective necessity of the ECtHR's need to identify structural defects of national legal systems and to suggest the ways to remove them. But the Constitutional Court also considered problems connected with possible

²⁵⁸ On 15 March 2016, the European Commission for Democracy through Law (Venice Commission) adopted "Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation." It found the law of 2015 contrary to Art. 26 and Art. 27 VCLT and Art. 46 ECHR. The Commission emphasized that the State as a whole (all State organs) is bound to respect international treaties binding upon it and it cannot invoke a norm of its internal law to justify its failure to perform according to a treaty (in this case the ECHR). Under Art. 46 ECHR the State is bound by the interpretation of the Convention given by the ECtHR. The State has to execute the judgment, only the modality of execution is at States' discretion, however, not unfettered. The Russian Federation should have recourse to dialogue, instead of resorting to unilateral measures, which are at variance with Art. 31 VCLT, which stipulates that a State has to interpret the treaty 'in good faith'. (Opinion no. 832/2015, CDL-AD(2016)005, paras 96–100). See also Final Opinion no. 832/2015 of 10–11 June 2016 on the amendments to the Federal Constitutional Law of the Constitutional Court.

²⁵⁹ Case 12-П/2016 (Constitutional Court, 19 April 2016) "On the resolution of the question of possibility to execute the Judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v Russia* in accordance with the Constitution of the Russian Federation in respect to the request of the Ministry of Justice of the Russian Federation." Venice Commission, 'Judgement No. 12-П/2016 of 19 April 2016 of the Constitutional Court', <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)033-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)033-e)> (access: 24 September 2016).

²⁶⁰ *Ibidem*, para. 4.4.

deviations from the principle of subsidiarity, on the basis of which the ECtHR is called upon to exercise its powers.²⁶¹ The main problem for the Constitutional Court was, as it seems, the lack of competence of the ECtHR to give the ruling *in abstracto*. The task of the ECtHR in that particular case was, in the opinion of the Constitutional Court, not to review, *in abstracto*, the compatibility of Art. 32(3) of the Constitution with the Convention but to determine, *in concreto*, the effect of those provisions on the applicants' rights secured by Art. 3 of Protocol No. 1 to the Convention. The Constitutional Court noted that starting from standards established by the ECtHR itself, disenfranchisement for serious crimes that is, crimes punishable by three or more years of imprisonment, does not violate the principle of proportionality. That was exactly the case of Mr. Anchugov and Mr. Gladkov who were sentenced to fifteen years of imprisonment (as commutation of death sentences) for particularly grave crimes. Consequently, their rights guaranteed by Article 3 of Protocol No. 1 had not been infringed upon. Therefore, in that sense the judgment in their case is essentially the act of an *in abstracto* review of a norm exercised by the ECtHR.²⁶²

Those developments indicate that Russian judges are well prepared to adjudicate on international law issues but also that they use international law as a political tool. That occurred in *Inpredserwis v The Consulate General of the Republic of Poland* and in *Markin and Anchugov* saga. The selective application of international law seems also characteristic for Russia. International law is applied to the extent it suites the case, e.g. to focus attention on formal, less important issues, instead than on the substance of the case. We will illustrate this phenomenon invoking the *Crimea* case in which the judges of the Constitutional Court justified the Russian aggression on the territory of Ukraine.

6.3. The Vienna Convention on the Law of Treaties and Politics – the *Crimea* Case

The decision of the Constitutional Court of 2014 concerning Crimea is a landmark historic judgment,²⁶³ however, not on account of the development of international law, which it could have marked. The Constitutional Court decided on the 'accession' to the Russian Federation, as Russian judges called it, not on an 'illegal annexation' on 18 March 2014 of the Autonomous Republic of Crimea and the city of Sevastopol. The act constituted an illegal annexation in the opinion i.a. of one hundred States, which, from the beginning, condemned

²⁶¹ *Ibidem*, para. 5.5.

²⁶² *Ibidem*, para. 6.

²⁶³ Case 6-П/2014 (Constitutional Court, 19 March 2014) "On the verification of the constitutionality of the international treaty, which has not yet entered into force, between the Russian Federation and the Republic of Crimea on the accession of the Republic of Crimea to the Russian Federation and the formation of new constituent entities within the Russian Federation."

Russian activities on the Ukrainian territory and subsequently supported the UN GA resolution 68/262 of 27 March 2014.²⁶⁴ The Resolution entitled “Territorial integrity of Ukraine” affirmed the UN GA commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders and underscored invalidity of the Crimean referendum held on 16 March 2014. Furthermore, the judgment did not take into account that few days earlier the Constitutional Court of Ukraine had declared unconstitutional The Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1702-6/14 “On holding of the all-Crimean referendum” of 6 March 2014.²⁶⁵

The decision of the Constitutional Court concerns only the procedure to conclude the treaty and legal effects of a clause on provisional application of this treaty. The title of the judgment sounds quite innocent: “On the verification of the constitutionality of the international treaty, which has not yet entered into force, between the Russian Federation and the Republic of Crimea on the accession of the Republic of Crimea to the Russian Federation and the formation of new constituent entities within the Russian Federation.” In reality the Constitutional Court was to confirm legality of the annexation of Crimea deciding on the date when ‘the accession’ became effective. The Court dealt with the case i.a. on the basis of the Vienna Convention of the Law of Treaties selecting from it only the provisions on the procedure and the form and leaving out the consideration of the treaty making powers in Crimea or the substance of a treaty (if international law is indeed part of Russia’s

²⁶⁴ A/RES/68/262. Cf. e.g. “The Opinion of the Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on the annexation of the Crimean Peninsula to the Russian Federation in light of international law” (22 June 2014), <<http://www.msz.gov.pl/resource/d93bc452-c276-4f5a-8551-a04464c6b202:JCR>> (access: 21 July 2016).

²⁶⁵ Case 2-rp/2014 (Constitutional Court of Ukraine, 14 March 2014). The Court observed that the Ruling contradicts not only the Constitution of Ukraine but “also the fundamental principles of sovereignty and territorial integrity of a state, constituted in international law instruments, in particular the principle of mutual respect for the sovereign equality of each state including political independence, the ability to change the borders under international law by peaceful means and by agreement. As a result of these principles States Parties shall refrain from violation of territorial integrity or political independence of any state by use of force or threat of force or other manner inconsistent with the purposes of the United Nations, as well as actions directed against the territorial integrity or unity of any State Party (The United Nations Charter, the Final Act of Conference on Security and Cooperation in Europe of 1975, the Framework Convention the Protection of National Minorities of 1995)”, para. 4.5. English translation: Ministry of Foreign Affairs, ‘Judgement of the Constitutional Court of Ukraine on all-Crimean Referendum’ (15 March 2014), <<http://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennya-konstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu>> (access: 26 September 2016). In case 3-rp/2014 (Constitutional Court of Ukraine, 20 March 2014) the Court found the resolution of the parliament of Crimea on ‘declaration of independence’ of 11 March 2014 to be contrary to the Constitution and to the UN Charter (principle of self-determination).

legal system, the Court should have elaborated on the compatibility of the accession/annexation with the UN Charter).

The Constitutional Court avoided any references to international law especially the UN Charter or the ICJ's case law, except for the law of treaties. In that sense the decision is the example of a failed dialogue.

The Constitutional Court found the Agreement on the accession of the Republic of Crimea to the Russian Federation of 18 March 2014 in compliance with the Russian Constitution in terms of procedure of signing, conclusion and entry into force of a treaty, separation of State power into legislative, executive and judicial, delimitation of competence between federal State organs and content of its norms. As far as the law of treaties is concerned, the Constitutional Court took for granted that the document signed by the President of the Russian Federation constitutes an international treaty. It did not examine the Agreement in terms of powers of the other party. The Court had to assess constitutionality of Art. 1 and Art. 10 of the Agreement. Under Art. 1(1) of the Agreement the Republic of Crimea becomes the member of the Russian Federation on the date of the signing of the Agreement. Article 10 provides for the Agreement to be provisionally applied and to enter into force on the date of ratification. The Constitutional Court observed that the accession of Crimea to the Russian Federation took place following the procedure of the ratification of a treaty. The procedure complies, first of all, with the VCLT which in Art. 25 confirms that a treaty may be provisionally applied pending its entry into force. The Court noted that also the Russian law authorises the provisional application of a treaty (Art. 23 of Federal Law of 15 July 1995 no. 101-FZ "On International Treaties of the Russian Federation") and invoked for support its 2012 judgment.²⁶⁶ In the judgment the Court emphasised that the Russian Federation may agree to the provisional application of treaties, if the subject matter of a treaty is of special interest to its parties and because of that interest the parties wish to give effect to its provisions not waiting for its ratification and entry into force. Since the provisional application of the Agreement complies both with international and domestic law, Crimea acceded to the Russian Federation on 18 March 2014.²⁶⁷

It is interesting to note that the decision of the Constitutional Court provoked strong reactions of the other European constitutional courts. On the initiative of the Constitutional Court of Ukraine the "Joint Statement on respect for the territorial integrity and international law in administering constitutional justice" was adopted and signed by the presidents of the constitutional courts i.a. of Lithuania, Georgia, Moldova, Poland, Ukraine, Cyprus, Azerbaijan. The Joint Statement labelled the role of the Russian Constitutional Court as unprecedented, condemning the Court for taking part in the annexation of Crimea and violating international

²⁶⁶ Case 8-П/2012 (Constitutional Court, 27 March 2012).

²⁶⁷ Case 6-П/2014 (Constitutional Court, 19 March 2014) para. 3.

law also by recognizing the Republic of Crimea as a legal entity and the Agreement as an international treaty.²⁶⁸

The case illustrates as well that the dialogue between judges may take different forms and is much easier nowadays i.a. due to the development of different forms of cooperation between judges, including e.g. the Conference of European Constitutional Courts.

7. Ukraine

7.1. The Legal Setting for Judicial Dialogue

Two studies in this volume are devoted to the application of international law in Ukraine (see further in this volume Kolysnik, Tsymbriivskyy). That is why here we will only emphasize some aspects characteristic for the judicial dialogue from the perspective of this country. Ukraine is a former Soviet Republic. After the World War II it was granted a limited power to partake in international relations including international treaties making. This power was obviously based on the Soviet concept of the relationship between international and municipal law.

The country gained independence in 1991 and in 1996 adopted its Constitution. The provisions of the Ukrainian Constitution on international law resemble the provisions of the Russian Constitution, but seem narrower – they refer to a specific category of treaties as a part of the Ukrainian legislation (not the Ukrainian legal system) and lack references to the universally recognized principles of international law. However, Art. 18 of the Ukrainian Constitution refers to the respect of the generally acknowledged principles and norms of international law. Yet, this provision concerns only external relations.²⁶⁹ Article 9 of the Ukrainian Constitution addresses only treaties and provides that:

²⁶⁸ Joint Statement Concerning Respect for Territorial Integrity and International Law in Administering Constitutional Justice, <<http://www.lrkt.lt/en/news/other-news/the-president-of-the-constitutional-court-supports-the-initiative-of-the-constitutional-court-of-ukraine-at-the-conference-of-european-constitutional-courts-to-condemn-the-annexation-of-the-crimea/471>> (access: 15 June 2016).

²⁶⁹ Art. 18 of the Constitution reads: “The foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law.” English version: Council of Europe, ‘The Ukrainian Constitution’, <http://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution_en.asp> (access: 25 September 2016).

International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.²⁷⁰

The Constitution mentions expressly only treaties ratified by the President upon the prior consent of the Parliament (the Verkhovna Rada) and is silent on other treaties and customary international law. It has been therefore up to the judges to infer the authorisation to apply them from other provisions of the Constitution.²⁷¹

The first step in the process seems to be the 2001 opinion of the Ukrainian Constitutional Court on compliance with the Constitution of the Rome Statute of the International Criminal Court (ICC). The Constitutional Court rejected the argument that Art. 27 of the Rome Statute on irrelevance of official capacity for the jurisdiction of the ICC violates the constitutional provisions on immunities of the MPs, the President of Ukraine and the judges. The Court cited Art. 18 of the Constitution and indicated *pacta sunt servanda* principle as an example of generally recognized principles of international law. Then the Court emphasized that Ukraine is bound by various international treaties providing for responsibility for crimes laid down in the Rome Statute and the prohibitions of such crimes are also regarded as customary norms of international law. The Court observed that the crimes' "criminal nature according to Article 18 of the Constitution of Ukraine is not dependent on accession of Ukraine to the Statute and its entering into force."²⁷² The judgment implies that Ukraine is bound by customary law and this law has to be taken into account by the judges.

There are no other judgments of the Constitutional Court on customary international law and there exist no relevant guidelines for the judges. Moreover,

²⁷⁰ Ibidem.

²⁷¹ Some Ukrainian scholars are of the opinion that the Act of Declaration of the Independence of Ukraine of 24 August 1991 and the Declaration on State Sovereignty of Ukraine of 16 July 1990, have to be taken into consideration in that regard. The preamble to the Constitution refers to the Act of 1991 (which in its turn is adopted "[i]n view of [...] implementing the Declaration of State Sovereignty of Ukraine"). The preamble reads: "The Verkhovna Rada of Ukraine, on behalf of the Ukrainian people – citizens of Ukraine of all nationalities, [...] guided by the Act of Declaration of the Independence of Ukraine of 24 August 1991, approved by the national vote of 1 December 1991, adopts this Constitution – the Fundamental Law of Ukraine." The 1990 Act contains a number of references to international law, both in general terms and to specific principles of international law and international agreements. The most important is as follows: "The Ukrainian SSR recognizes the prevalence of general human values over class values and the priority of generally recognised norms of international law over the norms of domestic law" (R. Khorolskyy, 'Country Report Ukraine' para. I.1, citing i.a. M. Buromenskyy, *International Law: Manual for students [in Ukrainian]* (Kharkiv 2005), pp. 73–79). Khorolskyy suggests that the Constitutional Court does not share this opinion.

²⁷² Opinion on the conformity of the Rome Statute with the Constitution of Ukraine, Case 3-B/2001 (Constitutional Court, 11 July 2001) para. 2.2.

the law is in that respect ambiguous. Some laws provide for application of customary law but they restrict references e.g. to international commercial customs²⁷³ or customs of merchant shipping.²⁷⁴ The ambiguity is growing if one notes the deletion in 2010 of the reference to “international customs that are recognized in Ukraine” as applicable law from Art. 4 of the Law on international private law.²⁷⁵ The reasons for such amendment are not known; the preparatory materials only mentioned the objection of the parliamentary legislative.²⁷⁶ In such situation it is not astonishing that ordinary courts do not apply international customary law.²⁷⁷

The legal position of the treaties other than referred to in Art. 9 of the Constitution is also not clear. In line with Art. 151 of the Constitution it seems that the Constitutional Court may review constitutionality of all the treaties in force or those which had been submitted to the Verchovna Rada for consent.²⁷⁸ Besides, the Constitution refers once to international treaties of Ukraine and on other occasions to treaties “ratified” by the Verchovna Rada.²⁷⁹ In 2004 Ukraine attempted to clarify this ambiguous regulation and adopted the Law on international treaties of Ukraine, the act replaced previous regulations.²⁸⁰ The Law distinguishes between treaties concluded by the President, the Government or ministers. It defines different procedures for their conclusion but it also contains the provision on legal effects of treaties in domestic law. Art. 19 (1) specifies that treaties in force concluded with consent of the Verkhovna Rada are a part of domestic law and “apply in a manner consistent to the norms of national legislation.”²⁸¹ In case of conflict with domestic law, the treaty norm prevails.

The language of the provision remains ambiguous. Furthermore, as in Russia, in Ukrainian system there are separate endorsements of international law

²⁷³ Art. 4(5) of the Commercial Procedural Code of Ukraine, Law no. 1798-XII (6 November 1991).

²⁷⁴ Art. 6 of the Code of Merchant Shipping of Ukraine, Law no. 176/95-BP (23 May 1995).

²⁷⁵ The Law of Ukraine no. 2709-IV (23 June 2005) amended by the Law no. 1837-VI “On Amendments to Certain Legislative Acts of Ukraine concerning regulation of issues of private international law” (21 January 2010).

²⁷⁶ Cited by Khorolsky R. (n. 7).

²⁷⁷ *Ibidem*, para. III.13.

²⁷⁸ Art. 151 of the Constitution reads: “The Constitutional Court of Ukraine, on the appeal of the President of Ukraine or the Cabinet of Ministers of Ukraine, provides opinions on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature.” Text available at <http://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution_en.asp> (access: 25 September 2016).

²⁷⁹ See e.g. Art. 26, Art. 85(32), Art. 106(3), Art. XV of the Constitution.

²⁸⁰ The Law of Ukraine no 1906-IV (29 June 2004). The Act replaced two previous acts: “On Effect of International Treaties on the Territory of Ukraine” of 1992 and “On International Treaties of Ukraine” of 1994.

²⁸¹ Text available at <<http://zakon3.rada.gov.ua/laws/show/1906-15>> (access: 25 September 2016); “і застосовуються у порядку, передбаченому для норм національного законодавства.”

in civil, criminal, administrative, commercial procedural laws regulating application of various sources of international law, their legal effects, reopening of proceedings following decisions of international courts etc. All these codes refer only to treaties “consent to which binding character was granted by the Verkhovna Rada of Ukraine”.²⁸² The position of other treaties than ratified upon consent of the Parliament is still not clear.

Accordingly, the provisions of Ukrainian law on application of international law do not establish neither a clear, nor a friendly legal basis for Ukrainian judges to apply and interpret international law. The commentators concordantly indicate the reluctance of Ukrainian judges to apply international law.²⁸³ They connect it with general problems within the judiciary, e.g. deficiencies in legal training of judges, but also signal the progress achieved i.a. owing to the US involvement²⁸⁴ and the EU aid in the reform of the Ukrainian judiciary of 2010 (i.a. administrative courts were established and an electronic database holding all national court decisions was created) and the development of the various forms of cooperation including judicial cooperation.²⁸⁵

7.2. The Birth of Judicial Dialogue in Ukraine

In 2011 R. Petrov and P. Kalinichenko observed that:

Ukrainian courts refer mainly to international agreements which are duly signed and ratified by the Ukrainian Parliament (Verkhovna Rada) and which are self-executing within the Ukrainian legal system. Even in these cases, the correct application of international

²⁸² The formula reflects Art. 85(32) of the Constitution. Art. 2, Art. 8 of the Civil Procedural Code of Ukraine, Law no. 1618-IV (18 March 2004); Art. 1, Art. 9 the Criminal Procedural Code of Ukraine, Law no. 4651-VI (13 April 2012); Art. 4 of the Commercial Procedural Code of Ukraine, Law no. 1798-XII (6 November 1991); Art. 5, Art. 9 of the Code of Administrative Proceedings of Ukraine, Law no. 2747-IV (6 July 2005).

²⁸³ R. Petrov, P. Kalinichenko, ‘The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine’ (2011) 60 *International and Comparative Law Quarterly* 344.

²⁸⁴ N. Prescott, ‘Orange Revolution in Red, White and Blue: US Impact on the 2004 Ukrainian Election’ (2006) 16 *Duke Journal of Comparative & International Law* 238.

²⁸⁵ R. Petrov, P. Kalinichenko (n. 284), pp. 330–331. The authors observe that “these changes have not altered the reputation of the Ukrainian judiciary as one of the most corrupt institutions in the country. EU experts warn that the Ukrainian judiciary faces serious problems in the quality and substance of the legal training of its judges, as well as their regular professional training and funding. As a result, judicial decisions in Ukraine do not always comply with rule of law standards, and are often made arbitrarily. Independent surveys show an alarming level of widespread corruption among judges (40 per cent of judges admitted having been offered bribes – there are no statistics on judges admitted having been taken bribes in Ukraine and Russia). As a consequence, the majority of Ukrainians do not have trust in the judicial system, but consider it corrupt, politically biased and non-transparent”, *ibidem*.

agreements is not guaranteed, since one of the most important impediments for the application of international law by the Ukrainian judiciary is the correct understanding of these international conventions by national judges. International and European organizations realize this problem and target their assistance towards eliminating the incorrect application of international and European law by Ukrainian judges. This has led to the rise of judicial activism among Ukrainian judges in the “post-Orange Revolution” period, such as in the *Yushchenko*, where the Ukrainian Supreme Court opened a door for Ukrainian courts to apply the judgments of other international tribunals and courts.²⁸⁶

The 2004 judgment of the Ukrainian Supreme Court in *Yushchenko v Central Election Committee of Ukraine*²⁸⁷ is probably not the first case in which Ukrainian courts relied on foreign and international decisions but certainly it is an important judgment for democracy in Ukraine.²⁸⁸ The decision is deeply rooted in the US jurisprudence (*Bush v Gore*, *Marbury v Madison*),²⁸⁹ which was certainly known to the judges who had participated before in various seminars and trainings organised with the US support.²⁹⁰ Since the US Court decisions are not mentioned in the judgment, the case is as an example of a silent dialogue. It concerned the results of the second round of the 2004 presidential election in Ukraine. The election was won by a narrow margin by Yanukovych but numerous factors indicated that his victory was gained through fabrication of results, allowing many individuals to vote twice, through threats and coercion, not mentioning, as appeared at the later stage, poisoning with dioxin of the counter-candidate – Yushchenko.

Yushchenko appealed to the Ukrainian Supreme Court claiming violations of the election laws and asking the Court for an injunctive and a declaratory relief. In its response the Supreme Court recalled that it may control the acts of the government (in that respect i.a. the case is compared to *Marbury v Madison*²⁹¹)

²⁸⁶ R. Petrov, P. Kalinichenko (n. 284), p. 344. Repeated in P. Van Elsuwege, R. Petrov, *Legislative Approximation and Application of EU law in the Eastern Neighbourhood of the European Union, Toward a Common Regulatory Space* (Routledge 2014), p. 147.

²⁸⁷ *Yushchenko v Central Election Committee of Ukraine* (Supreme Court, 3 December 2004). See: N. Prescott (n. 285), pp. 219–248.

²⁸⁸ E.g. case 11-rp/99 (Constitutional Court, 29 December 1999) on death penalty, cited below.

²⁸⁹ Respectively, *Bush v Gore* 531 U.S. 98 (2000), *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803), p. 178. The latter case triggered the development of the American model of constitutional review performed by ordinary courts.

²⁹⁰ N. Prescott (n. 285), p. 240, see also p. 233. The author on page 244 underlines that “The United States prepared Ukraine for cases like *Yushchenko* by helping Ukraine shape its Constitution, by assisting the judges in issuing unbiased decisions, and by encouraging the Ukrainian Supreme Court to assert its *Marbury v Madison* power.”

²⁹¹ The case is important also for the determination of the role of the court: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” *Marbury v Madison*, op. cit., p. 177.

and has the power to influence the outcome of the elections (in that respect the case is compared to *Bush v Gore*). It was the first time for the Ukrainian Supreme Court to assert its power to interpret the election laws and the Constitution and to adjudicate on the validity of election, including its conformity with the Constitution. Moreover, it exercised its power of judicial review independently from the Constitutional Court (the Supreme Court had not referred the case to the Constitutional Court). The Court found the election invalid and ordered the runoff.²⁹²

The Ukrainian judges are still reluctant to rely on foreign and international decisions.²⁹³ In 2003 Wilkinson identified main reasons for such situation: the lack of translation of international case law and jurisprudence into Ukrainian to help judges to adapt their decisions to the best European standards, the delays in adapting national legislation to ratified treaties, and – the most important – the belief that international case law is not relevant to civil law systems.²⁹⁴ In that respect, he also pointed to the lack of proper Ukrainian term for *case law*. The closest Ukrainian word, *yurisprudentsiya*, signifies only the philosophy of law, and not the judicial precedents. The translators sometimes use the term *yurisdichna praktika*. But this term in Ukrainian law is only meant to be descriptive, not emphasizing the legal force of *jurisprudence constante*. In other words, the Ukrainian judges were not acquainted with the doctrine, which assumes that the judge should give weight to a rule that is accepted and applied in a long line of cases, and should not overrule or modify its own decisions without serious reasons. Instead, the judges have been guided in the application of selected statutes by the Supreme Court's plenum resolutions (orders), which are binding.²⁹⁵

Thanks to international support at least some of these reasons seem nowadays to be, to a certain extent, overcome (accessible translations of cases, better knowledge of case law owing to legal trainings etc.). However, the most difficult barriers, the long lasting habits, are still impeding application of foreign and international courts' decisions. It is interesting to note that in 2013 in the Report for the XVIth Congress of the Conference of European Constitutional Courts, the Constitutional Court of Ukraine justified its reluctance in referring to the decisions from other jurisdictions by 'objective reasons'. The most important one seems to be still the perception of the role of case law in continental law systems:

The Constitutional Court of Ukraine has not referred to the jurisprudence of the constitutional courts of foreign countries in its decisions, which may be viewed as the result of objective factors. One of them is related to the legal nature and legal consequences of its

²⁹² *Yuschenko v Central Election Committee of Ukraine* (Supreme Court, 3 December 2004).

²⁹³ R. Petrov, P. Kalinichenko (n. 284), p. 344.

²⁹⁴ D. Wilkinson, 'Interpreting Ukrainian legislation in light of international law and jurisprudence', *НАУКОВІ ЗАПИСКИ*, Том 22, Частина II, УДК 341.231.14, pp. 224–225.

²⁹⁵ *Ibidem*, p. 224.

decisions. Since the latter in accordance with the Constitution of Ukraine (Article 150) shall be binding on the territory of Ukraine, it is legally impermissible to refer to the legal sources which are not obligatory for our country in the text. Another factor is determined by the fact that the Ukrainian legal system belongs to the Roman-Germanic legal family, in which the case-law (jurisprudence) historically has not played such a role, as in the countries of Anglo-Saxon legal family (common law system). At the same time, in examining cases the Constitutional Court of Ukraine takes into account the foreign practice of constitutional justice regarding relevant issues. References to the legal positions of constitutional courts of other countries may be found in dissenting opinions of judges of the Constitutional Court of Ukraine.²⁹⁶

Against this background, it is not surprising that in most cases in which the Ukrainian judges rely on foreign or international jurisprudence, this fact is not expressly mentioned (silent dialogue). Similarly, it becomes understandable why it was necessary in Ukraine to adopt a clear obligation to follow the ECtHR case law. In fact, the Law “On execution of decisions and application of case law [in Ukrainian – *practice*] of the European Court of Human Rights” was adopted in 2006.²⁹⁷

The Constitutional Court confirmed the use of silent dialogue and indicated that the effect of the ECtHR case law for the first time was recognised by it in the decision of 1999 on death penalty.²⁹⁸ The Constitutional Court admitted that it avoided direct reference to the ECtHR judgment in *Soering v United Kingdom* but that it was highly influenced by it.²⁹⁹ The Court confirmed that it transplanted i.a. the concept of the rule of law from the ECtHR case law with such elements as justice, certainty, clarity and unambiguousness of legal norm, principle of proportionality, and principle of trust of citizens in the State.³⁰⁰ In recent years, the Constitutional Court refers not only more frequently to the ECtHR case law, but also indicates specific decisions.

For example, in 2015 the Constitutional Court broadly referred to the ECtHR case law to review the constitutionality of the provisions of the Code of Administrative Proceedings providing for one instance proceedings in certain administrative law cases.³⁰¹ The Court discussed carefully the European standard of the right

²⁹⁶ The Report of the Constitutional Court of Ukraine for the XVIth Congress of the Conference of European Constitutional Courts “Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives” (Constitutional Court, 2013), <<https://www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB-Ukraine-EN.pdf>> (access: 10 July 2016), para. II.1.23.

²⁹⁷ Law of Ukraine no. 3477-IV of February 2006.

²⁹⁸ Case 11-rp/99 (Constitutional Court, 29 December 1999).

²⁹⁹ The Report of the Constitutional Court of Ukraine (n. 297); case *Soering v United Kingdom*, App. no. 14038/88 (ECtHR, 7 July 1989).

³⁰⁰ E.g. cases of the Constitutional Court: 15-rp/2004 (2 November 2004), 3-rp/2003 (30 January 2003), 5-rp/2005 (22 September 2005), 6-rp/2007 (9 July 2007), 16-rp/2012 (29 August 2012), 8-rp/2010 (11 March 2010).

³⁰¹ Case 3-rp/2015 (Constitutional Court, 8 April 2015).

to a fair trial. It observed first that the ECHR does not oblige States to establish courts of appeal or cassation, nevertheless, a State, which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Art. 6. The Constitutional Court referred for authority to specific paragraphs of the ECtHR judgments in *Delcourt v Belgium* and *Hoffmann v Germany*.³⁰² The Court then underlined that the right to judicial protection includes, in particular, a possibility to challenge court decisions in appeal and cassation, which is one of the constitutional guarantees of implementation of rights and freedoms, their protection from violations and illegal encroachments, including from false and unjust judgments.³⁰³

Furthermore, the Constitutional Court, when referring to para. 57 of *Ashendon v the United Kingdom* of 28 May 1985 (the name of the case is incorrect and it is difficult to establish which case the Court wanted to indicate) and *Krombach v France*, established the constitutional standard for a permitted restriction to the right to appeal or submission of a case for cassation conforming to the ECHR standard (whilst a right can be restricted by law, the restriction must pursue a legitimate aim, and not infringe upon the very essence of the right to a fair trial, and there should be a proportionate correlation between that aim and introduced measures).³⁰⁴ On such basis the Constitutional Court found the provisions under review to be disproportionate.

In the mentioned above 2013 Report, the Court reported many detailed references in its own decisions to the ECHR and other treaties and e.g. to the Council of Europe recommendations. The Court underlined that it is bound to consider judgments of the ECtHR as Ukraine ratified the ECHR, recognized the jurisdiction of the ECtHR and also because Art. 55 of the Constitution guarantees the constitutional right of every person after exhausting all domestic legal remedies to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions. Furthermore, pursuant to Art. 92 of the Constitution, the Law “On Execution of Judgments and Application of Case-Law of the European Court of Human Rights” was adopted. This law binds courts when considering cases to which the Convention is applicable and the case law of the ECHR as a source of law (Art. 17(1))³⁰⁵ and obliges courts to execute judgments against Ukraine (Art. 2).

³⁰² *Delcourt v Belgium*, App. no. 2689/65 (ECtHR, 17 January 1970) para. 25; *Hoffmann v Germany*, App. no. 34045/96 (ECtHR, 11 October 2001) para. 65.

³⁰³ Case 3-rp/2015 (Constitutional Court, 8 April 2015) para. 2.1.

³⁰⁴ *Ibidem*, para. 2.2. See also *ibidem*, para. 2.3, where the Court discussed proportionality of administrative penalties and referred to the ECtHR decisions: Case *Krombach v France*, App. no. 29731/96 (ECtHR, 13 February 2001) para. 96 is properly cited.

³⁰⁵ Art. 17(1) of the Law “On Execution of Judgments and Application of Case-Law of the European Court of Human Rights” reads: “While adjudicating cases courts shall apply the Convention and the case-law of the Court as a source of law.” Art. 18 provides for detailed rules on usage of the Ukrainian translations and of the original texts of the Court’s decisions. English

The other interesting thing about Ukraine is the reception of the CJEU case law through the case law of the ECtHR³⁰⁶ or the references to the obligation to follow the case law of the ECtHR contained in the Law of 2006 (it shows how in the view of the potential EU membership, the courts desperately needed authorization for such references).³⁰⁷ That was the practice of administrative courts, which started to rely on European standards i.a. on the rule of law, the principle of certainty or the principle of State liability towards individuals. In the *Person v Kiev City Centre for Social Assistance*, the Administrative Court of the Kiev District imported the principle of legal certainty from the CJEU case law. It held that the rights of the disabled to claim social and financial assistance from the State flow from the principle of legal certainty since a State cannot justify its failure to guarantee constitutional rights by the absence of a specific national law. For authority the Court referred to the landmark decision of the CJEU in *van Duyn v the Home Office*,³⁰⁸ where, as the Ukrainian Court explained, it is specified that nationals may rely on the State's obligations, even in cases when these obligations are provided in law without direct effect.³⁰⁹ There are probably many other CJEU judgments better suited for the reference in this case than *van Duyn*, but the lengths, to which the judges went to make the State responsible towards individuals is remarkable.

Last but not least, one must indicate the recent judgments of the Ukrainian courts dealing with the consequences of the occupation of Ukrainian territories. In particular, the recent case law has dealt with recognition of official documents issued on the occupied territories. They applied the so-called *Namibia exception* elaborated in the ICJ Advisory Opinion on Namibia. In this Opinion the ICJ observed that though the official acts of the occupant are illegal and invalid, "this invalidity cannot be extended to the acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to

translation of the Law available at <http://sutyajnik.ru/rus/echr/etc/2006_law_ukraine.htm> (access: 25 September 2016).

³⁰⁶ Cf. case 1-rp/2011 (Constitutional Court, 26 January 2011) on commutation of death penalty to life imprisonment, which refers to *Scopolla v Italy*, App. no. 10249/03 (ECtHR, 17 September 2009) and through this decision to the judgments (cited in its para 38) of the CJEU (Joined Cases C-387/02, C-391/02, C-403/02 *Berlusconi and Others*, 3 May 2005) for authority that the principle of the retroactive application of the more lenient penalty formed a part of the constitutional traditions common to the EU Member States.

³⁰⁷ Cf. R. Petrov, P. Kalinichenko (n. 284), p. 349.

³⁰⁸ C-41/74 *van Duyn v the Home Office* (CJEU, 4 December 1974).

³⁰⁹ Due to anonymization, the name of the applicant is not mentioned in the names of the cases. Case 4/337 (Kiev Administrative Court, 26 June 2008) cited by R. Petrov, P. Kalinichenko (n. 284). The authors emphasise that the judgment became a pattern for subsequent decisions of administrative judges (cf. cases of the Kiev Administrative Court: 5/435 (10 November 2008), 5/503 (24 November 2008); 2/416 (25 November 2008); 5/451 (1 December 2008)). See other examples *ibidem*, p. 349.

the detriment of the inhabitants of the Territory.”³¹⁰ Ukrainian courts took into account the documents issued on the occupied Ukrainian territories to confirm deaths, births, marriages, divorces etc. emphasising that to disregard them would be contrary to human rights and the principle enshrined in the ICJ opinion. (See further in this volume Kolysnik).

8. Conclusions

The application of international law in the countries under our review takes place in various constitutional and legislative settings. Depending on the perceived relationship between international and domestic law, domestic courts apply international law directly (however, the scope of international law which is applied varies) or by virtue of some form of domestic incorporation as in Hungary or even in Russia or Ukraine where, despite the existence of constitutional provisions, some sort of statutory or other endorsement (like the resolutions of the plenum of supreme courts) seems to be required. We do not intend to identify the models followed in these States into monistic or dualistic since each practice exhibits traits of both. The application of international law does not depend as much on the monistic or dualistic scheme but on the broader, legal and also political context as visible by examples of Hungary, Russia or Ukraine. The judges can be more (as in Poland and the Czech Republic) or less open to considerations of international law (as in Hungary, Lithuania, Russia or Ukraine). In some countries they are more driven by parochial interests than in the others but the attitude towards international law varies also among the courts (constitutional, supreme, ordinary etc.) and individual judges in each State.

The legal settings (possibly with the exception of Ukraine) are open towards considerations based on international law but what matters in the end is practice. The latter is dependent on the particular judicial culture and the awareness on the part of the judges of peculiarities and complexity of international law. In most cases judges confine themselves to a ‘simple’ referring to international treaty or other international law documents. And in the majority of cases it is probably enough. Judicial interactions require good expertise in international law. That is why they are not frequent and are usually characteristic of higher courts. Yet, it must be submitted that in all examined countries the judges look to foreign or international courts’ case law if confronted with new or more complex issues

³¹⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, (ICJ, Advisory Opinion, 21 June 1971) para. 125.

such as the one in *Natoniewski*, or the Polish *Abortion and status of foetus* cases or in Ukrainian cases concerning the recognition of the documents issued on the occupied territories of the country.

The judicial deference to foreign or international case law is a means of application of law, a method used by courts for various purposes. The Central and Eastern European judiciary use it similarly to other European courts. The purposes range from determining the understanding of an international law norm (interpretation), establishing the standard of protection of a right, to supporting court's own reasoning, either concurring or dissenting with the decision of the other court. Under each jurisdiction we were able to find important judgments which are worth discussion since they enrich the State practice under customary law concept (e.g. *Natoniewski*, *Nigerian Embassy*), signify developments of international law (e.g. the Czech Supreme Administrative Court case on asylum), or crystallise the perception of certain rights, institutions or effects of international law in domestic law, such as the Czech, the Hungarian, the Lithuanian or the Russian cases concerning the status of the ECtHR's decisions in respective domestic laws. We also traced exasperating symptoms of politically biased judgments using selectively international law for political purposes (e.g. Russian cases).

Finally yet importantly, it must be emphasised that language issues continue to matter. The interaction between judges depends both upon judges' linguistic skills as well as on good quality translations of their decisions into foreign languages. Judges in Central and Eastern Europe should be more focused on interaction and ensure a good quality of their decisions on important issues of international law as well as their availability to the public. In that respect, it must be positively noted that many important decisions of the constitutional courts are nowadays available at least in English.

In the light of the output of the research presented in this contribution, it is possible to conclude with regard to judicial dialogue, that it occurs more frequently in the more recent case law of the Central and Eastern European judiciary.

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II. The Dialogue of CEE Constitutional Courts in the Era of Constitutional Pluralism

Izabela Skomerska-Muchowska*

1. Introduction

The main function of any constitutional court is to protect an institutional integrity of a state based on principles of democracy and rule of law and constitutionally granted rights. When performing these tasks, courts do not operate in isolation. In the 21st century the globalisation tendencies are stronger than ever. The practice of national constitutional courts has been equally affected. As guardians of national constitutions, when conducting the control over the constitutionality of legal acts issued within a given legal system, they can no longer rely solely on a national law and ignore the international context. The universal fundamental values like democracy, the protection of basic human rights and freedoms, and the application of fundamental principles of law are protected not only at a national constitutional level, but also by international law both universally and regionally. In Europe, two legal regimes are of special importance in this regard: first, the system of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR or the Convention) whose

* Dr iur., Assistant Professor, Department of European Constitutional Law, Faculty of Law and Administration, University of Lodz, Poland.

provisions are interpreted and applied by the European Court of Human Rights (ECtHR). The second regime binding upon the Member States of the European Union is based on the Treaties of the European Union (the Treaty on the European Union TEU) and the Treaty on Functioning of the European Union (TFEU) and by the Charter of the Fundamental Rights of the European Union, whose uniform interpretation and application is ensured by the Court of Justice of the European Union (the CJEU). The two treaty-based regimes, constituted in a national like way by written meta-norms or codified secondary rules and based on normative foundations similar to state constitutions, are recognised by academia as constitutional legal orders.¹ The constitutional courts of each of these systems, the ECtHR and the CJEU respectively, exercise compulsory jurisdiction over disputes that arise in the respective legal regimes as organs responsible for authoritative interpretation of the constitution and for preservation of coherence of a given legal systems. The courts' authority to interpret and apply the regimes' laws is final.²

The legal reality of overlapping constitutional orders, both special regimes of international law and national constitutional orders, can be explained through the lens of constitutional pluralism. The concept has emerged in the context of discussions about relations between legal orders in a complex, partly overlapping and not necessarily hierarchical legal reality. The notion identifies the phenomenon of a plurality of constitutional sources, which creates a context for potential constitutional conflicts between different constitutional orders to be solved in a non-hierarchical manner. Such context affects the role of all national courts and the character of adjudication.³ Specifically, constitutional courts do not only apply international law but act as guardians of constitutional orders holding a position of ultimate authority within it. As such, the courts are confronted with other constitutional orders whose provisions are applicable within their scope of jurisdictions. Due to a special position of constitutional courts and their engagement in exchange of views and concepts with other courts (both international and foreign national) the area of their practice seems to be the most useful one for a research aiming at exploration of the role of judicial dialogue in a pluralistic legal reality. In such reality, undoubtedly, judicial activity cannot be reduced to a mechanical application of law in the form of judicial syllogism. For this reason in recent years the role of judges has become increasingly relevant. Judicial dialogue understood as a reference to a foreign (international

¹ See: A.S. Stone Sweet, H. Keller, 'The Reception of the ECHR in National Legal Orders', [in:] H. Keller, A.S. Stone Sweet (eds), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008), p. 3.

² Cf. A. Stone Sweet, 'Constitutionalism, Legal Pluralism and International Regimes' (2009) 16 *Indiana Journal of Global Legal Studies*, p. 621.

³ See: M.P. Maduro, 'Contrapuntal Law: Europe's Constitutional Pluralism in Action', [in:] N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003), p. 501; M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously' (2009) 5 *European Constitutional Law Review*, p. 5.

or national) case law in constitutional interpretation⁴ is the main mechanism of coexistence of the highest courts in a legal constellation constructed in a heterarchical manner.

The aim of this contribution is to explore a phenomenon of judicial dialogue of the CEE constitutional courts from the point of view of constitutional pluralism. We will examine whether these courts act as international courts responsible for effective application of international rule of law and its development within the 'global community of courts' through engagement in judicial dialogue, as described by A.-M. Slaughter.⁵ After a short review of the concept of constitutional pluralism the practice of CEE constitutional courts will be examined. First, we will identify interlocutors of CEE constitutional courts and then the phenomenon of judicial dialogue in specific fields of law will be discussed. The last part is devoted to limits of judicial dialogue visible against the background of the identified and analysed case law.

2. The Concept of Constitutional Pluralism

2.1. From Dualism to Pluralism – a Conceptual Framework

Legal pluralism is commonly recognised as a new idea of the end of the 20th century. The Kelsian monistic concept of unity of international and municipal law has by now been recognised as inadequate for description of mutual relations between international and national law.⁶ At the same time, the dualistic approach may be recognised as an intellectual basis for the concept of legal pluralism with regard to autonomous natures of national and international legal orders.⁷ The du-

⁴ Cf. V. Perju, 'Constitutional Transplants, Borrowing, and Migrations', [in:] M. Rosenfeld, A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), p. 1304.

⁵ See: A.-M. Slaughter, 'A Global Community of Courts' (2003) 4 *Harvard International Law Journal*, p. 191.

⁶ Cf. A. Bogdandy von, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 *International Journal of Constitutional Law*, p. 397; J. Nijman, A. Nollkaemper, 'Beyond Divide', [in:] idem (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007), p. 341; G. Ulfstein, 'The International Judiciary', [in:] J. Klabbbers, A. Peters, G. Ulfstein (eds), *The Constitutionalisation of International Law* (Oxford University Press 2009), p. 142. However opposite position by P. Allott, *The Emerging Universal Legal System in New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007).

⁷ The dualist or pluralist view on the relationship between domestic and international law was presented by H. Triepel and then developed *inter alia* by D. Anzilotti. See: R. Collins, 'Classical

alistic concept of a relation between international and national law is based on the presumption of autonomy of both systems. Such autonomy is related to the fact that the norms of legal orders in question have various addressees and the consequent divergent relations require different form of regulations.⁸ However, this does not mean that international law is deprived of any domestic significance. On the contrary, national courts as State organs fulfil a crucial function in execution of international obligations by a State.⁹ Since, on the one hand, international law is addressed to States and regulates their relations, and, on the other hand, national law governs relations within a State territory and is addressed to subjects under its jurisdiction, international law has been recognised as applicable by national judges as far as they are authorised to do so by a national legal order, usually, through national constitutional provisions. Thus, dualism, as defined by G. Gaja, is not a single concept but rather a set of concepts based on common grounds. According to this author,

[t]he main feature of dualism appears to be that international law and municipal laws are viewed as separate legal systems, which may be defined as self-contained, because within each system the only existing rules are those that are part of the system. Rules which are not created within the system may nevertheless be relevant for the system if they are referred to by a rule included in the system.¹⁰

legal positivism in international law revisited', [in:] J. Kammerhofer, J. D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Oxford University Press 2014), p. 24.

- 8 D. Ancillotti, argued, that international and municipal law "are enacted by different wills: international law stems from the collective will of several States, while rules of municipal law are always the expression of the will of a State, or better of the will belonging to a State, if one does not wish to prejudge the well-known controversy on the binding nature of custom, which many jurists consider as law which is not State law, while nobody doubts that it belongs to municipal law. [...] if norms of international law only regulate relations among States, and give rights and duties only to States, it is impossible that disputes governed by international law ever come as such before national judicial authorities. One could therefore state that on principle these authorities never take a decision which is immediately based on a rule of international law." Quotation after G. Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 *European Journal of International Law*, p. 123.
- 9 As D. Ancillotti further pointed out "norms of international law do not have any intrinsic or necessary inadequacy for being observed and applied by national courts. Courts are State organs and everybody knows that implementation – taking the word in its wide meaning – of international law may only take place through these organs. The State is certainly no fiction, but is nevertheless an abstraction, as it is a collective body represented as a unity – it is a collective will, which is shaped and expressed by one or several individual wills, an activity that requires and sets forth a sum of individual activities. Thus, the State expresses its will and acts through those to which these functions pertain and which we call its organs. So also rights and duties that international law gives to a State may be exerted and respectively accomplished only through its organs." Quotation after: *ibidem*, p. 123.
- 10 G. Gaja, 'Dualism: A Review', [in:] J. Nijman, A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007), p. 53.

The development of international law, and especially the adoption of international instruments aiming at conferral of rights upon individuals and creation of international self-contained regimes equipped with judicial bodies having jurisdiction to adjudicate in cases of individual rights on the one hand and phenomenon of the so-called “globalisation of national constitutions”¹¹ on the other, questions a relationship between international law (or special regimes of international law) and national legal orders.

The above question of relationship between international law and national law is currently explored by academia through the lens of legal pluralism. It is conceived of as a landscape of overlapping and interacting cycles of international, European and national legal orders.¹² The notion of legal pluralism was defined for the first time in regard to the EU as a reaction to the judgement of the German Federal Constitutional Court. N. MacCormick thus wrote:

The most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical. The legal system of Member States and their common legal system of EC law are distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another.¹³

Both dualism and legal pluralism are based on autonomy of legal orders. In case of dualism clear distinction was made between effectiveness of international law in municipal legal orders and international responsibility for performance of international obligations. There is no hierarchy between international and national law or between international tribunals and national courts. Even if the aim of international norm is to confer rights upon individuals, such obligation is enforceable under international law exclusively at the international level.¹⁴ The concept of legal pluralism presupposes that there exist overlapping legal orders, thus a particular situation can be governed by norms belonging to different legal systems. Thus constitutional pluralism, born within autonomous, directly applicable normative system of the EU,¹⁵ is understood as a plurality of institutional normative orders,

¹¹ A. Peters, ‘The Globalization of State Constitutions’, [in:] J. Nijman, A. Nollkaemper, *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007), p. 251.

¹² Since the article is focused on role of national constitutional courts the question of relations between regimes of international law and general international law is not discussed.

¹³ N. MacCormick, ‘The Maastricht Urteil: Sovereignty Now’ (1995), p. 1, *European Law Journal*, p. 259.

¹⁴ As the International Court of Justice held in *La Grand* the international obligation of the duty to notify defendants of their right to consular assistance “can be carried out in various ways. The choice of means must be left to the United States” *Germany v United States of America* (ICJ, 27 June 2001), para. 125. See also: *Avena and Other Mexican Nationals, Mexico v United States of America* (ICJ, 31 March 2004), para. 141.

¹⁵ R. Barents, ‘The Precedence of EU Law from the Perspective of Constitutional Pluralism’ (2009), p. 5; *European Constitutional Law Review*, p. 421; Priban I., ‘Asking the Sovereignty

each with a functioning constitution conceived of as a body of higher-order norms establishing and conditioning relevant governmental powers.¹⁶ The EU legal order makes its own independent constitutional claims, which exist alongside the continuing claims of states.¹⁷

The debate on constitutional pluralism started but did not end with the EU. The concept of constitutionalisation of international law understood as “the process of (re)organization and (re-)allocation of competence among the subjects of the international legal order, which shapes the international community, its value system and enforcement”¹⁸ and even the idea of creation of “global constitutional community”¹⁹ further exposes the understanding of constitutional law and blurs the direct link between constitutional law and the nation state. The constitutional claim of international law is based mainly on developments of the end of the 20th century and the beginning of 21st century. Namely, the recognition of *jus cogens* norms and *erga omnes* obligations under international law provoked the discussion concerning internal hierarchy of international law, public law analogies and, in consequence, the proclamation on a constitutional nature of the international legal order as a normative system based on common values of the international community.²⁰

The specific manifestation of the constitutionalisation of international law is the expansion of international human rights, which are perceived by some authors as

Question in Global Legal Pluralism: From “Weak” Jurisprudence to “Strong” Socio-Legal Theories of Constitutional Power Operations’ (2015) 28 Ratio Juris, p. 33.

¹⁶ Although commonly used the idea as such remains Problematic. See: M. Avbelj, J. Komárek, ‘Four Visions of Constitutional Pluralism’ (2008) 4 European Constitutional Law Review, p. 524; N. Walker, ‘The Idea of Constitutional Pluralism’ (2002), p. 65, Modern Law Review, p. 317; N. Walker, ‘Post-Constituent Constitutionalism? The Case of the European Union’, [in:] M. Laughlin, N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007), p. 247. Some authors distinguish between legal and constitutionalism and pluralism e.g. N. Krisch, points out that “[t]he contest between constitutionalism and pluralism has so far largely lacked a common basis – pluralists have typically made their case on analytical grounds, while constitutionalists have mostly turned to the normative sphere. So whereas pluralism seems to provide a strong (though contested) interpretation of the current, disorderly state of post-national law, constitutionalism – if not yet realized today – appears as the more attractive vision for the future.” N. Krisch, ‘The case for pluralism in post-national law’, [in:] G. de Búrca, J.H.H. Weiler, *The Worlds of European Constitutionalism* (Oxford University Press 2011), p. 203.

¹⁷ N. Walker (n. 17), p. 337.

¹⁸ E. de Wet, ‘The International Constitutional Order’ (2006) 55 International & Comparative Law Quarterly, p. 51.

¹⁹ A. Peters, ‘Membership in the Global Constitutional Community’, [in:] J. Klabbbers, A. Peters, G. Ulfstein (eds), *The Constitutionalisation of International Law* (Oxford University Press 2009), p. 153.

²⁰ Cf. E. de Wet (n. 19), pp. 57–63; J. Klabbbers, T. Piiparinen, ‘Normative Pluralism: An Exploration’, [in:] iidem (eds), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge University Press 2013), p. 13.

international constitutional rights.²¹ The universality of human rights is, however, questioned.²² Thus although human rights constitute fundamental value of international law, pluralistic interaction took place predominantly in case of a specific treaty based regimes.²³ The ECHR is the most prominent example. The jurisprudence of the ECtHR interpreting specific human rights on the basis of the concept of the Convention as a living instrument strongly influences also the development of national constitutional rights.

2.2. Institutional Dimension of the Constitutional Pluralism – the Role of Judicial Dialogue

In the legal environment described above it is impossible to avoid conflicts arising between European, international, or national political and legal institutions. Since there is no hierarchy between competing legal orders each of them is based on its own secondary rules (if one was to use Hart's terminology).²⁴ The existence of multiple poles of constitutionalism equipped with an ultimate judicial body results in jurisdictional competition between international courts (in our case mainly the CJEU and the ECtHR) and national constitutional courts. Both constitutional and international courts perceive their own basic documents (national constitutions, on the one hand, and international treaties, on the other) as supreme law and claim ultimate authority to interpret them. Such judicial or interpretative competition distinguishes constitutional courts from other national courts. While all other national judges face the problem of multiple loyalties and dual or multiple preliminarily since they belong to plural legal orders,²⁵ constitutional courts are, first of all, guardians of national constitutions. By definition, therefore, their main task covers authoritative interpretation of the constitution and thus also the preservation of the coherence of the legal order. Nevertheless, even when performing the role of servants of the constitution, they are faced with authority of international courts carrying out exactly the same function within treaty-based regimes. Since national constitutions, directly or indirectly, insert internation-

²¹ A. Peters (n. 12), p. 167.

²² See: R.A. Macdonald, 'Pluralistic Human Rights? Universal Human Wrongs?', [in:] R. Provost, C. Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Springer 2013), p. 15.

²³ However one must agree that fragmentation of international law on human rights can be seen as the way of development of universal human rights law: "it is through fragmentation that human rights can aspire to universality." C.I. Fuentes, R. Provost, S.G. Walker, 'E Pluribus Unum – Bhinneka Tunggal Ika? Universal Human Rights and the Fragmentation of International Law', [in:] R. Provost, C. Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Springer 2013), p. 38.

²⁴ H.L.A. Hart, *The Concept of Law* (Oxford University Press 1997).

²⁵ See more: G. Martinico, 'Multiple loyalties and dual preliminary: The pains of being judge in a multilevel legal order' (2012) 10 I-CON 871.

al and European law into national legal orders²⁶ constitutional judges must determine not only the position of international and European legal orders within national system but also their own relation with international courts. In both so-called monistic and dualistic states international law is applicable (in the broad meaning of the term including any form of invocability) within the limits determined by a national constitution as interpreted by a particular constitutional court. It means that regardless of whether a given legal system is called 'monistic' or not, in fact the constitutional courts act always as dualistic or pluralistic since even in so called 'monistic' states a national constitution is perceived as a means of general incorporation of international law to domestic legal order. At the same time a constitution as the supreme law of a land establishes limits for effectiveness of international law within a domestic system. The difference between those two, as it was already indicated, lays in the fact that in case of dualism, international law as well as decisions of international courts are invoked simply to ensure that international obligations of the state are fulfilled. In case of constitutional pluralism national and international laws are interconnected by common values, which create the platform for dialogue. However, it does not mean that in the pluralistic world conflict of legal orders is excluded. It is minimized due to the axiological consistency of legal orders, but not fully eliminated.

The pluralistic approach does not provide a clear answer as to who is to act as a final arbiter in case of conflict. In a given case a judge is to employ different forms of judicial techniques in order to find the best legal solution. The role of a dialogue, especially the dialogue between highest (constitutional) courts cannot be overestimated in formation of a common understanding of law. The pluralist approaches to the international legal order claim to preserve space for contestation, resistance and innovation, and to encourage tolerance and mutual accommodation.²⁷ The relationship between the orders is now horizontal rather than vertical, that is to say, heterarchical rather than hierarchical.²⁸ As the result, the main institutional relations between legal orders are based on mutual recognition and respect between authorities.

At the same time, because of globalisation, courts of different states are faced with similar legal problems. The increasing availability of foreign judicial decisions and the development of bilateral and multilateral cooperation of constitutional courts, at least on the European level, create a unique possibility of interaction also between national constitutional courts. As the result, both vertical and horizontal dialogues have become the main tool of development of the international rule of law. It must be noted in that regard that constitutional courts, in contrast to other national courts, operate mainly on matters

²⁶ See: contribution by Wyrozumska in this volume.

²⁷ See: G. de Búrca, 'The ECJ and the international legal order: a re-evaluation', [in:] G. de Búrca, J.H.H. Weiler, *The Worlds of European Constitutionalism* (Oxford University Press 2011), p. 105.

²⁸ N. Walker, op. cit. (n. 17), p. 337.

of principle. In Habermas's understanding using a constitutive interpretation in order to deliver acceptable solution of a legal problem, do constitutional courts not only build up the understanding of a legal order as a "system of rules structured by principles",²⁹ but also develop their own concept of "value jurisprudence".

The legal and constitutional pluralism require an expansion of the scope of legal arguments to be employed by courts and an increased focus on systemic and teleological reasoning resulting in increasing contextualization of judicial reasoning.³⁰ The new legal challenges before courts do not require a construction of new judicial techniques, but rather a recognition that law is a dynamic structure and requires the reflexive methodology of adjudication. Constitutional courts have a leading role in judicial dialogue within pluralistic legal environment. The participation in a dialogue requires not only sufficient openness for arguments of other interlocutors, but also self-reflection and self-determination. This leads to a gradual change of the language. The sovereignty arguments are supplemented by constitutional identity ones. Although this term remains subjective and ambiguous,³¹ it can be considered as a symbolic barrier where the influence of others finishes and self-consideration within a specific community starts.

The resolution of conflicts though dialogue does not necessarily bring a clear-cut simple solution and requires an on-going process of mutual accommodation. The heterarchical nature of legal pluralism entails "specific language of dialogue and encounter, give and take, criticism and self-criticism. Dialogue means both speaking and listening, and that process reveals both common understandings and real differences. Dialogue does not mean everyone at the table will agree with one another. Pluralism involves the commitment to being at the table – with one's commitments."³²

In the subsequent parts of this paper we will explore how the CEE constitutional courts consider their own role in the pluralistic environment and how they

²⁹ J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (The MIT Press 1996), pp. 253, 262.

³⁰ M.P. Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', [in:] J.L. Dunoff, J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009), pp. 356, 361.

³¹ See: M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010); idem, 'Is Global Constitutionalism Meaningful or Desirable?' (2014) 25 *European Journal of International Law*, p. 177; A. Śledzińska-Simon, 'Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland' (2015) 13 *I-CON* 124.

³² K. Lachmayer, 'The Possibility of International Constitutional Law. A Pluralistic Approach towards Constitutional Law and Constitutional Comparison', [in:] P. Riberi, K. Lachmayer (eds), *Philosophical or Political Foundation of Constitutional Law? Perspectives in Conflict* (Nomos Publishing 2014), p. 283.

interact with other international and foreign courts. We will search for the position at the discussion table the CEE courts take and the commitments they will bring to it.

3. Judicial Dialogue in Practice of the CEE Constitutional Courts

3.1. The Actors of Judicial Dialogue

In multi-centric or poly-contextual environment of European human rights protection system it is desirable that constitutional courts of all States parties to the Convention consider, directly or indirectly, the case law of the ECtHR. Similarly the jurisprudence of the CJEU is significant not only for the Member States of the EU, but to all the States parties to the ECHR because of interactions between both international courts. In addition, case law of foreign domestic courts may be relevant, if it contributes to legal evolution of human rights protection standard or principles of democratic state based on rule of law.

The aim of this part of the paper is to explore the scope of judicial dialogue in CEE in both institutional terms and so taking into consideration both international and cross-national aspects of it. We will analyse how and why constitutional courts of Czech Republic, Hungary, Lithuania, Poland, Russia and Ukraine enter into conversation with other courts, and how they build court-to-court relations.

3.1.1. The Dialogue with the European Court of Human Rights

The ECHR is the most frequently referred to international court in the CEE States. The ECtHR is an international treaty binding upon these states. Its formal position in national legal orders is determined by national constitutions.³³ Since the relation of national constitutional courts and the ECtHR are based simultaneously on the international treaty and national regulations, this kind of dialogue is described in literature as a vertical³⁴ or a mandatory one.³⁵

Different factors influence implementation of the ECHR and of the case law of the ECtHR, in domestic legal orders. The Venice Commission identified

³³ See: contribution by Wyrozumska in this volume.

³⁴ See: A.-M. Slaughter, 'A Typology on Transjudicial Communication' (1994) 29 *University of Richmond Law Review*, p. 99.

³⁵ See: M. Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), p. 21.

a range of them. From the domestic perspective what matters are: the conceptualization of the relation between international and domestic legal orders and international law, a position of human rights treaties within domestic legal orders' hierarchy, direct and indirect effect and the interpretation clauses in domestic constitutions and legislation enabling the reception of human rights treaties and decisions of monitoring bodies into the domestic legal order (legal possibility of reopening the procedure after the ECtHR decision indicating the violation of the Convention).³⁶ Another identified factor is the position of human rights instruments related to their specific aim. They are to ensure the effective protection of human rights, which means that main beneficiaries of human rights treaties are not states but individuals.³⁷ It is also important to notice that the Protocol 11 to the ECHR ensures compliance with the obligations arising from the Convention under individual applications subject solely to the exhaustion of domestic remedies, which includes the constitutional complaint lodged before the constitutional court if applicable. Thus the decision of a constitutional court can be subject to review by the ECHR.³⁸ The position of the ECHR within the ECtHR system is also vital. According to Art. 32 ECHR, the ECtHR poses exclusive and final jurisdiction with regard to interpretation of the Convention. In line with Art. 46 States are to abide by the final judgments of the ECtHR.³⁹ On that basis the ECtHR has developed specific powers to give maximum effect to its case law, like pilot judgments procedure, which encourages domestic constitutional courts to consider the practice of the Court in a systemic manner. Finally, in CEE States all national constitutions in question have been adopted with the perspective of accession to the European Convention thus there is a strong focus on conformity or even unity of constitutionally granted rights with those provided for by the Convention. Human rights and rule of law standards were 're-imported' from international law into the legal orders of CEE States.⁴⁰ In the transformation period, the interpretation of national constitutions in the light

³⁶ European Commission for Democracy through Law (Venice Commission) Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts adopted by the Venice Commission at its 100th plenary session (Rome, 10–11 October 2014) on the basis of comments by Ms. Veronika Bílková (Member, Czech Republic), Ms. Anne Peters (Substitute Member, Germany), Mr. Pieter van Dijk (Expert, The Netherlands), Study No. 690/2012 (Strasbourg, 8 December 2014), p. 5.

³⁷ *Ibidem*, p. 17.

³⁸ Cf. A. Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts. Der Europäische Verfassungsgerichtsverbund' (2010) 6 *European Constitutional Law Review*, p. 175.

³⁹ See: European Commission for Democracy through Law (Venice Commission) Report On The Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts, Study No. 690/2012, CDL-AD(2014)036 (Strasbourg, 8 December 2014).

⁴⁰ See: A. Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 *Vienna Online Journal on International Constitutional Law*, p. 170.

of the ECtHR seemed to be treated as a proof of systemic changes in CEE⁴¹ and was to confirm the belonging of the CEE states to the community of democratic states based on the rule of law. All of the above factors lead to the recognition of the case law of the ECtHR as an indicator of the common European standard of protection of human rights and, as such, also as the substantive source of constitutional values.⁴²

In the Czech Republic before 2001, international human rights treaties, as an only category of incorporated international treaties, had been granted a status equal to the Constitution within the Czech legal order.⁴³ After the 2001 Euro-amendment of the Constitution⁴⁴ the incorporation clause was extended to all ratified and promulgated international treaties and treaties on human rights were deleted from the formal definition of the constitutional order.⁴⁵ However, the Czech Constitutional Court declared in 2002 that human rights treaties ratified prior to the constitutional amendment would not be affected by the change in the regulation and sustained the ‘constitutional law quality’ granted to the ECHR by the legal system of the Czech Republic.⁴⁶ In the judgment

⁴¹ Cf. R. Prochazka, *Mission Accomplished. On Founding Constitutional Adjudication in Central Europe* (Central European University Press 2002), p. 17; A. Czarnota, M. Krygier, W. Sadurski (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders, Constitutional Evolution in Central and Eastern Europe: Expansion and Integration into the EU* (Springer 2006); L. Hammer, F. Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (Eleven International Publishing 2012). It is worth notice that although Lithuania has ratified the ECHR in 2000 already in 1991 the Reconstituent Seimas of the Republic of Lithuania made an official statement that “it will respect and honestly fulfill all the obligations established by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950”, Declaration of the Seimas of the Republic of Lithuania on the Obligations of the Republic of Lithuania arising from the Convention for the Protection of Human Rights and Fundamental Rights of 4 November 1950, 5 October 1991, 17/94 on the confidentiality of legal counselling (Lithuanian Constitutional Court, 18 November 1994), quotation after A. Čepas, ‘Preface’, [in:] *Human Rights in Lithuania* (NAUJOS SISTEMOS 2005). See also: judgements of Polish Constitutional Court K 1/92 (Polish Constitutional Court, 20 October 1992). If not indicated otherwise translations of the judgments of the Polish Constitutional Court comes from the website of the Court <<http://trybunal.gov.pl/en/>> accessed between March 2012 and May 2016.

⁴² Cf. M. de Visser, *Constitutional Review in Europe* (Hart Publishing 2015) 229.

⁴³ See: detailed analysis P. Mikeš, ‘Czech Courts and International Law’ (2011) 2 *Czech Yearbook of International Law*, p. 289.

⁴⁴ Constitutional Act 395/2001 Coll.

⁴⁵ See: P. Štruma, ‘Human Rights in a New EU Member State: The Czech Example’, [in:] R. Arnold (ed.), *Universalism of Human Rights* (Springer 2013), p. 357.

⁴⁶ The Constitutional Court held that: “[t]he inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the Constitutional Court, that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms [...]. The guarantee of a general

of 11 November 2006 the Court confirmed a special position of international human rights treaties, and stressed that the case law of the ECHR as the authoritative interpretation of the ECtHR must be taken into account by all state organs.⁴⁷

After 2010 amendment of the Hungarian Constitution, the Constitutional Court in the judgment of 12 July 2011 stressed the importance of international agreements on human rights as a minimum standard of protection and emphasised its own obligation of due consideration of case law of the Strasbourg court stemming from *pacta sunt servanda* principle.⁴⁸ The Court applied a clearly du-

incorporation norm within the Constitution, and the rejection thereby of dualistic concept of the relationship between international and domestic law, cannot be interpreted to mean that ratified and promulgated international agreements on human rights and fundamental freedoms are removed as a reference point for the purpose of the evaluation of domestic law by the Constitutional Court with derogative effect. Therefore, the scope of the concept of constitutional order cannot be interpreted only with regard to Art. 112(1) of the Constitution, but also in view of Art. 1(2) of the Constitution and ratified and promulgated international agreements on human rights and fundamental freedoms must be included within it." Judgement Pl. ÚS 36/01 (Czech Constitutional Court, 25 June 2001). See also judgements: I. ÚS 752/02 (Czech Constitutional Court, 15 April 2003) and Pl. ÚS 44/02 (Czech Constitutional Court, 24 June 2003). If not indicated otherwise translations of judgments of the Czech Constitutional Court come from the website of the Court <<http://www.usoud.cz/en/decisions/>> (access: between March 2014 and May 2016).

⁴⁷ I. ÚS 310/05 (Czech Constitutional Court, 11 November 2006). The Court held that: "[t]he immediate applicability of international treaties also includes the obligation of Czech courts and other public authorities to take into account the interpretation of these treaties by international tribunals as authorities called upon to pronounce authoritatively on the interpretation of international treaties. This of course also applies to the interpretation of the ECHR by the ECtHR. The relevance of the ECtHR jurisprudence achieved constitutional law quality in the Czech Republic. ECtHR decisions are for the Czech Republic and for public authorities on its territory binding in an individual case, which also comes from Art. 46(1) of the ECHR. [...] For the reasons mentioned above, however, have public authorities a general duty to take into account the interpretation of the ECHR carried out by the ECtHR. [...] Public authorities, in the first place then the courts, are therefore obliged to take into account the case law of the ECtHR as well as in the cases where decisions concerned the Czech Republic as well as in the cases that concerned another Member State of the ECHR when these cases were, by its nature, significant also for the interpretation of the ECHR in the Czech context" (translation after Mikeš P., 'Country Report Czech Republic' 10. In 2010 the Czech Constitutional Court repeated this statement and not only included broad analysis of the ECtHR case law into argumentation but also pointed out that there is an obligation of any national court of the Czech Republic to consider practice of the European Court. Otherwise "courts ignorance or lack of knowledge may lead to the State liability of violation of the Convention", II. ÚS 862/10 (Czech Constitutional Court, 19 May 2010).

⁴⁸ Case 61/2011 (Constitutional Court of Hungary, 12 July 2011): "There are some fundamental rights the essential content of which is formulated in the same manner in the Constitution and as in an international treaty (e.g. the International Covenant on Civil and Political Rights and the European Convention on Human Rights). In such cases, the level of protection

alistic approach towards the Convention as an incorporated international treaty. The Court used this reasoning in subsequent decisions where the Court employed formula to justify consideration of the decisions of ECtHR in subsequent judgements:

in the course of examining the petition, the Constitutional Court took account of the case law of the European Court of Human Rights [...]. Hungary as a state party joined the Convention on the protection of human rights and fundamental freedoms promulgated in Act XXXI of 1993 [...], therefore the Constitutional Court applies as the minimum requirements of protecting rights in the course of elaborating the Hungarian constitutional standards the aspects found in the judicial practice of ECHR on the interpretation of the Convention.⁴⁹

It means that due to the incorporation of the ECHR into Hungarian legal order, the Court recognises the Convention as a part of constitutional standard of protection of human rights (although the minimal one) and the case law of the ECtHR is considered as a part of the Convention.⁵⁰

The Lithuanian Constitutional Court in 1995 in case concerning ratification of the ECHR, stated that the Convention

is a peculiar source of international law, the purpose of which is different from that of many other acts of international law. This purpose is universal, i.e. to strive for universal and effective recognition of the rights declared in the Universal Declaration of Human Rights and to achieve that they were observed while protecting and further implementing human rights and fundamental freedoms. With respect to its purpose, the Convention performs the same function as the constitutional guarantees for human rights, because the Constitution establishes the guarantees in a state and the Convention – on the international scale. That is why it is very significant to evaluate and establish the relation between the Convention and the Constitution.⁵¹

of fundamental rights guaranteed by the Constitutional Court cannot be in any case lower than the level of the international protection namely that of the European Court of Human Rights. Consequent of the principle of *pacta sunt servanda* the Constitutional Court is bound to follow the Strasbourg jurisprudence and the level of protection of fundamental rights which is thereby defined, even if such a turn could not be deduced necessarily from its' own 'precedent-decisions'" translation after Kovács P., 'International Law in the Recent Jurisprudence of the Hungarian Constitutional Court: Opening of a New Tendency?', [in:] A. Seibert-Fohr, M.E. Villiger (eds), *Judgments of the European Court of Human Rights – Effects and Implementation* (Nomos 2014), p. 251.

⁴⁹ Hungarian Constitutional Court cases: 1/2013 (I. 7.) AB, 22/2013 (VII. 19.) AB, 7/2014 (III. 7.) AB.

⁵⁰ See: detailed discussion by N. Chronowski, T. Drinóczi, I. Ernstz, 'Hungary', [in:] D. Shelton (ed.), *International Law and Domestic Legal Systems. Incorporation, Transformation and Persuasion* (Oxford University Press 2011), p. 278.

⁵¹ Case 22/94 (Lithuanian Constitutional Court, 24 January 1995) on the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 23. If not indicated otherwise translations of judgments of the Lithuanian Constitutional Court come from the website

The Court stressed that the legal system of the Republic of Lithuania is based on the principle of primacy of the Constitution and that the conflict situation is possible in following circumstances: firstly, if the Constitution established a complete and final list of rights and freedoms and the Convention set forth some other rights and freedoms; secondly, the Constitution prohibited some actions and the Convention defined them as one or another right or freedom; thirdly, some provision of the Convention could not be applied in the legal system of the Republic of Lithuania because it was not consistent with some provision of the Constitution. However, the Court noticed that neither the Constitution nor the Convention contain a complete and final list of human rights and freedoms and that consistent interpretation should be the main tool to avoid conflict. The Court stressed that

the interpretation of the compatibility (relation) of the norms of the Constitution and the Convention must be semantic, logical and not only literal. Literal interpretation of human rights alone is not acceptable for the nature of the protection of human rights. [...] The literal interpretation of legal norms when applied as the only way of interpretation is not acceptable because while interpreting the contents of a legal norm not the particular wording of a certain rule is most significant, but the fact that the text should provide understanding beyond doubt that the instruction is given to certain subjects under certain conditions to act in an appropriate way.

The Court thus indicated necessity of employment of dynamic interpretation of human rights guaranteed by the Constitution. Even if the wording of the provision protecting the analogous right differs in the Constitution and in the ECHR, the provisions should be interpreted harmoniously. Consequently, “the provisions of the Convention, which define human rights and freedoms, may be applied along with the constitutional provisions provided they do not contradict the latter.”⁵² In 2000 the Lithuanian Constitutional Court expressly recognized the ECtHR’s case law as a source in construction of law. The Lithuanian Constitutional Court held that “the jurisprudence of the European Court of Human Rights as a source of construction of law is also important to construction and applicability of Lithuanian law.”⁵³

Thus, the Constitutional Court’s case law granted the status of an authoritative source of interpretation of law, first, to the Convention, and, later, to the jurisprudence formed by the ECtHR.⁵⁴

of the Court <<http://www.lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2016>> (access: between March 2014 and May 2016).

52 Ibidem. See also: case 11/99 (Lithuanian Constitutional Court, 7 January 1999).

53 Case 12/99-27/99-29/99-1/2000-2/2000 (Lithuanian Constitutional Court, 8 May 2000).

54 Cf. Constitutional Court of the Republic of Lithuania, National Report XVIth Congress of the Conference of European Constitutional Courts “Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives”, Vilnius 2013, 13. See also: case 26/2014–4/2015 (Lithuanian Constitutional Court, 9 July 2015) on the compliance of certain provisions of the

In 2012 the Lithuanian Constitutional Court and the ECtHR did not see eye to eye in the context of *Paksas* case⁵⁵ analysed in depth below (Section II.4). The Lithuanian Court decided in that case that “even though the jurisprudence of the European Court of Human Rights, as a source for construction of law, is important also for construction and application of Lithuanian law, the jurisdiction of the said Court does not replace the powers of the Constitutional Court to officially construe the Constitution.” The Court delimited the scope of own competence and powers of the ECtHR and held that:

in itself the judgment of the European Court of Human Rights may not serve as the constitutional basis for reinterpretation (correction) of the official constitutional doctrine (provisions thereof) if such reinterpretation, in the absence of corresponding amendments to the Constitution, changed the overall constitutional regulation (*inter alia* the integrity of the constitutional institutes – impeachment, the oath and electoral right) in essence, also if it disturbed the system of the values entrenched in the Constitution and diminished the guarantees of protection of the superiority of the Constitution in the legal system.

The Polish Constitutional Court also found that the ECtHR plays an essential role in determining a standard catalogue of fundamental rights and freedoms in a democratic state.⁵⁶ According to the Court:

special role of the European Convention stems from the fact that states-parties to the Convention not only obliged themselves to observe a catalogue of rights and fundamental freedoms included in the Convention but also to comply with the judgments of the European Court of Human Rights which adjudicates on the basis of the Convention and the Protocols that supplement it. The Court’s judicial decisions determine the normative contents of rights and fundamental freedoms that are formulated in a compact way, which is understandable, in the Convention and the Protocols. The judicial decisions of the European Court determine common normative contents of rights and fundamental freedoms the regulation of which (also by constitutions) sometimes significantly differs in various states.⁵⁷

rules on the amounts and payment of remuneration to advocates for the provision and coordination of secondary legal aid and detailed discussion of the case law by Kuzborska.

⁵⁵ Case 8/2012 (Constitutional Court of Lithuania, 22 May 2012).

⁵⁶ See *inter alia* Polish Constitutional Court cases: SK 29/04 (6 December 2004), para. VIII.2.; SK 52/08 (9 June 2010), para. III.7.3.2.

⁵⁷ Case U 10/07 (Polish Constitutional Court, 2 December 2009), para. V.3.2. See also: Case SK 32/14 (Polish Constitutional Court, 22 September 2015). The Court resolved question of constitutionality of provisions of Polish Code of Civil Procedure precluding possibility of reopening of the case in consequence of the ECtHR’s decision on infringement of Art. 6 of the ECHR. The Court held that according to the Art. 91(1) of the Polish Constitution the ECHR possesses special legal status. It is part of the Polish legal order and is directly applicable. It is an act of higher legal value than statutes. The content of the Convention is determined by its text as interpreted by the ECtHR. Constitutional status of the Convention covers not

This means that the Polish Constitution recognizes significance of the ECHR not only as an international treaty but also as an emanation of common European standards (at least at a minimal level) of human rights protection.

It must be also noted that, according to their scope of jurisdiction the Polish and the Czech Constitutional Courts decide about conformity of national law not only with the Constitution but also with international treaties. In cases concerning the ECHR the courts interpret the ECHR in the light of the jurisprudence of the ECtHR. Significantly, in any case the examination of conformity of national provisions with the ECHR is connected with examination of their consistency with a parallel constitutional norm. The fact that the result of the Court's review as to the conformity with both acts is usually exactly the same proves that even if there are two formally separate criteria of legality of national norm they are perceived by the Court as substantively identical.⁵⁸

In the Russian Federation the ECtHR's judgements are recognised as part of legal system of the state on the basis of Art. 15(4) of the Constitution.⁵⁹ According to the Federal Law on ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto Russia recognises the Convention as an integral part of its legal system. The Constitutional Court plays an important role in development of human rights protection in conformity with European standards as established by the Convention and case law of the ECtHR. In 2001, shortly after the accession of Russia to the ECHR, the Constitutional Court stated in *Burdov* that the Convention

is ratified by the Russian Federation and is in force in all its territory and, consequently, forms part of the domestic legal system. Furthermore, the Russian Federation accepted

only provisions concerning rights and freedoms but also other provisions of the Convention including Art. 6, which obliges state-parties to respect final decision of the ECtHR in any case to which they are parties. This obligation includes prohibition of challenging the infringement of subjective rights decided by the ECtHR and duty of any positive action in order to implement the judgment.

⁵⁸ See e.g.: as to Art. 8 of the ECHR: K 39/12 (Polish Constitutional Court, 20 January 2015), K 23/11 (Polish Constitutional Court, 30 July 2014), I. ÚS 2482/13 (Czech Constitutional Court, 26 May 2014), Pl. ÚS 24/11 (Czech Constitutional Court, 20 December 2011); as to Art. 10 of the ECHR: K 28/13 (Polish Constitutional Court, 21 September 2015); as to Art. 11 of the ECHR: K 5/15 (Polish Constitutional Court, 17 November 2015), K 44/12 (Polish Constitutional Court, 18 September 2014); as to Art. 7 (1), Art. 8 and Art. 18 of the ECHR: K 54/07 (Polish Constitutional Court, 23 June 2009); as to Art. 6 of the ECHR: P 26/11 (Polish Constitutional Court, 15 October 2013), K 6/13 (Polish Constitutional Court, 11 March 2014), K 47/15 (Polish Constitutional Court, 9 March 2016), K 19/11 (Polish Constitutional Court, 3 June 2014), 3 ÚS 1136/13 (Czech Constitutional Court, 27 October 2015); as to Art. 4(1) and (2) and Art. 5(1): II. ÚS 3626/13 (Czech Constitutional Court, 16 December 2015).

⁵⁹ Russian constitutional Court cases: 4-П (4 February 1996), 1-П (25 January 2001), 2-П (5 February 2007), see also: A.L. Burkov, *The Impact of the European Convention on Human Rights on Russian Law. Legislation and Application in 1996–2006* (ibidem-Verlag, Stuttgart 2007), <<http://sutyajnik.ru/documents/4237.pdf>> (access: between March 2014 and May 2016).

the jurisdiction of the European Court of Human Rights and undertook to render its law-enforcement practice, including judicial, in full conformity with the obligations flowing from the participation in the Convention and the Protocols thereto.⁶⁰

The Constitutional Court also emphasized that the provisions of the Civil Code of the Russian Federation in that case must “be considered and applied in consistent normative unity with the exigencies of the Convention.”⁶¹

In 2007 the Constitutional Court developed the above concept, however, made the reservation in regard to the scope of jurisdiction of the ECtHR. The Russian Constitutional Court held that⁶²

[b]y ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms, the Russian Federation recognized the jurisdiction of the European Court of Human Rights as obligatory in questions concerning the interpretation and application of the Convention and Protocols to it in cases of alleged violation by the Russian Federation of provisions of the mentioned instruments. Thereby, like the Convention for the Protection of Human Rights and Fundamental Freedoms, the judgments of the European Court of Human Rights – to the extent that they interpret the substance of the rights and freedoms provided for by the Convention, relying on the generally recognized principles and norms of international law, including the right to access to court and fair justice – are an integral part of the legal system of the Russian Federation. That is why they shall be taken into account by the federal legislator in regulating social relations and by the law-enforcement authorities in applying the respective norms of the law.⁶³

The reference to “generally recognised principles and norms of international law” seems to determine both the basis of incorporation of the ECHR into Russian legal order through Art. 15 of the Constitution and limits of applicability of case law of the ECtHR under the Russian Constitution.⁶⁴ At the same time, the Constitutional Court softens the effectiveness of the ECtHR’s case law by indication that it must be taken into account while in the previous decision an obligation to ensure full conformity of the national law with the ECHR and case law of ECtHR was declared.⁶⁵ In the discussed case the Court abstained from recognition of challenged provisions of the Code of Civil Procedure on supervisory review,⁶⁶ although

⁶⁰ Case 1-П (Russian Constitutional Court, 25 January 2001), para. 6.

⁶¹ *Ibidem*.

⁶² Case 2-П (n. 60).

⁶³ *Ibidem*, para. 2.1.

⁶⁴ See: detailed discussion K. Koroteev, S. Golubok, ‘Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe’ (2007) 7 Human Rights Law Review, p. 619.

⁶⁵ *Ibidem*, p. 624.

⁶⁶ Supervisory review (*‘nadzor’*) is a form of extraordinary appeal against a final judicial decision inherited by Russia and other former communist states from Soviet law. This procedure had been based on the assumption that prosecutors and higher courts supervise the activities

there was no doubt that they are contrary to the right of a fair trial. Similarly, the above-mentioned reservation was used by the Russian Constitutional Court in the one of the most recent decisions discussed in Section III. 4. to deny execution of the decisions of the ECtHR because of their inconformity with the Russian Constitution and international law.

The position of case law of the ECtHR in the Ukrainian legal order is determined by the Constitution and Art. 17 of the Law of Ukraine on Execution of Judgments and Application of the case law of the European Court of Human Rights, which stipulates the obligatory application of the Convention, as interpreted by the ECtHR, as the source of law. These should be taken into consideration by all judges of Ukraine, including those of the Constitutional Court of Ukraine. Although the Ukrainian Constitutional Court frequently invokes the ECHR in its decisions,⁶⁷ references to case law of the ECtHR are rather rare. Yet, in the last years the frequency of references has been increasing.⁶⁸ The reluctance of the Ukrainian judges to invoke 'external' sources can be explained by the judicial tradition. However, in some cases the implicit influence of the ECtHR practice is evident. The death penalty case⁶⁹ may serve as a flagship example. Even though the Constitutional Court avoided making direct reference to findings of the ECtHR with regard to the non-conformity of death penalty as a type of punishment to the prohibition of torture, inhuman and degrading treatment provided for in Art. 3 of the ECHR, the content of the Ukrainian decision is manifestly inspired by the ECtHR judgment in *Soering v United Kingdom*.⁷⁰

3.1.2. The Dialogue with the CJEU

The dialogue with the CJEU concerns mainly Member States of the EU. In practice of the Russian and the Ukrainian Constitutional Court the case law of the CJEU does not constitute a point of reference.⁷¹

of lower courts and constitutes a means by which final decisions that are *res judicata* may be overturned on request of governmental authorities. *Ibidem*, p. 622.

⁶⁷ See i.a.: cases indicated in Constitutional Court of Ukraine, National Report XVIth Congress of the Conference of European Constitutional Courts "Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives", Kyiv 2013: 9-rp/97 (Ukrainian Constitutional Court, 25 December 1997) case prior to accession of Ukraine to the ECHR; 19-rp/2004 (Ukrainian Constitutional Court, 1 December 2004); 6-rp/2007 (Ukrainian Constitutional Court 9 July 2007); 2-rp/2008 (Ukrainian Constitutional Court, 29 January 2008); 20-rp/2008 (Ukrainian Constitutional Court, 8 October 2008); 5-rp/2012 (Ukrainian Constitutional Court, 13 March 2012).

⁶⁸ See i.a. Ukrainian Constitutional Court cases: 8-rp/2010 (11 March 2010); 17-rp/2010 (29 June 2010); 1-rp/2012 (18 January 2012); 10-rp/2012 (18 January 2012).

⁶⁹ Case 11-rp/99 (Ukrainian Constitutional Court, 29 December 1999).

⁷⁰ *Soering v United Kingdom*, App. no. 14038/88 (ECtHR, 7 July 1989).

⁷¹ Cf. Constitutional Court of Ukraine, National Report XVIth Congress, (n. 68) 13, Constitutional Court of the Russian Federation, National Report XVIth Congress of the Conference of European Constitutional Courts "Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives" (Vienna 2014) 23.

Within the EU legal order the CJEU has exclusive jurisdiction to decide about validity of secondary law and to deliver a legally binding interpretation of EU law norms. One must emphasize that the concept of the ‘autonomous nature’ of the EU (or the former ‘Community’) legal order was developed as the result of the judicial dialogue between national courts and the CJEU. The judicial dialogue with constitutional and the highest courts of the Member States started after the formulation of, firstly, the two main principles governing the application of today’s EU law in national legal orders such as the direct effect⁷² and the supremacy⁷³ of EU law and, secondly, proclamation of auto-referential, complete nature of EU. Importantly, human rights protection must be considered as an inherent part of the EU legal order.⁷⁴ All the above-mentioned legal concepts were formulated by the CJEU in response to inspiring (or even provocative) questions of ordinary courts. As the result, the position of the CJEU within the legal system of the Union has become comparable to the position of constitutional courts within national systems. Thus, ordinary courts became a part of the system of the judicial protection of the EU. In consequence, the powers of constitutional and highest courts have somewhat eroded. For instance, the landmark *Internationale Handelsgesellschaft* judgment aimed at the limitation of the review of constitutionality of acts of EU institutions by the German Federal Constitutional Court. In response the German Constitutional Court⁷⁵ as well as other constitutional courts of the Member States⁷⁶ accepted the autonomy and primacy of EU law, yet, not unconditionally. They determined red lines preserving their own position and supremacy of national constitutions in court-to-court relation with the CJEU.⁷⁷

Despite the fact that the CEE constitutional courts enter into the dialogue with the CJEU at a specific stage of development of EU law and in the situation when constitutional courts of the ‘old’ Union had already established their relations with the CJEU, they not only build up their own, constitutionally based approaches, but also actively participate in further developments at the EU level. When doing so,

⁷² 26/62 NV *Algemene Transport – en Expeditie Onderneming van Gend & Loos* (CJEU, 5 February 1963).

⁷³ 6/64 *Costa v ENEL* (CJEU, 15 July 1965).

⁷⁴ 11/70 *Internationale Handelsgesellschaft GmbH* (CJEU, 17 December 1970).

⁷⁵ See: direct answer in *Internationale Handelsgesellschaft GmbH (Solange I)* BvL 52/71 (German Federal Constitutional Court, 29 May 1974) and its development in *Re Wünsche Handelsgesellschaft (Solange II)* 2 BvR 197/83 (German Federal Constitutional Court, 22 October 1986); *Brunner v the European Union Treaty* (German Federal Constitutional Court, 12 October 2013).

⁷⁶ See: *Frontini v Ministero delle Finanze* 183/73 (Italian Constitutional Court, 27 December 1973); *S.p.a. Granital v Amministrazione delle Finanze dello Stato* 170 (Italian Constitutional Court, 8 June 1984); *Administration des Douanes v Societe ‘Cafes Jacques Vebre’ et SARL Wiegel et Cie* (8 January 1971).

⁷⁷ See more: M. Claes, *The National Courts Mandate in the European Constitution* (Hart Publishing 2006).

they refer to experiences of other courts, however, within the framework of the national CEE constitutions.

Specific constitutional determinants have been affecting the position of CEE constitutional courts towards EU law. First, the strong sovereignty concerns must be taken into account as the challenge for constitutional courts to explain preservation of (newly recovered) independence with the process of the European integration. Secondly, the constitutional courts of new democracies had to build up their own position in the system.⁷⁸ The two factors are clearly visible in the jurisprudence of all the courts subject to our analysis.

The Czech Constitutional Court in the first significant case concerning EU law, *Sugar Quotas III*,⁷⁹ based its legal argumentation on distinction of EU Treaties from other international agreements on the basis of Art. 10a of the Czech Constitution authorising delegation of state powers on international organisation. The Court held that

[d]irect applicability in national law and applicational precedence of a regulation follows from Community law doctrine itself, as it has emerged from the case law of the ECJ. If membership in the EC brings with it a certain limitation on the powers of the national organs in favour of Community organs, one of the manifestations of such limitation must necessarily also be a restriction on Member States' freedom to determine the effect of Community law in their national legal orders. Art. 10a of the Constitution of the Czech Republic thus operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously that provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the Czech Republic. The Constitutional Court is of the view that – as concerns the operation of Community law in the national law – such approach must be adopted as would not permanently fix doctrine as to the effects of Community law in the national legal order. A different approach would, after all, not correspond to the fact that the very doctrine of the effects that Community acts call forth in national law has gone through and is still undergoing a dynamic development. This conception also best ensures that which was already mentioned, that is, the conditionality of the transfer of certain powers.

The Czech Constitutional Court turned out to be the most open among discussed courts. The reasoning seems to reflect a pluralistic approach since the Court recognised not only the autonomy of EU law in terms of its adoption and validity but also found a legal basis for its applicability in the Czech Republic. The Constitutional Court found that since the accession of the Czech Republic to the EU,

⁷⁸ Cf. W. Sadurski, “‘Solange, chapter 3’: Constitutional Courts in Central Europe – Democracy – European Union’ (2006) 40 EUI Working Paper LAW.

⁷⁹ Case Pl. ÚS 50/04 (Czech Constitutional Court, 8 March 2006). Cf. A. Albi, ‘Supremacy of EC Law in new Member States. Bringing Parliaments into the Equation of “Cooperative Constitutionalism”’ (2007) 3 European Constitutional Law Review, p. 25.

a substantive change in the Czech constitutional order took place, and in consequence it is obliged to “interpret Czech constitutional law in the context of the principles of the Community [EU] law.”⁸⁰

The Court reviewed regulation on sugar quotas under national constitutional law, however, interpreted it in light of general principles of Union law as defined in the CJEU’s case law. In subsequent decision *Arrest Warrant*⁸¹ it did so in extensive manner and interpreted the Czech Constitution in the light of the EU framework decision. The Court based its decision on Art. 1(2) of the Constitution of the Czech Republic in connection with the principle of sincere cooperation (now Art. 4(3) TEU, former Art. 10 TEEC) and formulated a constitutional principle,⁸² according to which

the domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and cooperation between Community and Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected which supports carrying out of that obligation, and not an interpretation which precludes it.⁸³

However, already in *Sugar Quotas III*, the Czech Constitutional Court expressed certain reservations in relation to the CJEU’s doctrine of precedence of Union law over national constitutional law. The Court did so with reference to the case law of other European courts. It indicated decisions of the Italian Constitutional Court,⁸⁴ the German Federal Constitutional Court,⁸⁵ the Supreme Court of Ireland,⁸⁶ the Supreme Court of Denmark⁸⁷ and found that “all above

⁸⁰ The Czech Constitutional Court found that “[a]lthough the Constitutional Court’s referential framework has remained, even after 1 May 2004, the norms of the Czech Republic’s constitutional order, the Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law”, para. VI.A.

⁸¹ *European Arrest Warrant* Pl. ÚS 66/04 (Czech Constitutional Court, 3 May 2006).

⁸² See: K. Wójtowicz, *Constitutional Courts and European Union Law* (Wydawnictwo Sejmowe 2014) 87.

⁸³ Para. VIII.61.

⁸⁴ *Frontini v Ministero delle Finanze* 183/73 (27 December 1973) and *Fragd v Amministrazione delle Finanze dello Stato* 232/1989 (Italian Constitutional Court, 21 April 1989).

⁸⁵ *Re Wünsche Handelsgesellschaft* (Solange II) 2 BvR 197/83 (n. 76); *Brunner v the European Union Treaty* 2 BvR 2134 and 2159/92 (12 October 1993).

⁸⁶ *Society for the Protection of Unborn Children (Ireland) Ltd. v Grogan* (Irish Supreme Court, 19 December 1989) and *Attorney General v X* (Irish Supreme Court, 5 March 1992).

⁸⁷ *Carlsen and Others v Rasmussen* I-361/1997 (Danish Supreme Court, 6 April 1998).

courts have never entirely acquiesced in the doctrine of the absolute precedence of Community law over the entirety of constitutional law but they retained a certain reservation to interpret principles such as the democratic law-based state and the protection of fundamental rights.”⁸⁸ The Court noticed the significance of judicial dialogue in that regard for the development of EU law. Elaborating its own position towards Union law, the Court based its findings on the concept of conditional conferral of powers under the Czech Constitution and held that this conditionality is manifested in the formal plane concerning the power attribute of state sovereignty itself, and the substantive component of the exercise of state powers. Consequently conferral has its limits and may persist as long as delegated powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive democratic state based on the rule of law.⁸⁹

In subsequent judgements the Czech Constitutional Court became even more protective as regards its own position toward EU law. In *Treaty of Lisbon I*⁹⁰ the Constitutional Court held that it possesses a power to review whether any act adopted by Union bodies exceeded the powers that the Czech Republic transferred to the EU pursuant to Art. 10a of the Constitution. However, the Constitutional Court assumed that such review would be possible in exceptional cases such as in particular, “abandoning the identity of values and exceeding of the scope of conferred competences.”⁹¹ The Court further explained that

the supreme protector of Czech constitutionality, including against possible excesses by Union bodies or European law. [...] If European bodies interpreted or developed EU law in a manner that would jeopardize the foundations of materially understood constitutionality

⁸⁸ Para. VI.A.

⁸⁹ “Constitutional Court’s view, this conferral of a part of its powers is naturally a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty is still founded upon Art. 1(1) of the Constitution of the Czech Republic. In the Constitutional Court’s view, the conditional nature of the delegation of these powers is manifested on two planes: the formal and the substantive plane. The first of these planes concerns the power attributes of state sovereignty itself, the second plane concerns the substantive component of the exercise of state power. In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. In such determination the Constitutional Court is called upon to protect constitutionalism (Art. 83 of the Constitution of the Czech Republic). According to Art. 9(2) of the Constitution of the Czech Republic, the essential attributes of a democratic state governed by the rule of law, remain beyond the reach of the Constituent Assembly itself.” Case Pl. ÚS 50/04 (n. 80), para. VI.A-3.

⁹⁰ *Lisbon Treaty I* Pl. ÚS 19/08 (Czech Constitutional Court, 26 November 2008) repeated in *Lisbon Treaty II* Pl. ÚS 29/09 (Czech Constitutional Court, 12 June 2010).

⁹¹ See: para. 120 *Lisbon Treaty I* Pl. ÚS 19/08.

and the essential requirements of a democratic, law-based state that are, under the Constitution of the Czech Republic, seen as inviolable (Art. 9(2) of the Constitution) such legal acts could not be binding in the Czech Republic.⁹²

This statement constitutes proclamation of constitutional identity clause conceived of as a red line demarcating the influence of the EU constitutional order on the Czech system. It was repeated and applied by the Czech Constitutional Court in the most controversial *Slovak Pensions* decision (discussed in point III.4), in which the Czech Constitutional Court adopted a dualistic rather than a pluralistic approach towards EU law.

The above described position of the Czech Constitutional Court shows, that the initial Euro-enthusiasm and openness to EU law has been replaced by a more preservative attitude, however, there are examples of judgments in which the Czech Constitutional Court in the course of examination of constitutionality of national implementing measures shaped constitutional standard following the doctrine established by the CJEU.⁹³ Although the Czech Constitutional Court accepted exclusive jurisdiction of the CJEU as to the interpretation and the control of validity of Union law,⁹⁴ it was quite sceptic towards its own classification as a court or tribunal in the meaning of Art. 267 TFEU. At the same time, the Czech Constitutional Court instructed other courts on the obligation to refer to the CJEU for interpretation of EU law⁹⁵ and inspired by the German

⁹² See: para. 215 *Lisbon Treaty* Pl. ÚS 19/08.

⁹³ Case Pl. ÚS 36/05 (Czech Constitutional Court, 16 January 2007) the Constitutional Court inferred, on the basis of case law of the CJEU cases: C-229/00 *Commission v Finland* (12 June 2003), and C-424/99 *Commission v Austria* (27 November 2001), that interference with the right to fair process was also involved in the case on hand. “The way in which the European Court of Justice construes the principles corresponding to the fundamental rights and freedoms necessarily has repercussions when domestic law and its conformity with constitutionally protected rights are construed. Art. 1 of the Charter bestows special protection upon fundamental rights. If then that Court concluded that the decision on the inclusion of medicinal preparations into the list of medications covered by public health insurance funds results in an interference with the rights of their producers and distributors and, for that reason, it is necessary to see to it that the principles of fair process are consistently observed, then the Constitutional Court must take this line of argument into account when interpreting Art. 36(1) or (2) of the Charter”, paras 40–41 of the judgment.

⁹⁴ “The Constitutional Court held that it is not competent to assess the validity of Community law norms. Such questions fall within the exclusive competence of the European Court of Justice. In terms of Community law as it has been expounded by the European Court of Justice (hereinafter ‘ECJ’), Community law norms enjoy application precedence over the legal order of Member States of the EC. According to the case law of the ECJ, where a matter is regulated solely by EU law, it takes precedence and cannot be contested by means of referential criteria laid down by national law, not even on the constitutional level.”

⁹⁵ See Czech Constitutional Court cases: III. ÚS 2738/07 (24 July 2008); I. ÚS 2553/07 (15 February 2010).

Constitutional Court⁹⁶ recognised failure of this obligation as a violation of the right to a fair trial.⁹⁷ In the subsequent judgment, in order to strengthen the argumentation, the Court referred to the decision of the ECtHR in *Ullens de Schooten et Rezabek v Belgium*⁹⁸ in which the Strasbourg Court found that Art. 6(1) ECHR places national courts under the obligation to provide rationale for any decision by which they refuse to submit a preliminary query. It means that in any case a refusal must be duly reasoned.⁹⁹ The last decision illustrates not only the extent of judicial dialogue on EU law in the Czech Republic but also the cross-fertilization of different legal systems, both European (international) and national, with regard to performance of obligations stemming from Treaties, on which the European Union is founded.

Whilst the Czech Constitutional Court's attitude towards EU law may be described as enthusiastic but cautious, the attitude of the Hungarian Constitutional Court towards EU law and the CJEU is not clear. The tactics of the Constitutional Court is to avoid confrontation. Shortly after the accession of Hungary to the EU the Constitutional Court examined the case concerning constitutionality of national legislation implementing EU regulations in the light of the principle of legal certainty.¹⁰⁰ The Court refused to consider the case as based on Union law since it recognised that the EU regulations in question specified obligations for the new Member States rather than for their citizens, and that the provisions of the challenged national law did not qualify as a translation or publication of the regulations of the Union, as they implemented the aims of the regulations by using the means of Hungarian law. The recognition of the case as a purely internal one gave rise to the controversial outcome: the principle of legal certainty as a component of the democratic State prevailed over Hungary's obligations stemming from its participation in the European Union.¹⁰¹

In subsequent decisions the Hungarian Constitutional Court developed a doctrine, according to which EU treaties and their amending treaties are not international treaties from the perspective of jurisdiction of the Constitutional Court.¹⁰² The Constitutional Court found that "these treaties are primary sources of Com-

⁹⁶ The Czech Constitutional Court referred to case BvR 2419/06 (German Federal Constitutional Court, 6 May 2008).

⁹⁷ Case II. ÚS 1009/08 (Czech Constitutional Court, 8 January 2009).

⁹⁸ *Ullens de Schooten et Rezabek v Belgium*, App. nos 3989/07 and 38353/07 (ECHR, 20 September 2011).

⁹⁹ See: case II. US 1685/11 (Czech Constitutional Court, 30 November 2011), para. 18 quotation after Constitutional Court of the Czech Republic, National Report XVIth Congress of the Conference of European Constitutional Courts "Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives" (25 September 2013) (English version of the judgment unavailable).

¹⁰⁰ Case 17/2004 (V. 25.) AB IV. 1. (Hungarian Constitutional Court).

¹⁰¹ Cf. W. Sadurski (n. 79), p. 15.

¹⁰² See *inter alia*: 053/E/2005, 72/2006 (XII. 15.), 32/2008 (III. 12.), 61/2008 (IV. 29.), 76/2008 (V. 29.), 61/B/2005, 281/B/2007.

munity law and the directives are secondary sources of Community law. They form part of the national legislation, since Hungary is the Member State of the EU¹⁰³ and that “despite its international law origin the Community legal order is a *sui generis* legal order.”¹⁰⁴ Thus the Constitutional Court consequently recognises that Union law lays outside its jurisdiction. However, it recognised its own jurisdiction in the proceeding aiming at an *a priori* constitutional review of an international treaty. It means that in opinion of the Hungarian Constitutional Court amending treaties before the entry into force have in Hungary the status of a concluded international agreement. Once the treaties enter into force, they become a part of an autonomous legal order and, as such, a part of the Hungarian law.¹⁰⁵ That’s how the Hungarian Constitutional Court determined its own relation with the CJEU in *Lisbon Treaty*.¹⁰⁶ The Court confirmed that “the authentic interpretation of the EU treaties and other EU-norms falls under the competence of the European Court of Justice.” As a consequence, it recognised also its own obligation under Art. 267 TFEU to refer to the CJEU preliminary questions concerning EU law. However, in this particular case, with regard to the interpretation of current Art. 50 TEU, the Hungarian Court applied *acte clair* doctrine as formulated by the CJEU and found that the wording of the provision makes it clear that no state can be obliged to uphold its membership in the European Union, if it does not want to do so. This reasoning was used by the Constitutional Court as a confirmation of the fact that the membership in the EU does not influence the sovereignty of the state.

In *Lisbon Treaty* the Hungarian Constitutional Court, inspired by the German Federal Constitutional Court, also signalled an intention to perform an *a priori* control of constitutionality of amending European treaties only in exceptional cases and recognised own jurisdiction to conduct *ultra vires* review with respect to the protection of the limits of the powers conferred by Hungary upon the EU as well as constitutional identity.¹⁰⁷ Such approach has been confirmed by the Court in the judgment concerning fiscal compact.¹⁰⁸

The Polish Constitutional Court accepted supremacy of EU law and position of the CJEU already in *Accession Treaty*.¹⁰⁹ The Court recognised autonomous

¹⁰³ Case 1053/E/2005 (Hungarian Constitutional Court).

¹⁰⁴ See: case 87/2008 (VI. 18.) AB (Hungarian Constitutional Court).

¹⁰⁵ Case 32/2008 (III. 12.) (Hungarian Constitutional Court).

¹⁰⁶ Decision 143/2010 (VII. 14.) AB (Hungarian Constitutional Court) on the constitutionality of the Act of promulgation of the Lisbon Treaty (Hungarian Constitutional Court, 12 July 2010). Press release: <http://www.mkab.hu/letoltesek/en_0143_2010.pdf> (access: between March 2014 and May 2016).

¹⁰⁷ A.F. Tatham, “‘Keeping Faith’ The Trials and Tribulations of the Hungarian Constitutional Court in Following its European Vocation”, [in:] M. Bobek (ed.), *Central European Judges Under the European Influence. The Transformative Power of the EU Revisited* (Hart Publishing 2015), p. 349.

¹⁰⁸ 22/12 (V. 11.) AB.

¹⁰⁹ Case K 18/04 (Polish Constitutional Court, 11 May 2006), para. III.2.2.

Union legal order, as a part of international legal order based on Polish internal hierarchical principles, as an element of Polish legal order. According to the Court

the concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law. The existence of the relative autonomy of both, national and Community, legal orders in no way signifies an absence of interaction between them.¹¹⁰

The Court noticed that a potential possibility of a collision between regulations of Union law and the Constitution is not excluded. However, in most cases such collision may be resolved by a 'sympathetic to European law' interpretation of domestic law (including the Constitution).¹¹¹ In the same case the Polish Constitutional Court established limits of the principle of interpretation of domestic law in a manner 'sympathetic to European law' and stressed that in no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantees included in the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold, which may not be lowered or questioned as a result of the introduction of Community provisions.

The above-described limitations were applied by the Court already in *Arrest Warrant I*¹¹² rendered few weeks before the *Accession Treaty*. The Constitutional Court noticed the obligation to assume an interpretation of national provisions consistent with Union law but decided that in case of obvious constitutional ban of extradition of Polish citizens, such interpretation is impossible. However, in the same case the Court used the possibility to maintain the legally binding force of unconstitutional provisions. The Court justified such decision by Art. 9 of the Constitution, according to which the Republic of Poland respects international law binding upon it. The Court found that this provision

is not only a grandiose declaration addressed to the international community, but also an obligation of state bodies, including the government, the parliament and the courts, to observe international law, which is binding for the Republic of Poland. Apart from introducing appropriate changes in the national legal order, the implementation of this obligation

¹¹⁰ See: para. III.6.2.

¹¹¹ See also: case Kp 3/08 (Polish Constitutional Court, 18 February 2009) concerning preliminary ruling procedure in the third pillar of the EU, para. III.4.2, *European Arrest Warrant II* SK 26/08 (Polish Constitutional Court, 5 October 2010), para. III.2.4, and *Lisbon Treaty* K 32/09 (Polish Constitutional Court, 24 November 2010), para. III.3.2.

¹¹² Case P 1/05 (Polish Constitutional Court, Court 27 April 2005).

may require the public administration bodies to undertake specific actions within the scope of their assigned competencies.¹¹³

As a result, in the specific case addressed to the Constitutional Court and in pending and future cases before Polish courts, during the time of maintenance of legal force of an unconstitutional provision, the Constitutional Court granted priority to obligation to surrender stemming from the Framework Decision, before a constitutional ban of extradition of Polish nationals.¹¹⁴ This concession was granted, however, on the basis of the Constitution of Poland.

The Court noticed also that an irreconcilable inconsistency between a constitutional norm and a norm of Union law is possible. In such case a contradiction could not be eliminated through an interpretation, which would respect the mutual autonomy of European and national laws. According to Polish Constitutional Court

such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. In such an event the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the European Union.¹¹⁵

In *Accession Treaty* the Constitutional Court also answered the question on its relation with the CJEU. The Court did not support the applicants' submissions as regards the alleged inconsistency between the scope of competence of the CJEU, as defined by the Treaties and the principle of sovereignty of Poland, the supremacy of its Constitution in the Polish legal system and the specific legal status of the Constitutional Court. According to the Court, the CJEU is an authorised guard of the correct understanding of the Treaties, but it is not the only one. The interpretation of Union law delivered by the CJEU should be

¹¹³ See: para. III.5.5 of the judgment P 1/05.

¹¹⁴ See more: K. Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' (2005) 6 *German Law Journal*, p. 1355. According to M. Safjan, "in this judgement an ideal balance between on the one hand, the requirements stemming from the clear constitutional rule which forbade extradition of Polish citizen and, on the other hand, the requirements of the European framework decision on EAW, was struck" so in consequence two goals were achieved – preservation of supremacy of the Constitution and effectiveness of Union law. See: M. Safjan, 'Central & Eastern European Constitutional Courts Facing New Challenges – Ten Years of Experience', [in:] M. Bobek (ed.), *Central European Judges Under the European Influence. The Transformative Power of the EU Revisited* (Hart Publishing 2015) 375.

¹¹⁵ See: para. III.6.3 of the judgment K 18/04.

performed within the scope of competence and functions conferred thereupon by the Member States and should respect the principle of mutual loyalty of Union and Member States authorities.¹¹⁶ The above statement reflects a pluralistic expectation of mutual trust and understanding in the course of conducting a dialogue. The Polish Constitutional Court thus intentionally entered into a heterarchical cooperative relation with the CJEU. The above attitude was confirmed in the subsequent judgements¹¹⁷ and supplemented by the refusal to examine the conformity of Polish law with Union law. According to the Constitutional Court, in line with Art. 91 of the Constitution, it is for ordinary courts to decide on the inapplicability of a conflicting provision, if necessary, in cooperation with the CJEU in the preliminary ruling procedure.¹¹⁸ At the same time, the Constitutional Court recognized its own jurisdiction to examine constitutionality of Union 'normative acts', and, in particular, regulations.¹¹⁹ The Court clearly distinguished the control of constitutionality of any normative act applicable within the Polish legal system from the examination of validity of acts of EU institutions performed exclusively by the CJEU. It must be noticed that the reasoning of the Polish Court in crucial aspects of the case was based on the case law of the CJEU examining the conformity of the Regulation with the right of a fair trial. In part it was based on case law of the ECtHR, presuming axiological convergence between constitutional traditions of Member States of the European Union, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.¹²⁰ Importantly, after a careful analysis

¹¹⁶ K. Wójtowicz (n. 83), p. 90.

¹¹⁷ Polish Constitutional Court cases: Kp 3/08 (18 February 2009), K 32/09 (n. 112), SK 45/09 (November 2011) and K 33/12 (23 June 2013).

¹¹⁸ See: case P 37/05 (Polish Constitutional Court, 19 December 2006).

¹¹⁹ According to Art. 79(1) of the Polish Constitution, a constitutional complaint may be submitted to the Constitutional Court for it to determine "the conformity to the Constitution of a statute or another normative act", upon which basis a court or organ of public administration has made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution. The Constitutional Court determined that regulations defined in Art. 188 TFEU as interpreted by the CJEU are 'another normative acts' within the meaning of Art. 79(1) of the Constitution. See: paras III.1.2-III.1.5.

¹²⁰ The Constitutional Court stated that "[t]he extensive catalogue of rights, freedoms and principles included in the Charter of Fundamental Rights stems, to a large extent, from the European Convention for the Protection of Human Rights and Fundamental Freedoms; the parties to the Convention also include the Republic of Poland. Pursuant to Art. 52(3) and (4) of the Charter of Fundamental Rights, in so far as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions. By contrast, on the basis of Art. 53 of the Charter, nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which

of conformity of the regulation in question with the right to a fair trial as established in both Polish and Union legal orders¹²¹ the Court declared that since there is no doubt as to the conformity of the challenged Regulation with the EU primary law, taking into account the *Foto-Frost* doctrine,¹²² there was no need to refer a question to the CJEU for a preliminary ruling.¹²³ This statement clearly indicates that in case of a doubt concerning the validity of a regulation the Court will refer the preliminary question to the CJEU in the future. It must be stressed that in contrast to the Czech or the German Constitutional Court,¹²⁴ the Polish Constitutional Court does examine exclusively normative acts, and does not possess jurisdiction to control constitutionality of acts of application of law. It means that the Polish Constitutional Court is not entitled under Polish law to control constitutionality of the CJEU's judgements.¹²⁵ The recognition of its own jurisdiction to control constitutionality of normative Union acts was the only one possibility for the Court to preserve its own position of the guardian of the Constitution in the field of EU law.

In *Lisbon treaty* the Polish Constitutional Court also formulated for the first time the concept of constitutional identity as the boundary for inclusion of international law and obligations streaming from it into constitutional order of the State. When doing so, the Court analysed decisions of the courts of other Member States concerning Lisbon Treaty,¹²⁶ and noticed that although they varied due to different constitutional requirements of admissibility as regards challenging the Treaty, the constitutional courts share the position that the view that

the constitution is of fundamental significance as it reflects and guarantees the state's sovereignty at the present stage of European integration, and also that the constitutional judiciary plays a unique role as regards the protection of constitutional identity of the Member States, which at the same time determines the treaty identity of the European Union.¹²⁷

the Union or all the Member States are party, including the Convention, and by the Member States' constitutions."

¹²¹ See: para. 6.4 of the judgment.

¹²² *FotoFrost* C-314/85 (CJEU, 22 October 1987).

¹²³ Para. III.8.1.

¹²⁴ The court invoked judgments of the Federal Constitutional Court of Germany to confirm exceptional nature of the control of constitutionality of acts of EU institutions.

¹²⁵ It must be reminded that *Solange* doctrine concerns this kind of control of constitutionality see also *Honeywell (Mangold)* 2 BvR 2661/06 (German Federal Constitutional Court, 6 July 2010).

¹²⁶ The Constitutional Court referred to cases: 143/2010 (Hungarian Constitutional Court); 2007–560 DC (French Constitutional Council, 20 December 2007); 2 BvE 2/08 (German Federal Constitutional Court, 30 June 2009); Pl. ÚS 19/08 (Czech Constitutional Court) (n. 91); 2008-35-01 (Latvian Constitutional Court, 7 April 2009), paras III.3.2-III.3.7.

¹²⁷ The Court indicated that the position constitutes part of "European constitutional traditions", para. III.3.8.

The Constitutional Court thus placed constitutional identity as an inherent element of a pluralistic constitutional constellation. Declaring that the common position described above constitutes “a vital part of European constitutional traditions”, it suggested that constitutional identity should be treated as the main point of reference in relations between constitutional orders of the Member States and the constitutional order of the EU.

The Lithuanian Constitutional Court based its approach towards EU law on paragraph 2 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union, according to which the norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Whenever this provision concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly. In an event of a collision of legal norms, European Union law shall have supremacy over the laws and other legal acts of the Republic of Lithuania. According to the Constitutional Court, the above provision constitutes a collision clause for all EU law. However, the Court made a reservation as to the relation between EU law and the Lithuanian law.¹²⁸ The Constitutional Court stressed that “the constitution also consolidates the principle that in cases where a national legal act (save the Constitution itself, it goes without saying) establishes a legal regulation conflicting with the legal regulation set down in an international treaty, the international treaty should be applied.”¹²⁹ As the result, the Court recognised that “the jurisprudence of the CJEU as a source of construction of law is also important to construction and application of Lithuanian law.”¹³⁰

Potentially, an important element of cooperation between constitutional courts and the CJEU should be a preliminary reference procedure.¹³¹ Without entering into a deep discussion as to what constitutes this procedure and what is its role in judicial dialogue, it must be noted that the CEE constitutional courts, similarly to their counterparts from other Member States, avoid a direct dialogue with the CJEU, however, duly consider the case law of the CJEU.¹³² The Lithuanian Constitutional Court made the first preliminary

¹²⁸ Case 17/02-24/02-06/03-22/04 (Lithuanian Constitutional Court, 14 March 2006).

¹²⁹ Case 13/2010-140/2010 (Lithuanian Constitutional Court, 22 December 2011).

¹³⁰ Lithuanian Constitutional Court cases: 30/03 (21 December 2006); 47/04 (4 December 2008) on the Compliance of paragraph 2 of Art. 15 of the Republic of Lithuania’s Law on Electricity (wording of 1 July 2004) with the Constitution of the Republic of Lithuania, 33/06 (27 March 2009) on the Law on Trade Marks 7/04–8/04 (27 March 2009) on state secrets and official secrets, para. 15.

¹³¹ More about preliminary ruling procedure and judicial dialogue in CEE see: Czaplńska in this volume; T. de la Mare, C. Donnelly, ‘Preliminary Rulings and EU Legal Integration: Evolution and Stasis’, [in:] P. Craig, G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011), p. 363.

¹³² Cf. G. Martinico, ‘Judging in the Multilateral Legal Order: Exploring the Techniques of “Hidden Dialogue”’ (2010) 21 *King’s Law Journal*, p. 257.

reference to the CJEU¹³³ in 2007. The Czech and the Hungarian Constitutional Courts, although recognized themselves as ‘courts’ in the meaning of Art. 267 TFEU, constantly avoid to use the preliminary ruling procedure.¹³⁴ The Polish Constitutional Court after a long time and a number of declarations¹³⁵ finally decided to ask the Luxemburg Court to decide on validity of the Union directive in 2015.¹³⁶

3.1.3. The Dialogue with Other International Courts

The judicial dialogue of the CEE constitutional courts with other international courts concerns mainly human rights protection and so involves references to decisions of the International Commission of Human Rights (rare and mainly supporting the adopted reasoning).¹³⁷ Only exceptionally, the Czech Constitutional Court dissented from decisions of the Human Rights Committee.¹³⁸ Decisions of other international courts are rarely invoked by constitutional courts, since, due to the scope of their jurisdiction, they do not apply often international law. The most experienced in this field are the Russian and the Ukrainian Constitutional Courts, however, although their decisions are broadly reasoned by international acts (both political and legal) there is no reference to the case law of international courts.¹³⁹ The practice of the Polish Constitutional Court does

¹³³ Case 47/04 (Lithuanian Constitutional Court, 8 May 2007) on the application to the Court of Justice of European Communities for a preliminary ruling.

¹³⁴ See: case Pl. ÚS 154/08 (Czech Constitutional Court, 30 June 2008).

¹³⁵ See especially: case SK 45/09 (n. 118). See: detailed analysis K. Kowalik-Bańczyk, ‘Sending Smoke Signals to Luxembourg – the Polish Constitutional Tribunal in Dialogue with ECJ’, [in:] M. Claes, M. de Visser, P. Popelier, C. Van de Heyning (eds), *Constitutional Conversation in Europe. Actors, Topics and Procedures* (Intersentia Publishing Ltd. 2012), p. 131.

¹³⁶ Case K 61/13 (Polish Constitutional Court, 7 July 2015).

¹³⁷ See i.a.: Pl. ÚS 37/04 (Czech Constitutional Court, 26 April 2006); 2/2014 (Lithuanian Constitutional Court, 4 November 2015); 10/2015 (Lithuanian Constitutional Court, 20 October 2015); P 29/09 (Polish Constitutional Court, 18 November 2010); 12-П/2016 (Russian constitutional Court, 19 April 2016).

¹³⁸ See: Pl. ÚS 33/96 (Czech Constitutional Court, 4 June 1997); Pl. ÚS 45/97 (Czech Constitutional Court, 25 March 1998); Pl. ÚS 15/02 (Czech Constitutional Court, 21 January 2003) discussed by Wyzozumska.

¹³⁹ See especially last cases concerning Crimea: 6-П/2014 (Russian Constitutional Court, 19 March 2014); 2-rp/2014 (Ukrainian Constitutional Court, 14 March 2014). What is significant there is obvious contradiction between findings of both courts resulting from different interpretation of the general principles of international law, namely right to self-determination of people and territorial integrity of state. In case of the Russian constitutional Court it must be noticed that after amendment of the Constitution of the Russian Federation also its interpretation of general international law was changed in regard to relation between above-mentioned principles of international law. See decision on unconstitutionality of proposed referendum on independence in Tatarstan of 1993 discussed by G. Danilenko, ‘Implementation of International Law in Russia and Other CIS States’ (1998) <<http://www.nato.int/acad/fellow/96-98/danilenk.pdf>> (access: between March 2014 and May 2016).

not include judicial dialogue on international law with other international courts. The Czech Republic invocation of the International Court of Justice's *Nottebohm*¹⁴⁰ to establish significance of international law in regard to recognition of citizenship¹⁴¹ must be noticed. The practice of Lithuanian and Hungarian constitutional courts delivers interesting examples of judicial dialogue with international courts on international law.

The Hungarian Constitutional Court in the decision of 2003¹⁴² denied to accept the judgments of the ICJ as a source of constitutional obligation for Hungarian authorities. The case originated in the ICJ decision in *Gabčíkovo-Nagymaros*.¹⁴³ A member of the Hungarian Parliament submitted a constitutional complaint on the legislative omission through failure of implementation of the ICJ decision. The Constitutional Court held that the judgment of the ICJ cannot be considered as "a generally recognized principle of international law" or compared to incorporated international treaties. The Court held that

[e]ven though the proceedings of the International Court are based on the consent of the countries involved acknowledging the jurisdiction, as contained in an international treaty, the judgment is not a norm, not a contract, but the resolution of a specific dispute, even if some of its statements gain theoretical content or the value of a precedent. The International Court has no jurisdiction to annul an internal legal norm, to oblige the participating states to create law. The International Court cannot oblige the state to create law even if the state can only fulfil the obligation contained in the judgment by creating law.¹⁴⁴

As a consequence, the Court declared the lack of jurisdiction to decide about an obligation of the Parliament or the Government to enact internal law or to conclude a treaty.

The position of the Hungarian Constitutional Court is coherently dualistic. We must observe at this point that the discussed approach to decisions of the ECtHR is based on recognition of the ECHR as an incorporated international agreement, which forms a part of the Hungarian legal order. The Constitutional Court recognises legally the binding force of the Convention but not of the Strasbourg Court decisions, which are solely to be taken into account in the process of interpretation of Hungarian law. The dualistic approach made it impossible to recognise decisions of international courts as sources of obligations if such an obligation is not envisaged in incorporated international treaty. However, it does not mean that the case law of international courts other than the ECtHR cannot be taken

¹⁴⁰ *Nottebohm Lichtenstein v Guatemala* (ICJ, 6 April 1955).

¹⁴¹ Case Pl. ÚS 9/94 (Czech Constitutional Court, 13 September 1994) on the State power to grant citizenship under international law.

¹⁴² Case 988/E/2000 (Hungarian Constitutional Court, 7 October 2003).

¹⁴³ *Gabčíkovo-Nagymaros Project, Hungary v Slovakia* (ICJ, 25 September 1997).

¹⁴⁴ See: para. 3.3.

into account by Hungarian courts in the process of interpretation and application of international law.¹⁴⁵

The most prominent example of judicial dialogue in application of international law is the decision of the Lithuanian Constitutional Court in *Genocide*.¹⁴⁶ The case concerned the constitutionality of the Lithuanian Criminal Code, which retroactively provide for a criminal liability for genocide. The claimants argued that the Lithuanian law establishes a broader *corpus delicti* of genocide compared to that provided for in the international treaties in force to which Lithuania is a party. Furthermore, the claimants sustained that the retroactive effect of the national law is contrary to *nullum crimen sine lege* principle. The Court began its reasoning from Art. 135(1) of the Constitution and confirmed its former finding that in line with this provision the Republic of Lithuania

is obliged to follow the universally recognised principles and norms of international law; the said provision consolidates the constitutional principle of respect for international law, i.e. the principle of *pacta sunt servanda*, which means the imperative of fulfilling in good faith the obligations assumed by the Republic of Lithuania under international law, *inter alia*, international treaties.

The Court added that “the constitutional principle of *pacta sunt servanda* also means the imperative of fulfilling in good faith the international obligations arising from the universally recognised norms of international law (general international law) that prohibit international crimes.” It means that, in contrast to the Hungarian Constitution, the Constitution of Lithuania incorporates whole international law including not only international treaties but also general principles of law and customary international law into the Lithuanian legal order.

In the next part of the judgement the Court recognized prohibition of genocide and other international crimes as *jus cogens* norms of international law. When doing so the Court carefully analysed international acts and judicial decisions. The Court referred to case law of the ICJ¹⁴⁷ as well as to the decision of International Criminal Tribunal for Rwanda in *Kayishema and Ruzindana*.¹⁴⁸ International case law was also broadly invoked to define the content of prohibition of genocide as an international customary law rule. The Court started its

¹⁴⁵ Cf. N. Chronowski, E. Csatlós, ‘Judicial Dialogue or National Monologue? The International Law and Hungarian Courts’ (2013) 1 ELTE Law Journal, p. 26.

¹⁴⁶ Case 31/2011-40/2011-42/2011-46/2011-9/2012-25/2012 (Lithuanian Constitutional Court, 18 March 2014).

¹⁴⁷ The Court referred to *Advisory Opinion on the Reservations to the Convention on Genocide* (ICJ, 28 May 1951); *Armed activities on the territory of the Congo, Democratic Republic of the Congo v Rwanda* (ICJ, 3 February 2006); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro* (ICJ, 26 February 2007) and *Jurisdictional Immunity of States Germany v Italy Greece intervening* (3 February 2012).

¹⁴⁸ ICTR-95-1-T *Kayishema and Ruzindana* (ICTR, 21 May 1999).

analysis from the 1948 Geneva Convention on the Prevention and Punishment of the Crime of Genocide as reflection of customary law and then carefully analysed national law of several states,¹⁴⁹ resolutions of the UN General Assembly, resolutions of the UN Security Council establishing international criminal courts and interpretation of genocide delivered by the ICJ in *Application of the Convention against Genocide*¹⁵⁰ as well as the practice of international criminal courts¹⁵¹ and concluded that

under universally recognised norms of international law, states are under the obligation to adopt national legislation establishing liability for genocide. In the practice of the states concerned, the said obligation may also be understood as certain discretion, while taking account of a concrete historical, political, social, and cultural context, to establish, in their national law, a broader definition of the crime of genocide than that established under the universally recognised norms of international law, *inter alia*, as the possibility of including, within the respective national law, social and political groups in the definition of genocide.¹⁵²

As the result, the Constitutional Court adopted a broad definition of genocide, shaped to cover crimes committed against Lithuanian residents recognized as political opponents during the period of the USSR totalitarian system.¹⁵³ When

¹⁴⁹ The Court held that “it should be noted that, when defining genocide, besides the groups protected under the Convention Against Genocide, the national law of more than twenty states additionally incorporates other groups in the respective lists of protected groups (*inter alia*, political groups and various social groups characterised on the basis of social status, age, sex, sexual orientation, etc.)”, para. 3.3.

¹⁵⁰ See: para. 3.3.4 of the judgment.

¹⁵¹ See: para. 3. The Constitutional Court invoked decisions of ICTY: IT-95-10 *The Prosecutor v Jelisić* (14 December 1999); IT-98-33 *The Prosecutor v Krstić* (2 August 2001); IT-95-16-T *The Prosecutor v Kupreškić and Others* (14 January 2000); IT-03-66-T *The Prosecutor v Limaj and Others* (November 2005); IT-02-60-T *The Prosecutor v Blagojević and Jokić* (17 January 2005) and ICTR cases: ICTR-95-1-T *Kayishema and Ruzindana* (21 May 1999); ICTR-96-4-T *The Prosecutor v Akayesu* (2 September 1998); ICTR-97-20 *The Prosecutor v Semanza* (15 May 2003); ICTR-95-54A-T *The Prosecutor v Kamuhanda* (22 January 2004).

¹⁵² See: para. 3.7 of the judgment.

¹⁵³ “Thus, with consideration of such an international and historical context, *inter alia*, the aforesaid ideology of the totalitarian communist regime of the USSR upon which the extermination of entire groups of people was grounded, the scale of repressions of the USSR against residents of the Republic of Lithuania, which was a part of the targeted policy of the extermination of the basis of Lithuania’s political nation and of the targeted policy of the treatment of Lithuanians as an ‘unreliable’ nation, the conclusion should be drawn that, during a certain period (in 1941, when mass deportations of Lithuanians to the Soviet Union began and non-judicial executions of detained persons were carried out, and in 1944–1953, when mass repressions were carried out during the guerrilla war against the occupation of the Republic of Lithuania), the crimes perpetrated by the Soviet occupation regime, in case of the proof of the existence of a special purpose aimed at destroying, in whole or in part, any national, ethnic, racial or religious group, might be assessed as genocide as defined according

doing so, the Court defined the Geneva Convention term ‘in part’¹⁵⁴ as covering also a political or social group. Consequently the Court adjudicated positively on compatibility with the Lithuanian Constitution of Art. 99 of the Criminal Code, which stipulates that actions, aimed at physical destruction, in whole or in part, of persons belonging to any national, ethnic, racial, religious, and also social or political group.

When resolving the question of constitutionality of retroactive application of a wider notion of genocide enshrined in national law, the Court found that the norm of international law abolishing statutory limitations for prosecution and punishment of genocide concerns genocide as defined in the 1948 Geneva Convention. However, States may establish abolition of such limitations with reference to other crimes.

The Grand Chamber of the ECtHR considered these findings of the Constitutional Court a mere year later in *Vasiliauskas v Lithuania*.¹⁵⁵ The ECtHR accepted that the domestic authorities have discretion to interpret the definition of genocide more broadly than that contained in 1948 Genocide Convention. However, such discretion does not permit domestic courts to convict persons accused under that broader definition retrospectively. According to the ECtHR, the current development of interpretation of term ‘in part’ used in the Geneva Convention was unforeseeable in 1953 when the applicant killed Lithuanian partisans¹⁵⁶ and thus his conviction was contrary to *nullum crimen sine lege* principle contained in Art. 7 ECHR. It must be noted that the decision of the ECtHR was taken by 9 votes to 8,

to the universally recognised norms of international law (*inter alia*, according to the Convention Against Genocide)”, para. 6.3.

¹⁵⁴ “According to Article 1 of the Convention Against Genocide, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”

¹⁵⁵ *Vasiliauskas v Lithuania*, App. no. 35343/05 (ECtHR, 20 October 2015). The case originated in conviction for genocide of member of Soviet security services and was involved in the killings of Lithuanian partisans under Lithuanian law. The main question to be resolved by the ECtHR was conformity of retroactive Lithuanian law with Art. 7 of the Convention.

¹⁵⁶ The ECtHR found that “in 1953 there was no case law by any international tribunal to provide a judicial interpretation of the definition of genocide. [...] The Court [...] considers it reasonable to find that in 1953 it was foreseeable that the term ‘in part’ contained a requirement as to substantiality. [...] [H]owever, the Court is mindful of the subsequent development in the international case law on the crime of genocide. Half a century after the events for which the applicant was convicted, judicial guidance as to the interpretation of the phrase ‘in part’ emerged when cases concerning genocide were brought before the ICTY, ICTR and the ICJ. In particular [...], the intentional destruction of a ‘distinct’ part of the protected group could be considered as genocide of the entire protected group, provided that the ‘distinct’ part was substantial because of the very large number of its members. Furthermore, in addition to the numerical size of the targeted part, judicial interpretation confirmed that its ‘prominence’ within the protected group could also be a useful consideration. Be that as it may, this interpretation of the phrase ‘in part’ could not have been foreseen by the applicant at the relevant time”, para. 176.

which proves that international definition of genocide is still a subject of interpretative disagreements. Nevertheless, the decision of the Lithuanian Constitutional Court must be recognised as an important contribution to the development of international law.

The comparison of the Hungarian and Lithuanian approaches to international law also proves that constitutional openness, traditionally called as a monistic approach, and general incorporation of international law into domestic legal order creates favourable circumstances for judicial dialogue.

3.1.4. The Dialogue with Foreign National Courts

The judicial dialogue with foreign courts is deprived of any formal framework and is fully voluntary in nature and based on “a common substantive mission such as protection of human rights, at national, regional, or international level.”¹⁵⁷ Comparative argument is thus based on presumption of universality of human rights.¹⁵⁸ Decisions of foreign courts do not constitute binding legal sources, and for that reason they are not invoked by the Ukrainian and Russian Constitutional Courts. The lack of comparative arguments does not mean that foreign practice and comparative methodology is missing. In the Russian Constitutional Court there is a special unit for study and generalization of a foreign constitutional practice, which, whenever it is necessary and usually upon request by a judge rapporteur, prepares surveys on decisions of foreign constitutional control bodies.¹⁵⁹ It means that comparative analysis is present yet appears hidden in the practice of the Russian Constitutional Court.

The Czech, Hungarian, Lithuanian and Polish Constitutional Courts refer routinely to foreign national decisions. The reference to foreign courts takes place especially in ‘problematic’ cases, to draw inspiration for determination of democratic standards and proper balance between human rights and other interests. Constitutional courts most frequently refer to decisions issued by the Federal Constitutional Court of Germany which is explained in academia by historic and legal cultural affinities, linguistic ability and intellectual stimulus, constitution and constitutional jurisdictional formation in the post-Communist era and resulting influences on courts’ judicial practice.¹⁶⁰ However, references are also made to judgements of other national courts, including the CEE ones, especially in cases concerning common problems.

¹⁵⁷ As suggested by Anne-Marie Slaughter “[c]ourts may well feel a particular common bond with one another in adjudicating human rights cases [...] because such cases engage a core judicial function in many countries around the world.” A.-M. Slaughter (n. 35), p. 101.

¹⁵⁸ Ibidem, p. 107.

¹⁵⁹ See: Constitutional Court of the Russian Federation, National Report XVIth Congress (n. 72), p. 38.

¹⁶⁰ A.F. Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland. The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff Publishers 2013), p. 5.

The comparative reasoning may be used to change internal doctrine on particular legal institution like in the Czech example concerning the right to compensation for unlawful detention.¹⁶¹ Czech courts have for a long time rejected the possibility that the right covers also compensation for immaterial damage. The 2006 Constitutional Court's judgment analyses the decisions of selected national European courts (Germany, Austria, Greece, Denmark, the Netherlands) and the case law of the ECtHR relating to Art. 5(5) ECHR. It decided that:

irrespective of the manner in which the issues of damages is approached by the domestic legislator, case law of the ordinary courts and the Constitutional Court, and also the domestic doctrine of civil law, it is necessary, in the area of domestic application of the European Convention, to proceed from the notion of damage in the way it is conceptualised by other European constitutional and supreme courts, in whose case law is rooted also the case law of the European Court of Human Rights.¹⁶²

The approach of the Czech Constitutional Court illustrates that the case law of foreign courts may be recognised as emanation of a universal or at least a European standard of protection of human rights. At the same time it illustrates interconnections between the mandatory dialogue (with the ECtHR) and a non-mandatory one with foreign courts.¹⁶³

Constitutional dialogue with international and foreign jurisdictions, especially if it results in law-creating argument requires at least a minimal level of familiarity with an invoked legal system. Judges can optimally and reasonably use solution adopted by others, only if they are able to justify such practice. Otherwise, the position taken can be questioned and, as a result, prove inefficient before internal and external audience. Constitutional judges develop their knowledge on foreign law and practice not only by examination of legal sources but also during meetings with other judges and on the basis of academic contributions.¹⁶⁴

Constitutional courts usually use comparative argumentation carefully considering both the circumstances of the case in hands and the level of approximation of referred legal systems with their own legal order. Therefore, they make reservations on limits of a comparative method. The Hungarian Constitutional Court in *Election Procedure*¹⁶⁵ made a general statement with regard to a reference to foreign law suggested by the party to the proceedings. The Court found that:

¹⁶¹ M. Example after Bobek (n. 36) 156.

¹⁶² Case I. ÚS 85/04 (Czech Constitutional Court, 13 July 2006). Translation after M. Bobek, *op. cit.*, p. 156.

¹⁶³ Cf. *ibidem*, p. 156.

¹⁶⁴ M. Rosenfeld, A. Sajó, 'Introduction', [in:] *idem* (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

¹⁶⁵ Case 1/2013 (I. 7.) AB on the unconstitutionality of certain provisions of Act on Election Procedure (Constitutional Court, 4 January 2013).

[t]he constitutionality of a specific legal institution in another country depends on the constitution of the given state, the fitting into the legal system, and on the historical and political background. Therefore, the Constitutional Court – though acknowledging that taking into account foreign experiences may help to evaluate certain regulatory solutions – does not consider the example of any foreign country in itself as a determining factor with regard to the review of constitutionality (compliance with the Fundamental Law).¹⁶⁶

Similarly, the Polish Constitutional Court held that a comparative reasoning (including references to international law and practice) may be used, however, subject to various preconditions, especially if it aims at justification of dynamic interpretation of the Constitution. According to the Court:

there are particular circumstances in which one may resort to non-linguistic methods of legal interpretation [...]. The role of those methods is subsidiary to linguistic and logical interpretation, however, even if by means of that method a text is found to be synonymous, its interpreter may sometimes 'go beyond' its determined meaning. However, a strong axiological substantiation is required which will mainly invoke constitutional values. It is also necessary to note that if the Court invokes a foreign internal law it is necessary to determine if the use of alien models is adequate to the interpretation of the Polish law. One should be particularly careful in „selecting” a legal system which is to be invoked.¹⁶⁷

Interestingly, the Polish Constitutional Court treated in the same way the ECtHR case law and that of foreign courts as an emanation of a universal standard in the field of human rights protection which should be taken into account and justify dynamic interpretation of constitutional provisions.

The Czech Constitutional Court quite frequently refers to other constitutional courts and especially to the German Federal Constitutional Court, decisions of which were an undoubted source of inspiration in several fundamental cases concerning questions of Union law, discussed in other parts of this paper.¹⁶⁸ Here one must notice the decision of 3 May 2012¹⁶⁹ where the jurisprudence of the Polish Constitutional Court provided a strong persuasive argument in formulation of general principles regulating restrictions of judges' salaries.¹⁷⁰ Also in the

¹⁶⁶ Ibidem, III.3.4.

¹⁶⁷ Case K 38/07 (Polish Constitutional Court, 3 July 2008), para. III.4.

¹⁶⁸ See also i.a.: reference to the decision of the German Constitutional Court, the Italian Constitutional Court, the Austrian Constitutional Court, the Polish Constitutional Court, the Supreme Court of Spain, the Croatian Constitutional Court and the Supreme Court of the United States of America in Pl. ÚS 17/11 (Czech Constitutional Court, 15 May 2012) concerning photovoltaic power plants part VIII b paras 58–64 of the judgement; reference to the Polish Constitutional Court Pl. ÚS 33/11.

¹⁶⁹ Case Pl. ÚS. 3/11 (Czech Constitutional Court, 3 May 2012), para. VII.

¹⁷⁰ "The following fundamental, general theses regarding the constitutionality of salary restrictions on judges arise from the case law of the Constitutional Court, as well as from comparison with the case law of European constitutional courts (see, in particular, decisions

practice of the Hungarian Constitutional Court we can find referrals to decisions of foreign courts as sources of inspiration for interpretation of constitutional provisions.¹⁷¹

3.2. The Main Fields of Judicial Dialogue

3.2.1. The Judicial Dialogue on Human Rights Protection

As it was already mentioned, human rights protection constitutes the main field of judicial dialogue in the pluralistic legal order. On the one hand, the axiological similarity (nearly identity) of plural legal orders constitutes an essential element of ensuring coherence of the whole system. When applying national human rights provisions, constitutional courts refer to international courts' judgments not only on the basis of their legally binding force, but also to determine the European standard of protection. On the other hand, in difficult cases, in which there is a problem of proper balance between different rights and interests references to international and foreign courts' decisions strengthen the legal argumentation and deliver additional legitimization for a particular decision.

3.2.1.1. Searching for a Common Standard of Protection – Consistent Interpretation

Consistent interpretation is a well-established method used by national courts to avoid conflicts between domestic constitutional law and international and regional human rights law and to achieve conformity with European and international standards of human rights protection. Usually, Courts use judicial dialogue to bring an (evolving) standard of constitutional protection in line with a European standard stemming from the ECtHR but also the CJEU and foreign case law. In case of constitutional courts references to each other's decisions on human rights and judgments of international courts issues seem to be a highly effective tool of cross-fertilization.¹⁷²

When judicial dialogue is relied on to achieve consistent interpretation of domestic and international human rights law in constitutional courts, the foreign or international courts' judgments do not usually form a part of a legal reasoning in determination of the content and the scope of an applicable norm. These courts use instead international and foreign material to support

of the Polish Constitutional Court: P 1/94 (8 November 1994); K 13/94 (14 March 1995); P 1/95 (11 September 1995); P 8/00 (4 October 2000); K 12/03 (18 February 2004)."

¹⁷¹ Case 1/2013 (I. 7.) AB (n. 166).

¹⁷² E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 5 Tel Aviv University Law Faculty Papers 4.

or supplement their primarily domestic law-based argument.¹⁷³ In this regard, the judgment of the Polish Constitutional Court on the retirement age of men and women is a good example. The Constitutional Court considered exclusively the conformity between national provisions that set a different retirement age for men and women with Art. 32 (non-discrimination) and Art. 33 (equality of men and women) of the Polish Constitution. Regardless of such delimitation of the subject matter of the judgement, the Court devoted two separate parts in the judgment to the discussion of relevant EU and international standards of protection, including the case law of both the CJEU and the ECHR. In addition, the Constitutional Court noted explicitly, albeit in an *obiter dictum*, that the relevant provisions of domestic law were consistent with these European and international standards.¹⁷⁴

Another example of a dialogue that resulted in bringing Polish law in line with the ECHR is a case concerning the reorganisation of intelligence services.¹⁷⁵ In this case, the Constitutional Court held that although it was unnecessary to refer to Art. 6 ECHR (since the right of fair trial was enshrined in Art. 45 of the Polish Constitution), it was necessary to refer to human rights treaties and the judicial practice of the ECtHR and other international human rights bodies to establish the constitutional standard of protection.

The Russian Constitutional Court considers case law of the ECtHR when interpreting constitutionally granted human rights and especially the right to a fair trial.¹⁷⁶ For example, in the decision of 15 November 2011 the Constitutional Court referred to the decision of the ECtHR in *Gorodnichev v Russia*¹⁷⁷ in examination of constitutionality of the decision on discontinuation of the criminal proceeding after death of an accused person challenged by his relatives. It is interesting that the referred decision concerning admissibility of application to the ECtHR (in the light of its Art. 6) after applicant's death. The decision of the ECtHR was not used as a decisive argument by the Russian Constitutional Court. It rather confirmed its own findings and showed due consideration to the ECtHR decisions in Russian cases. In the decision of 5 December 2011¹⁷⁸

¹⁷³ M. Wendel, 'Comparative Reasoning and the Making of a Common Constitutional Law – The Europe-Decisions of National Constitutional Courts in a Transnational Perspective' (2013) 25 Jean Monnet Working Paper, p. 9; J. Krzemińska, 'Courts as Comparatists: References to Foreign Law in the Case law of the Polish Constitutional Court' (2012) 5 Jean Monnet Working Paper, p. 49, <www.jeanmonnetprogram.org> (access: between March 2014 and May 2016).

¹⁷⁴ See: point III.3 under the heading "EU law provisions concerning equal retirement age of men and women" and III. 4 under the heading "International law provisions concerning equal retirement age of men and women" K 63/07 (Polish Constitutional Court, 15 July 2009).

¹⁷⁵ Case K 51/07 (Polish Constitutional Court, 27 June 2008), para. III.4.2.

¹⁷⁶ See *inter alia* Russian Constitutional Court cases: 29-П (30 November 2012); 5-П (17 March 2009); 6-П (25 April 2011); 16-П (14 July 2011).

¹⁷⁷ *Gorodnichev v Russia*, App. no. 32275/03 (ECtHR, 15 November 2007).

¹⁷⁸ Case 27-П/2011 (Russian Constitutional Court, 6 December 2011).

concerning the constitutionality of the provision of the Russian Code of Criminal Procedure providing for home arrest, the Constitutional Court carefully analysed the case law of the ECtHR interpreting Art. 5 ECHR to establish a proper balance between the right to freedom and a public security interest.¹⁷⁹ Furthermore, it attempted to determine the essence of the right to freedom in the context of distinction between deprivation and limitation of liberty.¹⁸⁰

However, there are also examples, in which case law of the ECtHR has been used as a persuasive authority to alter the scope of human rights protection granted under domestic law. In *Maslov*, handed down by the Russian Constitutional Court in 2000¹⁸¹ interpretation of domestic law in conformity with the jurisprudence of the ECtHR¹⁸² resulted in the alteration of the scope of rights of defendants in the Russian Code of Criminal Procedure. The Russian Constitutional Court stressed the obligation of law enforcement agencies to enable detained persons to access a defence counsel in the first hours of police questioning, even though neither the Russian Code on Criminal Procedure nor the Russian Constitution contained such an obligation at the time.¹⁸³

The practice of the Russian Constitutional Court delivers also an interesting example of the use of the ECtHR case law to justify diminishing a constitutional standard of protection.¹⁸⁴ It happened in the case concerning compensation for taking of property by the State under the 2000 Bankruptcy Protection Act.¹⁸⁵ The Court decided that although the Constitution provides for expropriation by the State only by means of a judicial decision provided that “prior and equivalent compensation” is granted, the interpretation of the last condition as a right to a full compensation is not justified. As an argument, case law of the ECtHR was invoked. The Constitutional Court concluded that to achieve more social justice the amount of compensation must be fair, reasonable and proportionate to the public interest. So the Court instrumentally replaced literal meaning of the

¹⁷⁹ *Ibidem*, para. 2.

¹⁸⁰ *Ibidem*, para. 2.1. See also cases: 30-П (21 December 2011); 6-П/2015 (31 March 2015).

¹⁸¹ Case 11-П (Russian Constitutional Court, 27 June 2000).

¹⁸² ECtHR judgments cited by the Russian Constitutional Court were *Quaranta v Switzerland*, App. no. 12744/87 (ECtHR, 24 May 1991) and *Imbrioscia v Switzerland*, App. no. 13972/88 (ECtHR, 24 November 1993).

¹⁸³ For a detailed analysis of case law of the Constitutional Court of the Russian Federation see: National Report, Russian Federation, XVI Congress of the Conference of European Constitutional Courts, “Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives”, Vienna, May 2014, <www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB-Russie-EN.pdf> (access: between March 2014 and May 2016).

¹⁸⁴ After A. Trochev, ‘Russia’s Constitutional Spirit: Judge-Made Principles in Theory and Practice’, [in:] G.B. Smith, R. Sharlet (eds), *Russia and its Constitution: Promise and Political Reality* (Martinus Nijhoff Publishers 2008), p. 53.

¹⁸⁵ See: case 8-П (16 May 2000).

constitutional provision by interpretation “in conformity” with international obligations of the Russian Federation.¹⁸⁶

Although, as it was pointed out before, for a long time the Ukrainian Constitutional Court was rather reluctant to make explicit references to case law of the ECtHR and other courts, in the latest practice the Court incorporates into its legal reasoning the analysis of the European standard of human rights protection.¹⁸⁷ In the case of 22 April 2014¹⁸⁸ the Court interpreted the provisions of Ukrainian Code of Civil Procedure deciding whether rulings of courts of first instance, which are not explicitly referred to in the Code are subject to a separate challenge in an appellate instance. When establishing the content and the scope of the right to appeal, the Court referred to the ECtHR judgements to support the extensive interpretation of domestic procedural law in the light of the right to appeal, under which everyone is guaranteed the right to appeal against decisions, actions or omissions of public authorities, local authorities, officers and employees. A court’s refusal in admitting claims, complaints, issued in accordance with the procedural law is a violation of the right to a judicial protection, which, under Art. 64 of the Constitution cannot be restricted. The Court stressed that the realization of judicial proceedings on principles defined in the Constitution is the constitutional guarantee of everyone’s right to judicial protection. One of these principles is to ensure the appeal and the cassation appeal against a court decision, except in cases established by law. In the judgment of 8 April 2015¹⁸⁹ the Ukrainian Constitutional Court decided on unconstitutionality of the provisions of the Code of Administrative Proceedings of Ukraine, according to which a decision of a local general court in its capacity as an administrative court in cases concerning decisions, actions or omission of subjects of authority on bringing to administrative liability shall be final and may not be appealed, as it is contrary to the right to access to judgment. In its decision the Constitutional Court not only broadly analysed the case law of the ECtHR but also invoked the Charter of Fundamental Rights of the European Union as emanation of the European standard.

The dialogue with the CJEU may also bring domestic law in line with the European standard of human rights protection, especially, but not exclusively, in cases concerning measures implementing EU law in a domestic legal system.¹⁹⁰ For example, the Lithuanian Constitutional Court in its decision of 15 May 2007¹⁹¹

¹⁸⁶ A. Trochev (n. 185), p. 58.

¹⁸⁷ See also examples presented by in this volume by T. Tsymbriivskyy.

¹⁸⁸ Case 4-rp/2014 (Ukrainian Constitutional Court, 22 April 2014).

¹⁸⁹ Case 3-rp/2015 (Ukrainian Constitutional Court, 8 April 2015).

¹⁹⁰ Case: K 41/05 (Polish Constitutional Court, 2 June 2007); K 23/11 (n. 59).

¹⁹¹ Case 7/04–8/04 (n. 131).

invoked the case law of both the ECtHR¹⁹² and the CJEU¹⁹³ in order to interpret the notion of equality of any person before the court in the context of the right of the party to disclose information constituting a state secret. There the Court confirmed that

the jurisprudence of the European Court of Human Rights as a source of construction of law is important to construction and application of Lithuanian law as well; the same can be said *mutatis mutandis* as regards the jurisprudence of the Court of Justice of the European Communities and the Court of the First Instance of the European Communities.¹⁹⁴

Similarly, the Polish Constitutional Court in its judgment of 20 March 2006¹⁹⁵ referred to the decision of the Court of the First Instance in *Interporc II*,¹⁹⁶ which concerned access to documents of European institutions as a proof of an existing standard.

The 2009 Polish Constitutional Court judgment¹⁹⁷ may be considered as another example of a broad judicial dialogue on human rights protection with both the ECtHR and foreign courts. The Court was called upon to adjudicate a challenge to the constitutionality of the obligation to fasten seat belts in cars under the Polish Road Traffic Act. The applicant had been stopped by the police and fined for not fastening his seat belt. The applicant refused to pay the fine on the ground that the obligation in question was contrary to the right of privacy and violated his dignity. The Polish Constitutional Court referred to several cases of the ECtHR¹⁹⁸ as well as of national courts¹⁹⁹ to strengthen its argumentation concerning the acceptable scope of limitations to the right to privacy.

¹⁹² *Edwards and Lewis v the United Kingdom*, App. nos 39647/98, 40461/98 (ECtHR, 27 October 2004).

¹⁹³ Joined Cases T-110/03, T-150/03 and T-405/03 *Jose Maria Sison v Council of the European Union* (CJEU, 26 April 2005).

¹⁹⁴ *Ibidem*, para. 15.

¹⁹⁵ Case Sk 11/12 (Polish Constitutional Court, 23 October 2012). See also: case K 17/05 (Polish Constitutional Court, 20 March 2006).

¹⁹⁶ T-92/98 *Interporc v Commission* (CJEU, 7 December 1999).

¹⁹⁷ SK 48/05 (Polish Constitutional Court, 9 July 2009).

¹⁹⁸ Among them to ECtHR cases: *X v Belgium*, App. no. 8707/79 (13 December 1979); *Schmautzer v Austria*, App. no. 15523/89 (10 May 1993); *Viel v France*, App. no. 41781/98 (14 December 1999).

¹⁹⁹ For example: 1 BvR 1925/80 (German Federal Constitutional Court, 26 January 1982); 1 BvR 331/85 (German Federal Constitutional Court, 24 July 1986); 1 BvR 74/92 (German Federal Constitutional Court, 9 March 1992); *Schmautzer B 821/88* (Austrian Constitutional Court, 27 February 1989); *Society v Kohrig* 62719–24, 498 N.E. 2d 1158 (US Illinois Supreme Courts, 1 October 1986); *State v Hartog* 88–383, 440 N.W. 2d 852 (US Iowa Supreme Court, 17 May 1989); *State v Eckblad* 74109–3, 152 Wn. 2d 515, 98 3d 1184 (US Washington Supreme Court, 14 October 2004).

Similarly, the Constitutional Court of Czech Republic in 2005 deciding about the scope of the right to judicial review²⁰⁰ referred to the decisions of the Slovak²⁰¹ and Polish²⁰² Constitutional Courts, laws of the Netherlands and Lithuania, and the jurisprudence of the ECtHR.²⁰³ It used these references to support its arguments that the right to an effective remedy was broader under the Czech Constitution than the protection granted by the ECHR.

The practice of the Hungarian Court provides also interesting examples of cases resolved in judicial dialogue with international and foreign courts.²⁰⁴ The most prominent one is the famous totalitarian symbols saga.²⁰⁵ In 2000 the Hungarian Constitutional Court did not find that the prohibition of using and wearing totalitarian symbols, including the 'five-point red star' unconstitutional. Mr. Vajnai who had been punished under this provision for wearing a five-point red star in public challenged this decision before the ECtHR.²⁰⁶ In its judgment *Vajnai v Hungary*, the ECtHR concluded that the applicant's criminal conviction for simply having worn a red star had to be considered unnecessary, as it did not respond to a 'pressing social need'. Furthermore, the sanction against the applicant, although relatively light, came under criminal law, entailing serious consequences for the applicant. The sanction had therefore not been proportionate to the legitimate aim pursued. Accordingly, there had been a violation of Art. 10 ECHR. After the judgment of the ECtHR Mr. Vajnai had again been accused of wearing the red star in public. The Hungarian Supreme Court submitted a legal question to the Hungarian Constitutional Court. The Constitutional Court reversed its earlier judgment, and found the provision unconstitutional. In coming to this conclusion and establishing the proper level of protection, the Hungarian Con-

²⁰⁰ Case Pl. ÚS 11/04 (Czech Constitutional Court, 25 April 2005).

²⁰¹ The Czech Constitutional Court referred to the judgment of the Slovak Constitutional Court of Pl. ÚS 15/03 (11 February 2004).

²⁰² The Czech Constitutional Court referred to the judgment of the Polish Constitutional Court K 21/99 (10 May 2000).

²⁰³ Among them ECtHR cases: *Incal v Turkey*, App. no. 41/1997/825/1031 (9 June 1998); *Sramek v Austria*, App. no. 8790/79 (22 October 1989); *Pellegrin v France*, App. no. 28541/95 (8 December 1999).

²⁰⁴ See *inter alia*: 13/2000 (V. 12.) AB on the symbols of the State, 57/2001 (XII. 5.) AB on the right of reply, 22/2003 (IV. 28.) AB on euthanasia, 50/2003 (XI. 5.) AB on investigative committees, 6/2007 (II. 27.) AB on the questions 8 related to the prohibition of the publication of opinion poll results, 20/2007 (III. 29.) AB on the radio and TV broadcasting of the sessions of the Parliament, 53/2009 (V. 6.) AB on domestic violence and restraining order, para. III.3.4 and cases discussed by A. Wyrozumska 48/1998 (XI. 23.) AB; 21/B/2008, 154/2008 (XII. 15.) AB concerning the constitutionality of the Act of 2007 No. CLXXXIV on registered partnerships (Constitutional Court, 15 December 2008).

²⁰⁵ See: case 14/2000 (V. 12.) (Hungarian Constitutional Court, 9 May 2000). Discussed also in I. Skomerska-Muchowska, 'Judicial Dialogue on International Human Rights Law in Poland and Eastern Europe', [in:] A. Müller (ed.), *Judicial Dialogue and Human Rights* (Cambridge University Press forthcoming).

²⁰⁶ *Vajnai v Hungary*, App. no. 33629/06 (ECtHR, 8 July 2008).

stitutional Court not only relied on the ECtHR's *Vajnai* judgment, but also referred to domestic law of Slovakia, Germany, Italy, Lithuania, Latvia, Romania, Poland and Ukraine, as well as to the decisions of foreign constitutional courts on the subject as an important persuasive argument based on similar social and political situation behind the legal problem at hands.²⁰⁷ The judgment of the ECtHR was referred to as a 'new circumstance' justifying reopening constitutional procedure concerning an already decided question of constitutionality and one of factors reflecting social changes.

Another interesting example of practice of the Hungarian Constitutional Court is the case concerning the right to reply to a press statement infringing his (subjective) rights. In this judgment the Court found unconstitutional the amendment to the Civil Code. The proposed provision permitted anyone to demand the publication of their reply in the press, if they felt that their rights had been infringed by a publication. The law envisaged sanctions, including court-imposed fines, against the media in the case of refusal to publish the reply. In the reasoning of the decision the Court suggested that the proposed regulation is inspired by American legal solutions. The Court thus compared European standard of protection of freedom of speech with the American one and found certain similarities as far as the principles are concerned, however, stressed that there are also significant differences as regards admissible restrictions to the freedom of expression and the freedom of the press as well as legal remedies for violation of the right in question. That is why, in the light of the Hungarian Constitution interpreted in conformity with the ECHR, the proposed regulation did not ensure a proper balance between conflicting rights and interests. Similarly, in other case concerning freedom of speech²⁰⁸ the Hungarian Court also referred not only to the European standard as established by the ECtHR but also to the practice of the US Supreme Court.²⁰⁹

In a sensitive case concerning euthanasia the Hungarian Constitutional Court rejected a constitutional claim concerning conformity of provisions obliging physicians to treat patients that they consider terminally ill with maximum care. The right to human dignity granted under Art. 54(1) of the Constitution was understood as containing the right to end one's life with dignity. The Constitutional Court supported its findings by a broad analysis of both case law and regulations in force in European states such as the Netherlands, Belgium, United Kingdom, Germany, as well as United States and Australia.²¹⁰

²⁰⁷ German Federal Constitutional Court cases: 1 BvR 680/86 (3 April 1990); 1 BvR 204/03 (23 March 2006); 1 BvR 150/03 (1 June 2006); 2 BvR 2202/08 (18 May 2009); and 74/1958 (Italian Constitutional Court, judgment, 20 December 1958) were referred in the judgment of 19 July 2011 of the Polish Constitutional Court.

²⁰⁸ Case 7/2014 (III. 7.) AB on the unconstitutionality and the annulment of the text "on the basis of acknowledgeable public interest."

²⁰⁹ Case 57/2001 (XII. 5.) AB, para. 2.2.

²¹⁰ See: case 22/2003 (IV. 28.), paras 7–8 of the judgment.

Similarly, judgment of Lithuanian Constitutional Court of 2011²¹¹ must be brought to the attention.²¹² The case concerned the concept of family adopted by the legislator who limited its scope solely to relations based on a formal marriage. The Lithuanian Constitutional Court carefully analysed case law of the ECtHR²¹³ as well as national constitutional courts of Hungary, France and Germany²¹⁴ and found that there is no commonly accepted definition of family. Nevertheless, the Court decided that although marriage is one of the bases of the constitutional notion of family on which family relations are founded, it does not mean that the Constitution does not protect families different than those founded on the basis of marriage. Such protection may be granted to, *inter alia*, the relationship of a man and a woman living together without concluding a marriage; the relationship based on the permanent bonds of emotional affection, reciprocal understanding, responsibility, respect, shared upbringing of children and similar features, as well as on the voluntary determination to take on certain rights and responsibilities, which form a basis for the constitutional notion of motherhood, fatherhood and childhood.²¹⁵

3.2.1.2. Shaping the Standard of Protection Through Judicial Dialogue – the Pilot Judgement Procedure and Beyond

The ECtHR sometimes also confirms decisions of constitutional courts concerning incompatibility of national law or practice with human rights. This is true especially in cases of systemic violations when executive and legislature are unwilling or unable to ensure proper level of protection. The so-called Bug River claims' cases may serve as an example of such occurrences.

Following the World War II, the external borders of Poland were changed. And so Poland lost a major part of its territory eastwards from the Bug river. Inhabitants of that territory, according to the so-called 'Republican Agreements'²¹⁶ have been repatriated westwards. The agreements provided for an obligation of evacuated landlords to leave substantial – quantitatively and qualitatively – parts of their property in the abandoned territories. The thus lost property was to be compensated by the Republic of Poland. Whilst most of the repatriates were compensated, a number of claims remained unsatisfied. In 2002 the Polish Ombudsman challenged before the Constitutional Court provisions of domestic laws restricting largely and practically impeding the possibility to compensate these losses as fore-

²¹¹ Case 21/2008 (Lithuanian Constitutional Court, 28 September 2011).

²¹² See also: 4/2012–13/2012 (Lithuanian Constitutional Court, 11 June 2015) on the transfer of a share of the personal income tax to municipal budgets.

²¹³ See: para. III.2.

²¹⁴ See: para. III.3.

²¹⁵ See: para. III.13.

²¹⁶ Agreements of 1944 concluded by the Polish Committee for National Liberation [PKWN] and governments of three Soviet republic: Belarusian, Ukrainian and Lithuanian, as well as in two treaties of 1945 and 1957 concluded between the governments of Poland and USSR.

seen by the treaties. The Constitutional Court²¹⁷ held that the Republican Agreements gave rise to legitimate expectations of the Polish citizens that issues of compensation would be regulated in domestic law. The compensatory mechanism created for persons deprived of their property as the result of territorial changes, led to the establishment of legitimate expectations of the interested parties, that the problem would be ultimately solved in the future in such a way, that interests of all subjects, entitled to thus created right, would be taken into consideration. The Constitutional Court held that right to credit provided for in Polish regulation is covered by the right to property. In this respect the unjustified limitations to realization of that right destroying the essence of the right in question made the practice illusory. It was not only contrary to Art. 64 of the Polish Constitution and Art. 1 of the Protocol 1 to the ECHR as interpreted by the ECtHR²¹⁸ but also the rule of law (Art. 2 of the Constitution of Poland).²¹⁹ The Court stressed that the unconstitutionality of challenged provisions “arises from the defective legal formulation of the provisions governing the question of compensation, which causes an inadmissible systemic dysfunction.” According to the Court, the general property right as established by national law cannot be at the same time arbitrarily limited by the State in the way excluding substantial stocks of property from the compensation procedure, which *de facto* paralyses the possibility for beneficiaries to derive any economic advantage from these rights.

The judgement of the Constitutional Court had not been implemented neither by the executive, nor by the legislative. In 2004 *Broniowski*²²⁰ case was heard by the ECtHR, which broadly referred to and confirmed the findings of the Polish Constitutional Court as well as the related judgement of the Polish Supreme Court.²²¹

²¹⁷ Case K 33/02 (Polish Constitutional Court, 19 December 2002).

²¹⁸ The Court held that “[t]here can be no doubt that the right to credit belongs to the category of rights subject to protection under Art. 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.”

²¹⁹ According to the Constitutional Court “[t]he requirement of respect for the principle of maintaining citizens’ confidence in the State and the law made by it, ensuing from the principle of the rule of law (Art. 2 of the Constitution), entails a prohibition on enacting laws that would create illusory legal institutions. This principle therefore requires that the obstacles which prevent [persons] from benefiting from the right to credit be eliminated from the legal system. From the point of view of the confidence principle, in the case of the right to credit it is the means of protecting this right that is subject to assessment, rather than its substance. The lack of opportunity to benefit from this right, within the framework set out by the legislature, shows that an illusory legal institution has been created, and thereby constitutes a violation of Art. 2 of the Constitution.”

²²⁰ *Broniowski v Poland*, App. no. 31443/96 (ECtHR, 22 June 2004).

²²¹ Case I CK 323/02 (Polish Supreme Court, 21 November 2003) in which the Supreme Court regarded the situation obtaining after the entry into force of the Constitutional Court’s judgement, in particular the authorities’ practices, to be unacceptable and contrary to the rule of law.

The ECtHR fully accepted the Constitutional Court's conclusions concerning the lack of a legitimate aim pursued by Polish law and practice since they were based on its direct knowledge of national circumstances.²²² The ECtHR also expressly repeated in the grounds for judgment arguments concerning a violation of the rule of law. The ECtHR noticed that the December 2003 Act on the exercise of the State Treasury's powers, the Law on commercialisation and privatisation of State enterprises and other statutes "constituted the culminating event of a series of actions and omissions of Polish executive and legislative." The Act deprived the claimant of any further compensation given that his family had previously received some kind of compensation. By imposing limitations on the exercise of the right to credit, and applying practices that made it unenforceable and unusable, these authorities also destroyed the very essence of his right. According to the ECtHR, the state of uncertainty in which Broniowski found himself as a result of the delays and obstructions over the years was in itself incompatible with Art. 1 Protocol No. 1 ECHR. The ECtHR then found that the violation had originated in a widespread and systemic problem, which had resulted from a malfunctioning of Polish legislation and administrative practice and which affected and remained capable of affecting a large number of persons.²²³ The Court concluded that the facts of the case showed the existence of a shortcoming, which affected a whole class of individuals. In view of this systemic problem, the Court declared that general measures were called for in the execution of the judgement. The ECtHR stated that these measures should include a scheme, which would offer redress to all persons affected, and not only to the applicant.

In *Broniowski* judgment the ECtHR used for the first time the pilot judgement mechanism.²²⁴ It held that Poland must take the general measures necessary to remove any obstacle to the implementation of the right to credit of persons affected, or provide equivalent redress, and ordered the State to secure the effective and expeditious realization of the title in respect of the remaining Bug River claimants through legislative and administrative measures and thus avoid repetitive violations in a lengthy series of comparable cases. It must be stressed that the finding of systemic violation was essentially based on the previous judgments of the Polish Constitutional Court.²²⁵ The ECtHR fully respected the role of the

²²² See: *Broniowski v Poland*, para. 173.

²²³ *Broniowski v Poland*, para. 189.

²²⁴ See more, [in:] L. Wildhaber, 'Pilot Judgments in Cases of Structural or Systemic Problems on the National Level', [in:] R. Wolfrum, U. Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications: The Problems and Possible Solutions* (Springer-Verlag 2009), p. 69.

²²⁵ As noticed by Wildhaber "[t]he *Broniowski* judgment was particularly well-suited to the pilot-judgment kind of adjudicative approach; the Polish Constitutional Court and the Polish government were receptive to that approach; so in essence there was not much resistance", L. Wildhaber, (n. 226), p. 75.

Constitutional Court as national guardian of human rights. Consequently, even if the pilot judgment moved towards a constitutional court-type jurisdiction of the ECtHR, since it prescribed general measures to be taken by national authorities, due regard to the previous judgement of the Constitutional Court obviously highlights subsidiary nature of the ECtHR itself.

A similar situation occurred in the Polish saga on restriction of landlords' rights to increase rents resulting in the *Hutten-Czapska* ECHR pilot judgement.²²⁶ The Polish Constitutional Court examined a number of times the legal situation of real-estate owners and decided on unconstitutionality of statutory law limiting their property rights read in the light of the ECHR.²²⁷ The judgments were not respected by the legislative power. The situation resulted in a number of applications to ECtHR. In *Hutten-Czapska* the Chamber of the Strasbourg Court again decided the case with due regard to findings of the Polish Constitutional Court and held that the government had failed to set an adequate balance between the interests of the landlords and that of the tenants so as to guarantee an equitable system of landlord rights and as result Poland violated Art. 1 of Protocol 1. The judgment of the ECtHR not only contained extraordinary long quotations of the Polish Constitutional Court's findings fully approved by the ECtHR, but also indicated that "it was incumbent on the Polish authorities to eliminate, or at least to remedy with the requisite promptness, the situation found to have been incompatible with the requirements of the applicant's fundamental right of property in line with the Constitutional Court's judgments."²²⁸ The Grand Chamber repeated these arguments in the subsequent decision.²²⁹

Both *Broniowski* and *Hutten-Czapska* constitute examples of the cooperation between the two courts that can be even referred to as a 'judicial alliance'²³⁰ for criticizing the domestic legal framework, and in bringing the legislative and executive branches of the State in compliance with the standards of rights protection

²²⁶ ECtHR cases: *Hutten-Czapska v Poland*, App. no. 35014/97 (22 February 2005); *Hutten-Czapska v Poland*, App. no. 35014/97 (19 June 2006); *Hutten-Czapska v Poland*, App. no. 35014/97 (28 April 2008). Detailed analysis Sadurski W., 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe and the Idea of Pilot Judgments' (2008) 08 Sydney Law School Legal Studies Research Paper, p. 15.

²²⁷ Case P 11/98 (Polish Constitutional Court, 12 January 2000). The Court referred to following decisions of the ECtHR, as to the existence of legitimate aim *Spadea and Scalabrino v Italy*, App. no. 12868/87 (28 September 1995), as to the definition of property right *Sporrong and Lonnroth v Sweden*, App. nos 7151/75, 7152/75 (23 September 1982), as to the permissibility of limitation in rent system *Scollo v Italy*, App. no. 19133/91 (28 September 1995) and *Velosa Baretto v Portugal*, App. no. 18072/91 (21 November 1995).

²²⁸ Judgment of the Chamber of 22 February 2005, para. 187.

²²⁹ Judgment of the Grand Chamber of 19 June 2006, para. 223.

²³⁰ W. Sadurski (n. 228), p. 22.

shared by both courts.²³¹ The discussed cases prove that in some difficult cases it is necessary for the Constitutional Court and the ECtHR to act hand in hand to ensure a proper standard of protection of human rights. It must be stressed once again that judgments of the ECtHR were based on the findings of the Polish Constitutional Court and the dialogue with national judiciary.²³² It is suggested by some scholars that in these cases the relation between the national constitutional court and the ECHR in the two situations of systemic violations took a very specific dimension. The constitutional court deals with a general constitutional dimension, while the ECtHR focuses on issues pertaining to a concrete case. However the general findings of the Constitutional Court were the main argument of the ECtHR justifying 'systemic' approach in individual case and prescription of general measures to be taken by the State.

Subsequently, the ECtHR continued thus established judicial dialogue in another pilot-judgment based *Burdov* saga.²³³ The applicant, a participant of emergency operations at the site of the Chernobyl nuclear plant disaster, repeatedly sued the competent State authorities, seeking payment of social benefits in connection with the resulting damage to his health. The Russian courts granted him the relevant payments but a number of their judgments remained unenforced. In 2000 the applicant lodged a first complaint with the ECtHR about the non-enforcement of domestic judicial decisions. In 2002 the Court found violations of Art. 6 ECHR and of Art. 1 of Protocol No. 1 to the Convention.²³⁴

It must be noted that in a similar case already in 2001 (so before the decision of the ECtHR in *Burdov I*) in the judgment of 25 January 2001,²³⁵ the Russian Constitutional Court, found the relevant provision of the Civil Code incompatible with the Constitution in so far as it provided for special conditions on State liability for damage caused by the administration of justice.²³⁶ The Court assumed that an individual should be able to obtain compensation for any damage incurred through a violation by a court of his or her right to a fair trial within the meaning of Art. 6 ECHR. The Constitutional Court called upon the Parliament to adopt appropriate legislative measures. Once the *Burdov I* judgment was issued, the Constitutional Court immediately referred to it and declared the law concerning social benefits for Chernobyl victims unconstitutional, as the system

²³¹ W. Sadurski (n. 228), p. 23.

²³² L. Wildhaber, 'Rethinking the European Court of Human Rights', [in:] J. Christoffersen, M. Rask Madsen (eds), *The European Court of Human Rights. Between Law and Politics* (Oxford University Press 2011), p. 222.

²³³ Cf. P. Leach, H. Hardman, S. Stephenson, 'Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia' (2010) 2 Human Rights Law Review, p. 346.

²³⁴ See: *Burdov v Russia*, App. no. 59498/00 (ECtHR, 7 May 2002).

²³⁵ Case 1-П (n. 60).

²³⁶ The Court found, referring to relevant case law of the ECtHR, that an individual should be able to obtain compensation for any damage incurred through a violation by a court of his or her right to a fair trial within the meaning of Art. 6 of the Convention.

thus created lacked clarity and predictability.²³⁷ Consequently, in 2004, the Russian Parliament amended the legislation and introduced a new system of indexation of allowances. However, the execution procedure reminded problematic. And so by force of a judgment of 14 July 2005,²³⁸ the Constitutional Court considered certain provisions governing the special execution procedure to be incompatible with the Russian Constitution. Following the judgment, the Russian law was changed in that regard. In the meantime, Burdov obtained positive judicial decisions. Yet, there was a significant delay in their implementation so he had applied to the ECtHR for the second time.

In *Burdov II*, the ECtHR found it appropriate to apply the pilot-judgment procedure, given the recurrent and persistent nature of the underlying problems, the large number of people affected and the urgent need for a speedy and appropriate redress at the domestic level.²³⁹ In the statement of reasons the Strasbourg Court declared “considerable importance to the findings of the Russian Constitutional Court, which has invited Parliament since January 2001 to set up a procedure for compensation of damage arising, *inter alia*, from excessively lengthy proceedings. Of particular importance is the finding made by reference notably to Art. 6 of the Convention that such compensation should not be conditional on the establishment of fault.” The above statement confirms that the pilot judgment procedure also in this case was based on prior findings of the national Constitutional Court.

In February 2010 the Russian Constitutional Court issued a decision concerning, *inter alia*, implementation of ECtHR decisions and the right to a fair trial. This judgement can be recognised as a response to *Burdov II*.²⁴⁰ The Court interpreted Art. 46 ECHR in the light of the case law of the ECtHR and when referring to *Burdov II* stressed that this provision imposes on the respondent State a legal obligation not only to effect payments to persons concerned as a just satisfaction awarded by the ECtHR, but also to take general and, if appropriate, individual measures

²³⁷ Case 11-П (Russian Constitutional Court, 19 June 2002). Cf. P.B. Maggs, O. Schwartz, W. Burnham, *Law and Legal System of the Russian Federation* (Juris Publishing 2015), p. 394.

²³⁸ Case 8-П (Russian Constitutional Court, 14 July 2005) after P. Leach, H. Hardman, S. Stephenson (n. 217), p. 349.

²³⁹ *Burdov v Russia II*, App. no. 33509/04 (ECtHR, 15 January 2009). The ECtHR noticed that these problems did not affect only Chernobyl victims, as in the present case, but also other large vulnerable groups of the Russian population: non-enforcement very frequently occurred in cases concerning the payment of pensions, child allowances and compensation for damage sustained during military service or for wrongful prosecution. Approximately 700 cases concerning similar facts were currently pending and in some instances could lead to the Court finding a second set of violations of the Convention in respect of the same applicants. It was a matter of grave concern that the violations found in the present judgment had occurred several years after its first judgment in the applicant’s case, notwithstanding Russia’s obligation under Art. 46 to adopt, under the supervision of the Committee of Ministers, the necessary remedial and preventive measures. The breaches found thus reflected a persistent structural dysfunction and a practice incompatible with the Convention.

²⁴⁰ Case 4-П (26 February 2010).

to put an end to the violation in the domestic enforcement practice and to redress its effects as far as possible. Such measures are to be taken also in respect of other persons in a situation comparable to that of an applicant whose right the ECtHR found to be violated. Although it is for the respondent State to choose means by which the legal obligation based on Art. 46 of the ECHR will be discharged within a domestic legal system, such means must be compatible with the conclusions set out in a relevant judgment of the ECtHR. The Constitutional Court added, on the basis of the ECtHR case law, that save for cases where errors allegedly made by domestic courts in facts and in law could violate the rights and freedoms protected by the Convention, it is for the domestic authorities, namely judicial bodies, to decide on interpretation and application of the national legislation.²⁴¹ The discussed decision fully confirmed findings of the ECtHR and called all state authorities for effective implementation of decision of ECtHR also in regard to a right to court. As the result of the described extensive dialogue between the Russian Constitutional Court and the ECtHR in March 2010 the Federal law on damages for violation of the right to fair trial within the reasonable time or the right to execution of a court ruling within reasonable time was adopted.²⁴²

It must be noticed that the pilot judgment mechanism, though born as a child of judicial dialogue, grew up on the basis of respect between the ECtHR

²⁴¹ Para. 2 of the judgment.

²⁴² In its Interim Resolution on the case, in December 2009, the Council of Europe Committee of Ministers noted "with satisfaction the Russian authorities' prompt and constructive response to the Court's pilot judgment and to the Committee of Ministers' Interim Resolution." Committee of Ministers, Interim Resolution CM/ResDH (2009) 158, Execution of the pilot judgement of the European Court of Human Rights in the case of Burdov No. 2 against the Russian Federation relative to the failure or serious delay in abiding by final domestic judicial decisions delivered against the state and its entities as well as the absence of an effective remedy, adopted on 3 December 2009. In two inadmissibility decision of 2010 the ECtHR held that the applicants were required to exhaust the new domestic remedy, whilst specifying that it might review its position in the future depending on the Russian courts' ability to establish consistent case law in line with the requirements of the European Convention on Human Rights (*Nagovitsyn and Nalgiyev v Russia*, App. nos 27451/09 and 60650/09 (ECtHR, 23 September 2010)). However in two subsequent judgments of 2012 the Court noted with regret that there was still no remedy available in Russia by which to complain of such delays where the judicial decisions in question imposed obligations in kind on the Russian State. That problem, in the Court's view, remained unresolved despite the 2010 Federal law following the *Burdov II* judgment. The Court therefore considered that an application before it continued to be the only means by which these applicants could assert their rights and obtain effective redress for the clear violations of their Convention rights (*Ilyushkin and Others v Russia*, App. nos 5734/08, 20420/07, 54342/08, 56997/08, 60129/08, 4561/09, 7738/09, 11273/09, 11993/09, 16960/09, 20454/09, 21964/09, 26632/09, 28914/09, 31577/09, 31614/09, 31685/09, 32395/09, 35053/09, 36327/09, 38180/09, 45131/09, 48059/09, 52605/09, 56935/09, 58034/09, 59761/09, 1048/10 et 1119/10 (ECtHR, 17 April 2012) and *Kalinkin and Others v Russia*, App. nos 16967/10, 37115/08, 52141/09, 57394/09, 57400/09, 2437/10, 3102/10, 12850/10, 13683/10, 19012/10, 19401/10, 20789/10, 22933/10, 25167/10, 26583/10, 26820/10, 26884/10, 28970/10, 29857/10, 49975/10 et 56205/10 (ECtHR, 17 April 2012).

as the authoritative interpreter of the Convention and highest national courts as guardians of constitutionally granted rights.²⁴³ As it was emphasised, judicial dialogue has been a crucial element legitimising the law-creating attitude of the ECtHR. Once accepted it became an independent tool for resolution of systemic violations of the ECtHR or repetitive violation as determined in previous decisions of the ECtHR.²⁴⁴

Constitutional courts are supported by the ECtHR in enforcement of fundamental rights in other cases. In *Biblical Centre of the Chuvash Republic v Russia*²⁴⁵ the ECtHR had to decide about violation of Art. 9 ECHR by legislative and executive practice, which in the same time was contrary to decision of the Russian Constitutional Court. The Russian Court found application of dissolution, as a sanction against legal entities, imposed on formal grounds as unconstitutional.²⁴⁶ However, state organs did not follow the decision and applied dissolutions against religious schools without certification. The ECtHR held that such sanction against the applicant organisation was not necessary in a democratic society and thus contrary

²⁴³ In *Varga and others v Hungary*, App. nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13 (ECtHR, 10 March 2015) the Court relied on several decisions of *Kuria* (the Supreme Court of Hungary) and the decision of the Constitutional Court (32/2014 (XI. 3.)); similarly in *Rutkowski v Poland, Rutkowski and Others v Poland*, App. nos 72287/10, 13927/11 and 46187/11 (ECtHR, 7 July 2015) the ECtHR broadly referred to the case law of the Polish Supreme Court.

²⁴⁴ *Yuriy Nikolayevich Ivanov v Ukraine*, App. no. 40450/04 (ECtHR, 15 October 2009). The Court invoked as justification of application pilot judgment procedure extensive dialogue between the Ukrainian Government and the Committee of Ministers of the Council of Europe. *Gazsó v Hungary*, App. no. 48322/12 (ECtHR, 16 July 2015) and *Ananyev and Others v Russia*, App. nos 42525/07 and 60800/08 (ECtHR, 10 January 2012).

²⁴⁵ *Biblical Centre of the Chuvash Republic v Russia*, App. no. 33203/08 (ECtHR, 12 June 2014).

²⁴⁶ Case 14-П (Russian Constitutional Court, 18 July 2003). The case before the Constitutional Court originated in the a judgment of the Commercial Court of the Yaroslavl Region, which rejected a prosecutor's application for a judicial order requiring the Islamic Religious Organisations of Yaroslavl Muslims to discontinue the unlicensed education of followers at a Sunday school (*madrassa*). The Federal Court pointed out that the education provided at the *madrassa* was not accompanied by a final evaluation and certification and therefore fell outside the scope of the Education Act. The Constitutional Court stated that "The fact that Art. 61(2) of the Civil Code does not contain a specific list of provisions whose breach may entail dissolution of a legal entity [...] does not imply that this sanction can be applied on formal grounds only, in the event of a repeated violation of regulations that are binding on legal entities. Taking into account the generally accepted principles of legal liability (including the presence of *mens rea*) and the criteria for restricting rights and freedoms enunciated in Art. 55(3) of the Constitution, which are binding both on lawmakers and law enforcement authorities, [Art. 61(2) of the Civil Code] presupposes that repeated violations of law, taken in their entirety, must be so gross as to allow the commercial court – having regard to all the circumstances of the case, including the nature of violations committed by the legal entity and their consequences – to decide on the dissolution of the legal entity as a measure necessary for the protection of rights and lawful interests of others."

to Art. 9 ECHR interpreted in the light of its Art. 11.²⁴⁷ Another example of constructive dialogue between the Russian Constitutional Court and the ECtHR may be found in *Khmel v Russia*.²⁴⁸

The Lithuanian Constitutional Court was also supported by the ECtHR in preservation of adequate level of protection of human rights in Lithuania. In *Ramanauskas v Lithuania*²⁴⁹ the ECtHR confirmed findings of the Lithuanian Court in case of 8 May 2000,²⁵⁰ in which the Court ruled that the Operational activities act was generally compatible with the Constitution however it also gives interpretation of the Act in conformity not only with the Lithuanian Constitution but also with the ECHR as interpreted by the ECtHR.²⁵¹ Referring in particular to *Teixeira de Castro v Portugal* the Lithuanian Court emphasised that a criminal conduct simulation model could not be used for the purpose of incitement or provocation to commit an offence that had not already been initiated. It further held that this investigative technique did not allow officials to incite the commission of an offence by a person who had abandoned plans to commit the offence. In spite of the decision Lithuanian authorities used incitement. The ECtHR in *Ramanauskas v Lithuania* found that such practice contrary to the judgment of the Constitutional Court, violated Art. 6 of the Convention.

Examples of reinterpretation of the Constitution after the judgment of the ECHR are also present in the Czech practice. The Constitutional Court after the decision in *Kohlhofer et Minarik v Czech Republic*²⁵² pointed out that minority shareholders had to be protected within the light of Strasbourg case law.²⁵³ Similarly in regard

²⁴⁷ The ECtHR referred to the judgment of the Constitutional Court and held that “[t]he sanction of dissolution could be applied indiscriminately without regard to the gravity of the breach in question [...], a practice which the Constitutional Court found to be incompatible with the constitutional meaning of the relevant provisions as early as 2003. [...] In pronouncing the applicant organisation’s dissolution, the Russian courts did not give heed to the case-law of the Constitutional Court or to the relevant Convention standards and their decision-making did not include an analysis of the impact of the applicant organisation’s dissolution on the fundamental rights of Pentecostal believers. As it happened, their judgments put an end to the existence of a long-standing religious organisation and constituted a most severe form of interference, which cannot be regarded as proportionate to whatever legitimate aims were pursued”, para. 61. See also similar approach of the ECtHR in *Khmel v Russia*, App. no. 20383/04 (ECtHR, 12 December 2013) referring to 86-O (Russian Constitutional Court, 14 July 1998).

²⁴⁸ *Khmel v Russia*, App. no. 20383/04 (ECtHR, 12 December 2013) referring to 86-O (Russian Constitutional Court, 14 July 1998).

²⁴⁹ *Ramanauskas v Lithuania*, App. no. 74420/01 (ECtHR, 5 February 2008).

²⁵⁰ 12/99-27/99-29/99-1/2000-2/2000 (n. 52) on operational activity.

²⁵¹ The Constitutional Court invoked *Klass and Others v Germany*, App. no. 5029/71 (ECtHR, 6 September 1978); *Kopp v Switzerland*, App. no. 23224/94 (ECtHR, 5 March 1998); *Teixeira de Castro v Portugal*, App. no. 44/1997/828/1034 (ECtHR, 9 June 1998).

²⁵² *Kohlhofer et Minarik v Czech Republic*, App. nos 32921/03, 28464/04 and 5344/05 (ECtHR, 15 October 2009).

²⁵³ Case Pl. ÚS 14/10 (Czech Constitutional Court, 7 January 2011), para. 46.

to decision of ECtHR in *Husák v Czech Republic*²⁵⁴ concerning right of the accused to be heard in case of infringement of personal freedom before a court which makes a decision on the limitations of freedom, and this at any time such decision making takes place the Constitutional Court found that in principle, there is no reason for a child not to have the fundamental right to be heard directly before a court when a decision is being passed on restricting their personal freedom whilst an adult has such a right in the same circumstances. A relevant reason for denying the right of a child to be heard surely occurs when the child is not capable, with respect to the level of their development, of forming an opinion and evaluating the bearing of the measures relating to them.²⁵⁵

3.2.2. The Dialogue on EU Law

An important field of judicial dialogue in EEC is Union law. As it was already mentioned constitutional courts usually refer to foreign judgement to draw inspiration. Already in first decisions concerning EU law discussed in former part of the paper Polish and Czech Constitutional Courts invoked experience of their counterparts from 'old' Union. In these cases they did it briefly mainly to justify own position within pluralistic system as highest courts of national constitutional orders.²⁵⁶ Also the Hungarian Constitutional Court used case law of other courts in its decision *Lisbon Treaty*²⁵⁷ in similar way.

The conclusion of the Lisbon Treaty of 2007 gave rise new constitutional proceedings in which Polish and Czech Constitutional Courts, partly voluntary, partly provoked by the parties to the proceedings and the content of constitutional claims, made an in-depth comparative constitutional judicial analysis.²⁵⁸ The Czech Constitutional Court in *Lisbon Treaty I*²⁵⁹ expressly declared that it took as inspiration case law of other constitutional courts and considered fundamental especially the decisions of the German Federal Constitutional Court in *Solange II* and the *Maastricht*.²⁶⁰ However, in *Lisbon Treaty II* the Court was explicitly called by applicants to refer to the decision of the German Constitutional Court in order answer to the first question concerning definition of the "substantive limits to the transfer of powers" under eternity clause contained in the Czech Constitution.²⁶¹

²⁵⁴ *Husák v Czech Republic*, App. no. 19970/04 (ECtHR, 4 December 2008).

²⁵⁵ Case II. ÚS 1945/08 (Czech Constitutional Court, 2 April 2009).

²⁵⁶ See: especially Polish *Accession Treaty* decision and Czech *Sugar Quotas III* decision.

²⁵⁷ 143/2010 (VII. 14.) AB (n. 107).

²⁵⁸ See: broader discussion of Lisbon decisions of Member States Constitutional Courts in Lisbon Treaty cases by M. Wendel, 'Lisbon before the Courts: Comparative Perspective' (2011) 7 *European Constitutional Law Review*, p. 96.

²⁵⁹ *Lisbon Treaty I* Pl. ÚS 19/08 (n. 91).

²⁶⁰ See: paras 116–118 and 139.

²⁶¹ According to Art. 9(2) of the Czech constitution, the "substantive requisites of the democratic, law-abiding State may not be amended." According to Art. 1(1), the "Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen." See: M. Wendel (n. 174), p. 11.

As noticed by the Court itself, the question was “evidently inspired by the decision of the German Constitutional Court.”²⁶² The Constitutional Court considered it impossible to construct this kind of catalogue of non-transferrable powers under the Czech Constitution. The Court confirmed its previous findings that establishment of such limits should be left primarily to the legislature, since it is an *a priori* political question. The Court also stressed that concepts of sovereignty and the rule of law should be defined on case-by-case basis.²⁶³ The Court also dissented from the decision of the German Constitutional Court with regard to the interpretation of the principle of democracy.

In *Lisbon Treaty*²⁶⁴ the Polish Constitutional Court carefully analysed decisions of other European Constitutional Courts and concluded that “the jurisprudence the constitutional courts of the Member States share – as a vital part of European constitutional traditions – the view that the constitution is of fundamental significance as it reflects and guarantees the state’s sovereignty at the present stage of European integration, and also that the constitutional judiciary plays a unique role as regards the protection of constitutional identity of the Member States, which at the same time determines the treaty identity of the European Union.” The position of the Court is a pluralist one. It considered other members of the pluralist legal community to determine its own place in the whole system, on the one hand, and to confirm its own constitutional identity in relation to the CJEU and other courts. The subsequent part of the judgment stressed that legal solutions elaborated by other constitutional courts, even as distinguished as the German Federal Constitutional Court, cannot be considered suitable for the Polish constitutional framework. The Court was asked to determine the possible scope of transfer of powers and conditions of their execution under Art. 90 of the Polish Constitution. The Court held that it is neither its function to specify the content of the statute granting consent to ratification of an international agreement, as referred to in Art. 90 of the Constitution, nor to establish the rules of participation of the parliament and the government in implementation of the Treaty of Lisbon.²⁶⁵ The Court noticed that applicants’ expectations in this regard were inspired by the judgment of the German Federal Constitutional Court, in which it decided not only on the consistency of the Treaty of Lisbon with the German Basic Law but also

²⁶² See: *Lisbon Treaty II* (n. 91), para. 110.

²⁶³ The Court noticed that “[t]his does not involve arbitrariness, but, on the contrary, restraint and judicial minimalism, which is perceived as a means of limiting the judicial power in favour of political processes, and which outweighs the requirement of absolute legal certainty [...]. The attempt to define the term ‘sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens’ once and for all (as the petitioners, supported by the president, request) would, in contrast, be seen as an expression of judicial activism [...].”

²⁶⁴ Case K 32/09 (n. 112).

²⁶⁵ Para. III.2.6.

on constitutionality of some provisions concerning the powers of the Parliament with regard to European matters. The Polish Constitutional Court noticed vital differences between the Polish and the German Constitution, when it comes to regulating the systemic foundations of European integration. According to the Court, in the Polish constitutional system it is for the drafters of the Polish Constitution and the legislator to resolve the problem of democratic legitimacy of the measures provided for in the Treaty, applied by the competent bodies of the Union. However, in the next part of the judgment the Court determined, on the basis of Preamble, Art. 2 (the rule of law) and Art. 8 (supremacy of the Constitution) of the Constitution, the catalogue of inalienable competences, the Court included the following: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences.²⁶⁶ The statement of the Court is very similar to that of the German Constitutional Court based on eternity clause defined in Art. 79(3) of the German Basic Law.²⁶⁷

The Polish Constitutional Court entered into a dialogue on interpretation of the founding treaties also in relation to the ratification of the European Council Decision amending Art. 136 TFEU.²⁶⁸ The Court supported its argumentation with the CJEU's decision in *Pringle*.²⁶⁹ It also analysed the judgement of the German Federal Constitutional Court²⁷⁰ to determine the nature of the Decision and found, following the reasoning of the two mentioned courts, that the Decision did not concern competences vested in the organs of state authority, and therefore it could not confer such competences upon an international organisation or an international authority.

Judicial dialogue is also present in cases concerning interpretation of obligations of States under secondary law of the European Union and covers not only referrals to the CJEU²⁷¹ but also to other national courts. The best example of such dialogue is the case law relating to Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generat-

²⁶⁶ Para. III.2.1.

²⁶⁷ See: para. C.I.2 of the decision of the German Constitutional Court in *Lisbon Treaty 2* BvE 2/08 (German Federal Constitutional Court, 30 June 2009).

²⁶⁸ Case K 33/12 (Polish Constitutional Court, 26 June 2013).

²⁶⁹ C-370/12 *Pringle v Government of Ireland* (CJEU, 27 November 2012).

²⁷⁰ Case 2 BvR 1390/12 (German Federal Constitutional Court, 12 September 2012).

²⁷¹ See *inter alia*: 13/2013–34/2014 (Lithuanian Constitutional Court, 29 October 2015) on public interest services in the electricity sector, Pl. ÚS 37/04 (n 138) on discrimination.

ed or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC²⁷² (Data Retention Directive).²⁷³ It illustrates not only universality of rights protected under different constitutional orders, but also interactions between EU law and national law, which are in turn influenced by the ECHR. The case concerned compatibility of EU directive as well as national law both implementing the Directive and extending beyond this act with the right of respect of privacy and family life.

The Data Retention Directive as well as the national implementing measures evoked numerous doubts from the point of view of protection of the right to privacy. Consequently constitutional courts of Member States resolved number of cases concerning constitutionality of the system established by the Directive.²⁷⁴ The Directive constituted also the subject of judicial review by the CJEU in *Digital Rights Ireland Ltd.* within the preliminary ruling procedure instigated by the High Court (Ireland) and the Verfassungsgerichtshof (Austria).²⁷⁵ In the said judgment, the Court ruled that the Data Retention Directive 2006/24/EC was invalid as it violated Art. 7 (respect for private and family life) and Art. 8 (the protection of personal data) of the Charter of Fundamental Rights of the European Union. The CJEU found that the Data Retention Directive constituted a serious interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter, but it did not adversely affect the essence of those rights due to the fact that “Member States are to ensure that appropriate technical and organisational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of the data.” However, the vagueness of the Directive’s text about Member States’ obligation became one of the reasons for criticism. Moreover, the court acknowledged the danger of imprecise data treatment by electronic providers due to economic concerns, and found that the safeguards were insufficient.²⁷⁶ According to the Court,

²⁷² OJ L 105, 13.04.2006, 54.

²⁷³ Data Retention Directive regulated obtaining and storing telecommunications data in EU Member States. It contained provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks in regard to the retention of traffic and location data which are generated or processed by them, in order to ensure availability of such data for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law. The Directive did not address issues related to the retention and disclosure of the content of communication via ICT networks. Pursuant to its Art. 6, data were to be retained for periods of not less than six months and not more than two years from the date of the communication.

²⁷⁴ Cf. T. Konstadinides, ‘Destroying Democracy on the Ground of Defending It? The Data Retention Directive, the Surveillance State and Our Constitutional Ecosystem’ (2011) 36 *European Law Review*, p. 722.

²⁷⁵ Joined cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd.* (CJEU, 8 April 2014).

²⁷⁶ Para. 66 of the judgement.

due to the significance of means of electronic communication in the modern world, data retained on the basis of the Directive in question provided national authorities with additional possibilities to shed light on serious offences. Thus, the fight against serious crime, in particular against organised crime and terrorism, constituted legitimate aim of limitation of fundamental rights. Yet, the restriction of rights imposed by the Directive were recognised by the CJEU as contrary to the proportionality requirements. It must be noticed that the CJEU based its findings concerning right to privacy on the jurisprudence of the ECtHR.²⁷⁷

It must be noted that before the CJEU's judgment in *Digital Rights Ireland* was issued, the Czech national provisions aiming at implementation of the directive were challenged before the Czech Constitutional Court.²⁷⁸ What is significant, due to a strict connection of provisions in question with EU law, applicants suggested asking a question to the CJEU about the potential invalidation of the Directive. The Constitutional Court found that although it is not competent to interpret acts of EU institutions, since it is an exclusive competence of the CJEU, it was not necessary to refer the question to the CJEU because national law in question went beyond the purpose of the Directive.²⁷⁹ However, it must be noticed that the same provisions of the Directive later annulled by the CJEU, such as obligation of retention of data with absolutely no differentiation, were also covered by the Constitutional Court review. In that regard the Czech Court argued that the Directive provided sufficient discretion to Member States to implement the measures and thus, this abstract review concerned a review of domestic and not Community legislation. Consequently, since there was no question of EU law being involved, preliminary reference was unnecessary. Furthermore, the Czech Court underlined its role as guardian of the Constitution and emphasised that national legislators had to comply with domestic constitutional principles when legislating, regardless of whether the essence of the measures originated from an external source. The position of the Czech Constitutional Court was inspired by the reasoning of the Federal Constitutional Court of Germany in similar case²⁸⁰ although not referred to in this part of the judgment.

The Czech Constitutional Court then proceeded with examination of the attributes of the contested legislation. Doing so the Court broadly referred to the case law of the ECtHR as well as to the decisions of other constitutional courts²⁸¹ with

²⁷⁷ See paras: 35, 47, 54–55 of the judgment.

²⁷⁸ Case Pl. ÚS 24/10 (Czech Constitutional Court, 22 March 2011).

²⁷⁹ See: para. 25 of the judgment.

²⁸⁰ Cases: 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 (German Federal Constitutional Court, judgment, 2 March 2010) Data Retention.

²⁸¹ The Court referred to 1258 (Romanian Constitutional Court, 8 October 2009); (Supreme Court of Bulgaria, 11 December 2008); 65/2009, 78/2009, 82/2009 and 15/2010–22/2010 (Supreme Court of Cyprus, 1 February 2011).

special attention devoted to the German Constitutional Court jurisprudence concerning the content and the scope of the right to privacy.²⁸² The Court also referred to the decisions of the CJEU.²⁸³ In the conclusion the Constitutional Court found the national law on data retention disproportionate and thus, unconstitutional. The grounds of annulment were very similar to those indicated by the CJEU in *Digital Rights Ireland Ltd.*

It must be noted that in the last *obiter dicta*, the Czech Constitutional Court went back to the Data Retention Directive and called into question the validity of the Directive. It noted that there are serious doubts concerning data retention as an appropriate and effective measure as well as the necessity of such measures. In the light of these statements the refusal to refer the preliminary question to the CJEU is surprising. The only explanation of resistance of the Czech Court is preservation of its own role as a final arbiter in cases concerning domestic law and the position of the Constitution as the supreme law. The Court intended to avoid the situation in which it would be simply an executive body of a specific interpretation of both the directive and fundamental rights protected under EU law delivered by the CJEU. At the same time the Constitutional Court did not hesitate to support argumentation as to the interpretation of respective provision of the Constitution with references to foreign and international courts including the CJEU.

The above reasoning proves that court-to-court relation constitutes a very sensitive issue for the Czech Constitutional Court. On the one hand, as the European Arrest Warrant and other decisions showed, it can be recognised as Euro-friendly and open for interpretation of the Czech Constitution with the due consideration to European standards, on the other hand it is reluctant to use means of direct cooperation with the CJEU.²⁸⁴

The provisions of Polish law implementing the Data Retention Directive were challenged before the Constitutional Court after the decision of the CJEU.²⁸⁵ The Polish Constitutional Court in the statement of reasons firstly broadly analysed

²⁸² Case BVerfGE 65 (German Federal Constitutional Court, 15 December 1983); BVerfGE 115 (German Federal Constitutional Court, 4 April 2006); 1 BvR 668/04 (German Federal Constitutional Court, 27 July 2005); 1 BvR 370/07, 1 BvR 595/07 (German Constitutional Court, 27 February 2008); 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 (n. 277).

²⁸³ The Czech Constitutional Court referred to joint cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR* (CJEU, 9 November 2010) as indicating “[t]he necessity to provide, in a manner as stringent as possible, the guarantees and instruments for protecting the fundamental rights of individual when handling their personal data generated in course of electronic communications.” See: para. 52.

²⁸⁴ P. Molek, ‘The Czech Constitutional Court and the Court of Justice: Between Fascination and Securing Autonomy’, [in:] M. Claes, M. de Visser, P. Popelier, C. Van de Heyning (eds), *Constitutional Conversation in Europe. Actors, Topics and Procedures* (Intersentia Publishing Ltd. 2012), p. 131.

²⁸⁵ Case K 23/11 (n. 59).

the case law of the ECtHR with regard to Art. 8 ECHR (right to privacy).²⁸⁶ Secondly, the Court referred to the case law of the CJEU and other constitutional courts of the Member States.²⁸⁷ In regard to the above mentioned decision of the CJEU, the court noticed that although the CJEU's *Digital Rights Ireland* decision does not directly bind the Constitutional Tribunal in the procedure for the constitutional review of national provisions, "given the fact that there is a functional relation between the challenged provisions and the said Directive, and that the level of protection of privacy in the context of the storing and processing of personal data is – at least – not lower than the level guaranteed in Articles 7 and 8 of the Charter, the Constitutional Tribunal deems it useful to consider the decision of the CJEU a background for its own decision in the constitutional review of national provisions on granting access to telecommunications data to police forces and state security services."²⁸⁸ The Constitutional Court also reminded that its competence to review the constitutionality of normative acts covers a situation where the allegation of unconstitutionality concerns a statute aimed at ensuring the effectiveness of EU law in the Polish legal order.²⁸⁹ In subsequent part of the judgment the Constitutional Court referred to decisions of other constitutional courts²⁹⁰ to determine not only their way of understanding of right to privacy as guaranteed by European and national law and the scope of justified and necessary limitations in similar situations but also to find out the way of enforcement of the judgement of the CJEU.

It is obvious from the content of the judgment, that the previous judgment of the CJEU was decisive for the Polish Constitutional Court when evaluating the consistency of national provisions directly implementing the Data Retention Directive with human rights.²⁹¹ What is significant is that the Court read the CJEU *Digital Rights Ireland Ltd.* decision in the light of case law of the ECtHR.

²⁸⁶ See: para. 2 of the judgement entitled "Selected jurisprudence of the European Court of Human Rights."

²⁸⁷ See: para. 3 of the judgement entitled "The retention of telecommunications data in the jurisprudence of the Court of Justice of the European Union and selected constitutional courts of EU Member States."

²⁸⁸ Para. 3.2.3 of the judgment.

²⁸⁹ Case P 1/05 (n. 113), para. III.2.4; Kp 8/09 (Polish Constitutional Court, 3 December 2009), para. III.4.

²⁹⁰ 13627 (Supreme Administrative Court of Bulgaria, 11 December 2008); 1258 (Romanian Constitutional Court 8 December 2009); 1 BvR 256/08 (n. 282); Pl. ÚS 24/10 (n. 281); Pl. ÚS 10/2014 (Slovakian Constitutional Court, 23 April 2014); G 47/2012, G 59/2012, G 62/2012, G 70/2012, G 71/2012 (Austrian Constitutional Court, 27 July 2014), 3 July 2014, the Slovenian Constitutional Court.

²⁹¹ See: paras III.5.3, III.10.3 and III.10.4.3 of the judgement. In the literature the judgment is also recognised as the only one example of recognition of unconstitutionality of Polish law because of its inconsistency with EU law. Such a conclusion seems to be however kind of over interpretation of the Euro-friendly approach taken by the Constitutional Court. See: K. Kowalik-Bańczyk, 'Report on Poland', [in:] G. Martinico, O. Pollicino (eds), *The National Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective* (2010), p. 329.

3.3. The Limits of Judicial Dialogue – from Sovereignty to Constitutional Identity

As it was already mentioned, constitutional pluralism presupposed the existence of plural ultimate authority responsible for maintenance of coherence of the legal system and conformity of its norms with constitutional foundations. This task is performed by constitutional courts, on the one hand, and international courts (the ECtHR and the CJEU), on the other. From the perspective of institutional pluralism it is crucial to determine mutual legal relations between the highest courts. The common values, on which legal orders under consideration are based, minimize the risk of conflict between them in the process of consistent and mutually sympathetic interpretation. However, the existence of such a conflict cannot be excluded and, as it was already mentioned, it is an inherent element of the pluralistic environment. The aim of this part of contribution is to explore limits of the judicial dialogue established in the practice of constitutional courts. We will look mainly at arguments used by courts in cases where they dissented from the decisions of international courts.

With regard to the CJEU, it must be remembered that the CEE constitutional courts reserved to themselves the power to control the protection of individuals' constitutionally granted rights, over the preservation of limits of powers conferred upon EU institutions and over protection of national constitutional identity. It is for each of the constitutional courts to determine the boundary conditions. The relation between national constitutional courts is determined by two main legal factors: the position of international and European law in a national legal order and the scope of jurisdiction of the constitutional court in question.

The *Czech Slovak pensions* saga constitutes a prominent example of difficult cooperation including tension between the Constitutional Court and the CJEU. It also shows that declared ultimate authority of the Constitutional Court may be successfully questioned though cooperation of other national courts with the CJEU in the preliminary ruling procedure.²⁹² The dialogue between the Czech Constitutional Court and the CJEU was provoked by the conflict between the Czech Supreme Administrative Court and the Czech Constitutional Court.

²⁹² See: detailed analysis in that regard: J. Komárek, 'Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU ultra Vires; Judgment of 31 January, Pl. ÚS 5/12 *Slovak Pensions XVII*' (2012) 8 *European Constitutional Law Review*, p. 323; R. Král, 'Questioning the Recent Challenge of the Czech Constitutional Court to the ECJ' (2013) 19 *European Public Law*, p. 271; Z. Kühn, 'Ultra Vires Review and Demise of Constitutional Pluralism. The Czecho-Slovak Pensions Saga, and the Dangers of State Court's Defiance of EU Law' (2016) 1 *Maastricht Journal*, p. 183; G. Anagnostaras, 'Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court' (2013) 14 *German Law Journal*, p. 959; R. Zbiral, 'A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires' (2012) 49 *Common Market Law Review*, p. 1457.

The case originated in the specific historical legal circumstances connected with the dissolution of Czechoslovakia and the conclusion between the Czech Republic and the Slovak Republic of an international agreement aimed at coordinating matters relating to social security benefits. The criterion chosen for determining the applicable scheme and the authority with competence to grant such benefits was that of the State of residence of the employer at the time of dissolution of Czechoslovakia. Since the adopted solution resulted in differentiation of economic situation of Czech citizens based on former employer's residence, the Constitutional Court, on the basis of Art. 30 of the Czech Charter of Fundamental Rights, decided on special subsidiary payment to Czech citizens, residing in the Czech Republic conceived of as an additional benefit to pensions provided for in Art. 20 of the Czech-Slovak Agreement of 1992.²⁹³ The Czech Administrative Court disagreed with the law-creating decision and refused to apply Czech law as contrary to the Council Regulation 1408/71 on the application of social security schemes to employed persons moving within the Union as interpreted by the CJEU.²⁹⁴ The decision of the Supreme Administrative Court was challenged subsequently before the Constitutional Court. There existed a clear necessity to interpret EU law after the accession of the Czech Republic and Slovakia to the EU as the Czech-Slovak Agreement became a part of EU law.²⁹⁵ It seemed that the Constitutional Court had thus an excellent opportunity to make a reference to the CJEU and to submit constitutional arguments to support its own position. Instead, the Czech Court based the final decision on its own interpretation of the Regulation. In consequence it found Union law inapplicable to the case for temporal reasons and on this ground quashed the decision of the Supreme Administrative Court.²⁹⁶

In such a situation the request for a preliminary ruling concerning the conformity of the supplementary payment with EU law was submitted to the CJEU by the Supreme Administrative Court.²⁹⁷ Since the reference resulted in suspension of other similar proceedings until the judgment of Luxembourg Court was issued, the Constitutional Court was granted another opportunity to change its position

²⁹³ The Czech Constitutional Court in the first *Slovak Pensions* case held that Art. 20 of the Czech-Slovak Agreement was contrary to constitutional right to an adequate material security in old age. It found that it is necessary to bring the amount of old age benefits of Czech citizens granted under Art. 20 of the Agreement into line with the amount due to other pensioners residing in the Czech Republic, as required by Czech domestic law, including Pl. II. ÚS 405/02 (Czech Constitutional Court, 6 March 2003). In the subsequent judgment the Court found that beneficiaries of the special increment are solely Czech citizens residing in the Czech Republic. Pl. II. ÚS 252/04 (Czech Constitutional Court, 25 January 2005).

²⁹⁴ Case 3 Ads 2/2003–112 (Czech Supreme Administrative Court, 26 October 2005).

²⁹⁵ The agreement because it was listed in the third Annex of the Regulation 1408/71 and not listed in the annex as still applicable but interpreted in accordance with the general principles of EU law.

²⁹⁶ Case Pl. ÚS 4/06 (Constitutional Court, 20 March 2007).

²⁹⁷ Case 3 Ads 130/2008 (Czech Supreme Administrative Court, 23 September 2009).

since the decision on suspension was challenged before it. The Constitutional Court, however, not only sustained its former findings as to the scope of application of the Regulation, but also recognised that in situation when inapplicability of EU law was manifest, the referral to the CJEU was inadmissible and contrary to the Constitution.²⁹⁸

The Supreme Administrative Court referred to the CJEU two questions: the first one concerning the conformity of conferral of a supplementary payment under the judgment of the Constitutional Court with the Regulation, the second concerning conformity of requirement of citizenship and residency with the principle of non-discrimination as established in the Regulation. What is significant, in the conduct of the procedure before the CJEU, the Czech government argued against the judgment of the Czech Constitutional Court, which means that national constitutional interests connected with history of the State invoked by the Constitutional Court were not presented to the CJEU. In reaction, the Constitutional Court decided to submit its own statement to the CJEU to provide supplementary information and arguments for the proceeding, however the CJEU refused to accept it.

In C-399/09 *Landtová*,²⁹⁹ the CJEU had no doubts that the Regulation is applicable in the case and decided that the provisions of EU law do not preclude a national rule, such as that at issue in the main proceedings, which provides for payment of a supplement to old age benefit where the amount of that benefit, granted pursuant to the Czech-Slovak Agreement, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic. However, when answering the second question, the CJEU held that supplementary payment granted solely to Czech nationals residing in the territory of the Czech Republic is inconsistent with EU law as discriminatory measure, based on precondition of nationality, differentiating between Czech nationals and nationals of other Member States. The Court also explained that EU law does not require deprivation of such payment to an individual who satisfies the requirements.³⁰⁰

After the judgment of the CJEU the Supreme Administrative Court issued a rather provocative decision where it stated that since the judgment of the Constitutional Court was not only contrary to EU law but also violated the duty to refer a preliminary question to the CJEU, the Supreme Administrative Court is not bound by the effective judgement. Paradoxically, the Administrative

²⁹⁸ Case III. ÚS 1012/10 (Czech Constitutional Court, 12 August 2010).

²⁹⁹ C-399/09 *Marie Landtová v Česká správa sociálního zabezpečení* (CJEU, 22 June 2011).

³⁰⁰ The CJEU held: “EU law does not, provided that the general principles of EU law are respected, preclude measures to re-establish equal treatment by reducing the advantages of the persons previously favoured” and added, that “before such measures are adopted, there is no provision of EU law which requires that a category of persons who already benefit from supplementary social protection, such as that at issue in the main proceedings, should be deprived of it”, *ibidem*, paras 53–54.

Court based its findings on previous decisions of the Constitutional Court, in which the Constitutional Court quashed decisions of the Supreme Administrative Court because of the breach of the constitutional right to lawful judge. Moreover, the Supreme Administrative Court pointed out that although it did not question the position of the Constitutional Court as the guardian of the Constitution, the possibility of recognition of EU decisions as unconstitutional (according to the case law of the Constitutional Court³⁰¹) is exceptional and possible only if the relevant provisions of EU law violate the material core of the Constitution.

As the result, the Czech Constitutional Court for the first time in the history of the EU recognised the ruling of the CJUE to be *ultra vires*.³⁰² The Court held that the “[f]ailure to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships arising for social security from the free movement of persons in the European Communities, or the European Union, is a failure to respect European history, it is comparing things that are not comparable.” In consequence, according to the Constitutional Court “in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was *ultra vires*.”

The position of the Constitutional Court seems to be surprising in the light of previous decisions concerning Union law. In the discussed case the Constitutional Court consistently considered it as a purely internal one since from a national perspective the main problem was not the conformity of the special payment with EU law but a law-creating activity of the Constitutional Court.³⁰³ It must be repeated that the decision of the Constitutional Court was the sole ground of the supplementary benefit. The Constitutional Court missed the question of Union law in the first decision and, to defend its own legal construct, deemed EU law inapplicable. Such false assumption seems to have been the main reason for the disagreement. The whole argumentation of the Court is highly emotional and the application of *ultra vires* concept remains doubtful. The position of the Constitutional Court is based on a subjective interpretation of historical facts. At the same time, not only other Czech courts challenged the position of the Constitutional Court but also the Government and the Parliament³⁰⁴ disagreed. This fact clearly indicates the internal conflict between state authorities and judicial bodies.

³⁰¹ Case Pl. ÚS 50/04 (Czech Constitutional Court, 8 March 2006) and Pl. ÚS 19/08 (n. 91).

³⁰² *Slovak Pensions* Pl. ÚS 5/12 (Czech Constitutional Court, 31 January 2012).

³⁰³ Cf. J. Komárek (n. 293), p. 325.

³⁰⁴ Shortly of the judgment of the CJEU the Parliament adopted an act, which prospectively excluded the possibility of paying the special supplement to everyone with a specific reference to the CJEU’s ruling.

The Constitutional Court accused the CJEU of a lack of good will and cooperation and pointed to “deficiencies concerning the safeguards of a fair trial in the proceedings” before the CJEU. For the Constitutional Court it was obvious that the CJEU had a legal possibility to accept its letter.³⁰⁵ However, such possibility is not expressly indicated in the Statute of the CJEU. In opposition to the procedural position of the Commission, and State governments and other institutions involved in the procedure before national court, interventions of a third party is not regulated by the Statute of the CJEU.³⁰⁶ It must be also stressed that the function of the preliminary ruling procedure is to interpret EU law in circumstances of a particular case to support the national court in application of that law on the one hand and ensure its uniform application in the whole Union on the other. That’s why the CJEU is bound by findings of referring court as to the applicable national law.³⁰⁷ The CJEU does not resolve disputes between state authorities in this procedure. If it had accepted the letter of the Constitutional Court, the CJEU would have put itself in the position of an arbiter between the Supreme Administrative Court, the Czech Government and the Constitutional Court. Thanks to the fact that it rejected the letter of the Constitutional Court, the CJEU simply performed its function and interpreted the Regulation within the limits of the questions posed by the referring court.

It is yet another question whether the Constitutional Court should have made its own referral for a preliminary ruling in the two cases. Although it is obvious that the Constitutional Court missed this opportunity to resolve the legal problem by means of a direct dialogue with the CJEU, it must be noticed, that the main problem was that the Constitutional Court did not consider EU law in the first decision conferring a right to supplementary payment. This was an original sin on the part of the Constitutional Court. The subsequent argumentation was only a consequence of this initial omission. For this reason the Constitutional Court sustained that the whole case remains outside the scope of EU law. At the same time, the preliminary ruling request of the Supreme Administrative Court was not motivated mainly by the care for effectiveness of EU law in the Czech Republic, but it was politically motivated and aimed to challenge the position of the Constitutional Court. As the result of the provocation by the Supreme Administrative Court, the Constitutional Court overreacted and misused ultra vires review. Consequently, the decision of the Court has been broadly criticised

³⁰⁵ The Court indicated that “the ECJ regularly makes use of the institution of *amici curiae* in proceedings on preliminary questions, especially in relation to the European Commission. In a situation where the ECJ was aware that the Czech Republic, as a party to the proceeding, in whose name the government acted, expressed in its statement a negative position on the legal opinion of the Constitutional Court, which was the subject matter for evaluation, the ECJ’s statement that the Constitutional Court was a ‘third party’ in the case at hand cannot be seen otherwise than as abandoning the principle *audiatur et altera pars*”, para. VII.2.

³⁰⁶ See: J. Komàrek (n. 293).

³⁰⁷ C-213/04 *Ewald Burtscher* (CJEU, 1 December 2005).

and rejected by other state organs of the Czech Republic including administrative courts. It shows, that in the era of constitutional pluralism, at least within the EU, the question of the court of last world remains open and that any decision denying authority of the CJEU must be well grounded. It also illustrates problem of ‘dual loyalty’ of national courts applying EU law. The last, and unfortunately lesser word in the case belonged to the Constitutional Court but its argumentative power is rather weak, so the decision should not be recognised as a precedent.

Although the decision in *Slovak Pensions* can hardly be recognised as a precedent, it has influenced the perception of EU law in the Czech legal order. In the 2014 Report the Constitutional Court presented the following approach: “[t]he Constitutional Court believes that the national constitutional order and EU law are two different systems and two reference criteria, each of which is used autonomously by a different body. The ambits of the Court of Justice of the European Union and the Constitutional Court thus do not overlap, much as the Constitutional Court (driven by the German *Solange* doctrine) reserved the right to intervene, should the European Union overstep powers delegated to it by the Czech Republic (acting *ultra vires*), or should it interfere with the material core of the Constitution [...]” and concluded that “the case law of the Court of Justice of the European Union is of limited importance to the application practice of the Constitutional Court due to the mutual non-connectedness of the two judicial systems.”³⁰⁸ There is no doubt that the statement was connected with *Slovak Pensions* decision discussed in the subsequent part of the Report. The Constitutional Court tried to show that it was not in the position of competition CJEU basing its argumentation on a dualistic approach towards EU law.

The next example of an Eastern European court, which used dialogue to assert and justify a particular domestic constitutional standard that differs from the solution offered under international human rights law comes from Lithuania. It is the *Paksas* case of the Lithuanian Constitutional Court of 25 May 2012.³⁰⁹ In this case, the Lithuanian Constitutional Court emphasised the need to protect the ‘very constitutional identity’ of Lithuania when it justified its rejection of ECtHR jurisprudence. The case in question concerned the effects of the ECtHR judgment *Paksas v Lithuania*,³¹⁰ which criticised an earlier 2004 Constitutional Court’s decision³¹¹ concerning consequences of impeachment

³⁰⁸ Constitutional Court of the Czech Republic (2013) National Report XVth Congress of the Conference of European Constitutional Courts “Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives” 11.

³⁰⁹ Case 8/2012/05/09/2012 (Lithuanian Constitutional Court, 22 May 2012).

³¹⁰ *Paksas v Lithuania*, App. no. 34932/04 (ECtHR, 6 January 2011).

³¹¹ Case 24/04 (Lithuanian Constitutional Court, 25 May 2004).

procedure in the field of electoral rights.³¹² When reviewing this decision, the ECtHR found a violation of the right to vote and stand in parliamentary elections under Art. 3 of the First Protocol to the ECHR. In its subsequent decision of 2012, the Lithuanian Constitutional Court questioned the ECtHR's arguments and set out the limits of the legal consequences of the ECtHR judgments in the Lithuanian legal order based on two arguments. First, the Constitutional Court of Lithuania pointed to the subsidiary nature of the ECHR system and stressed its own exclusive competence to interpret the Constitution of Lithuania.³¹³

The Lithuanian Constitutional Court's second argument related to the need to protect the constitutional identity of the state. It observed that there was a close relationship between the impeachment procedure, breach of oath and electoral rights under the Lithuanian Constitution. It stressed that a change of any of these three elements would influence the balance of the Lithuanian constitutional system and the constitutional values behind this system. The Constitutional Court of Lithuania declared the Lithuanian Constitution as the supreme law of the land. It further stated that ECtHR judgments might not serve as a constitutional basis for the reinterpretation of the official constitutional doctrine if such reinterpretation, in the absence of corresponding amendments to the Lithuanian Constitution, affects the essence of the constitutional provision in question. Such reinterpretation based on ECtHR judgments could also not be accepted if it unduly interfered with the values entrenched in the Lithuanian Constitution and undermined the level of protection of fundamental rights offered by it.

The judgment of the Lithuanian Constitutional Court determined limits of effectiveness of the decision of the ECtHR, without questioning its legal value. It is clear for the Court that the decision is binding upon Lithuania, however, in case of conflict between the decision and constitutionally protected values the decision cannot be implemented without change of the Constitution. The Court decided that the harmonious interpretation of the Constitution has its limits if the constitutional identity of the State is to be ensured. Yet, the Court did not use the term; it referred to the "overall constitutional regulation" and the "system of values entrenched in the Constitution" and stressed its own role as a guardian of the constitution. The case constitutes an excellent example of a situation of collision

³¹² The Lithuanian Constitutional Court held that a person who had been removed from the office of the president for a gross violation of the Lithuanian Constitution or a breach of oath, could never be elected president of the republic or a member of the Seimas (lower chamber of Lithuanian Parliament) again, nor could he/she hold an office for which it was necessary to take an oath in accordance with the Lithuanian Constitution.

³¹³ "Even though the jurisprudence of the European Court of Human Rights, as a source for construction of law, is important also for construction and application of Lithuanian law, the jurisdiction of the said Court does not replace the powers of the Constitutional Court to officially construe the Constitution", para. III.2.

within a pluralistic system and shows that sometimes resolution of a conflict between a coexisting legal systems within pluralistic legal order cannot be resolved by judges.

The Russian Constitutional Court adopted different approach towards conflicting situation, for the first time in the *Markin* case concerning paternal leave granted in Russia elusively to female military personnel. After the judgments of the ECtHR³¹⁴ ascertaining violation of Art. 8 ECHR in which the ECtHR criticised the Russian Constitutional Court's decision based on the constitutional protection of motherhood and childhood³¹⁵ as 'unconvincing' and pointed to 'gender prejudices' in the decision,³¹⁶ there was a strong reaction in Russia.³¹⁷ When Mr. Markin applied for the reopening of his case before a regional court in St. Petersburg, in consequence of the ECtHR's ruling, the court referred the case to the Russian Constitutional Court as it was faced with the legal question of how to reconcile contradicting judgments of the Russian Constitutional Court and the ECtHR. In its decision, the Russian Constitutional Court³¹⁸ made sure that it left a backdoor open that would allow it to protect specific domestic solutions in the future, in particular solutions that were based on

³¹⁴ ECtHR cases: *Konstantin Markin v Russia*, App. no. 30078/06 (7 October 2010); *Konstantin Markin v Russia*, App. no. 30078/06 (22 March 2012).

³¹⁵ Case 187-O-O (Russian Constitutional Court, 15 January 2009). The Constitutional Court stated that: "Owing to the specific demands of military service, non-performance of military duties by military personnel *en masse* must be excluded as it might cause detriment to the public interests protected by law. Therefore, the fact that servicemen under contract are not entitled to parental leave cannot be regarded as a breach of their constitutional rights or freedoms, including their right to take care of, and bring up, children [...]. Moreover, this limitation is justified by the voluntary nature of the military service contract. By granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly, the special social role of women associated with motherhood. [Those considerations] are compatible with Art. 38(1) of the Constitution of the Russian Federation. Therefore, the legislature's decision cannot be regarded as breaching the principles of equality of human rights and freedoms or equality of rights of men and women, as guaranteed by Art. 19(2) and (3) of the Constitution of the Russian Federation." Translation after the ECtHR *Konstantin Markin v Russia* (Grand Chamber), para. 34.

³¹⁶ See: paras 57–59 of the ECtHR Chamber judgment *Konstantin Markin v Russia*.

³¹⁷ The President of the Constitutional Court, Valeri Zorkin claimed that the ECtHR had not shown sufficient respect for Russia's sovereignty and its legislature, which was better placed to solve questions related to national security and determining the scope of individual rights in this context. He further declared that the interpretation of the Russian Constitution by the Russian Constitutional Court could not automatically be overridden by an interpretation of the ECHR offered by the ECtHR. See more: W.E. Pomeranz, 'Uneasy Partners: Russia and the European Court of Human Rights' (2012) 3 *Human Rights Brief* 17; G. Vaypan, 'Acquiescence Affirmed, Its Limits Left Undefined: The *Markin* Judgment and the Pragmatism of the Russian Constitutional Court *vis-à-vis* the European Court of Human Rights' (2014) 3 *Russian Law Journal* 130.

³¹⁸ Case 27-П/2013 (Russian Constitutional Court, 6 December 2013).

its own interpretation of the Russian Constitution. The Russian Constitutional Court ruled that the district court was under an obligation to reopen the proceedings after the ECtHR had found a violation of the ECHR by Russia. However, the Court also noted that if a lower court is able to comply with the judgment of the ECtHR only by disregarding an interpretation of the Constitution and a finding of the constitutionality of an ordinary law by the Russian Constitutional Court that was binding on lower courts, the lower court in question is obliged to refer the case to the Russian Constitutional Court. The Constitutional Court will then re-assess its interpretation of the Russian Constitution and/or its finding on the constitutionality of a domestic provision in the light of the ECtHR judgment. The Russian Constitutional Court did not indicate in detail how it would solve such cases. In the case at hand, the decision on Mr Markin's right to parental leave became redundant because his children attained an age that no longer entitled him to parental leave.

In 2015 a group of Russian Members of Parliament challenged before the Russian Constitutional Court the constitutionality of the 1998 Federal Law "On Ratification of the ECHR" and the 1995 Federal Law "On International Treaties", alongside with a number of procedural norms. The applicants argued that the system of the ECHR and contested rules oblige national courts and other state bodies to unconditional implementation of the ECtHR decisions even if they are contrary to the Russian Constitution and that such a situation leads to a breach of human rights and contradicts the fundamental principles of the constitutional system. The Russian Constitutional Court in the decision of 14 July 2015³¹⁹ held that the contested norms do not conflict with the Constitution, however the reasoning of the Court was based on a very strong sovereignty argument supported by the primacy of the Constitution. The Court stressed that any derogation from the obligation to execute ECtHR judgments must remain an exemption since both the Constitution and the ECHR are based on the shared basic values. The Constitutional Court stressed that the system of the ECHR is based on the subsidiarity principle and that the protection granted by the ECtHR is essentially complementary to the national mechanism of judicial protection of human rights. It means that the protection must be granted in the first place by Russian courts including the Constitutional Court and that the result of the judgment of the ECtHR cannot be diminishing the level of protection of a constitutional standard.

The Court considered ECtHR judgments as an integral part of the Russian legal system however under supremacy of the Constitution. The Court held that the Constitution stipulates

³¹⁹ Case 21-П/2015 (Russian Constitutional Court, 14 July 2015) unofficial translation by Maria Smirnova, <<http://transnational-constitution.blogspot.com/2015/08/russian-constitutional-court-decision.html>> (access: August 2016). Official summary: <<http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-%D0%9F.pdf>> (access: August 2016).

“impossibility of implementation in the legal system of international treaties participation in which may result in either restriction on rights and freedoms of man and citizen or in violation of constitutional provisions by encroachment on the foundations of the constitutional system of the Russian Federation. Thus, neither the Convention [...] nor the ECtHR judgments based on the Convention and containing an assessment of national legislation or indicating the need to change any of its provisions have capacity to cancel the priority of the Constitution in the Russian legal system.”³²⁰ The Court stressed that conclusion of the international agreement “does not mean repudiation by Russia of its sovereignty.” As a result “in situation when the actual content of the judgment of the ECtHR [...] unlawfully from constitutional and legal point of view allude to principles and norms of the Constitution, Russia may, however as a matter of exemption, depart from her obligations when such derogation is the only way to avoid the violation of fundamental principles and norms of the Constitution.”³²¹

The next argument of the Russian Constitutional Court was based on the general international law. The Constitutional Court indicated that in a particular situation a dynamic interpretation of the ECHR by the ECtHR, such that changes the ECHR’s meaning and results in a conflict with a national constitution, must be recognised as unlawful in the light of general international law and especially the customary norms of the Vienna Convention on the Law of Treaties. The Constitutional Court argued that an international agreement is binding on the State parties only if it is interpreted according to the rules of 31(1) VCLT. Thus, if the ECtHR decides to deviate from these rules and attribute to the ECHR a meaning contradicting its object and purpose or violating peremptory norms of international law, the State party may refuse to execute the ruling. The Constitutional Court recognised sovereign equality as a *jus cogens* of general international law. The Court invoked Art. 46(1) of the Vienna Convention and held that it can be recognised as the basis to block the action against the State, which is manifestly contrary to constitutional norms of particular importance. The Court explained that the situation of conflict under consideration concerns a dynamic interpretation by the ECtHR, which had been unforeseeable at the moment of the accession to the Convention.

The Russian Constitutional Court also referred to the practice of the highest courts of European countries: Germany,³²² Italy,³²³ Austria,³²⁴ and the United Kingdom,³²⁵ which also “adhere to the principle of the priority of norms of national constitutions in the execution of the ECtHR judgments.” This referral to foreign courts is the most obvious example of an instrumental use of judicial

³²⁰ See: para. 2.2.

³²¹ See: para. 2.2.

³²² German Constitutional Court cases: *Görgülü* 2 BvR 1481/04 (14 October 2004); *Solange I* 2 BvL 52/71 (29 May 1974).

³²³ Italian Constitutional Court cases: 264/12 (19 November 2012); 234/14 (22 October 2014).

³²⁴ Case B 267/86 (Austrian Constitutional Court, 14 October 1987).

³²⁵ Case (2013) UKC 63 (The Supreme Court of the United Kingdom, 16 October 2013).

dialogue. It must be recalled, that the Russian Constitutional Court usually does not refer to other national courts, which means that we have to do with exceptional practice aimed at a specific goal. This aim was to prove that adopted approach is nothing special within the society of state-parties to the ECHR. However an analogy between findings of the Russian Constitutional Court and courts invoked by it is doubtful and misleading. The main problem discussed by national highest courts was *how* the judgement of the ECtHR should be implemented in terms of direct applicability of the ECHR and decisions of ECtHR. The courts declaring an international decisions non-executable but just with regard to unconstitutionality or legal impossibility for other reasons, of given modality of enforcement³²⁶ and did not call into question legally binding force of ECtHR decisions.

³²⁶ The German Federal Constitutional Court in *Görgülü*, (n. 34) set up constitutional limits of implementation of the judgments of the ECtHR and placed the Convention in German legal order at the level of regular legislation. However the Federal Constitutional Court has never put into question legally binding force of the judgments of the ECtHR but converted their direct effect. In other words, the German Federal Constitutional Court consider how the judgment should be implemented not whether it should be implemented. Moreover, *Security detention II* 2 BvR 233/08 (Federal Constitutional Court, 4 May 2011), the Court held that Fundamental Law should be interpreted in the light of the Convention and its development by the ECtHR. According to the Court it should be done though transposition of European standard into domestic legal order and held that "It is true that at national level, the European Convention on Human Rights ranks below the Basic Law. However, the provisions of the Basic Law are to be interpreted in a manner that is open to international law (völkerrechtsfreundlich). At the level of constitutional law, the text of the Convention and the case law of the European Court of Human Rights serve as interpretation aids for the determination of the contents and scope of the fundamental rights and of rule-of-law principles enshrined in the Basic Law. An interpretation that is open to international law does not require the Basic Law's statements to be schematically aligned with those of the European Convention on Human Rights but requires its valuations to be taken on to the extent that this is methodically justifiable and compatible with the Basic Law's standards." Cf. F. Hoffmeister, 'Germany: Status of European Convention on Human Rights in Domestic Law' (2006) 4 I-CON 722, 729; A. Seibert-Fohr, M.E. Villiger (eds), *Judgments of the European Court of Human Rights – Effects and Implementation* (Nomos 2014), p. 267. In case of the High Court of the United Kingdom the main question concerns the limits of obligation of the British courts stemming from the Human Rights Act to "take into account Strasbourg case law" "so far as it is possible to do so", to read and give effect to legislation in a way which is compatible with the Convention rights. The referred judgement thus concerns judicial enforcement of the ECtHR decision and not legally binding force of it and general obligation of execution of the judgment. In contrast to the legal consequences of the judgment of the Russian Constitutional Court, the exclusion of judicial implementation of the judgement by the High Court in particular case does not mean that the judgement is non-executable at all. The High Court expressly stated that implementation of the judgment belongs to the Parliament. See the discussion concerning problems with implementation of Hirst: E. Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 Human Rights Law Review, p. 503. Reference to Italian experience seems to be missed since in the decision of 2012 the Italian Constitutional Court clearly stated that: "when fundamental rights are at issue, respect for international obligations cannot in any

The main outcome of above discussed decisions of the Constitutional Court is reservation of the ‘right to object’ in most exceptional cases. The Court declared willingness to pursue ‘dialogue and constructive engagement.’³²⁷ However, the argumentation of the Court based on the constitutionally determined state sovereignty protected, according to the Court, by the equal sovereignty principle such as *jus cogens* norm of international law leaves no room for further negotiations in a situation of a conflict. The Court retained the competence to make a final decision as to the implementation of the ECtHR judgements in two kinds of constitutional proceedings: the review of the constitutionality of legislation which was found by the ECtHR contrary to the Convention (any court reconsidering a case on the basis of a decision of the ECtHR is obliged to submit legal question to the Constitutional Court)³²⁸ and the interpretation of the Constitution in cases brought by the President or the Government of the Russian Federation when they consider that implementation of particular decision of the ECtHR can violate the Constitution.

As a consequence of the above discussed case and also in response to subsequent judgements of the ECtHR especially in *Anchugov & Gladkov*³²⁹ and *Yukos*³³⁰ the amendment to the Federal constitutional law on the Constitutional Court of Russian Federation (‘Amendment’) was adopted in December 2015. The new law extended powers of the Constitutional Court and entitled it, upon a request by the President or the government, to review a contradiction between the provisions of a treaty as interpreted by a treaty body and the provisions of the Constitution, and to declare decisions of international courts as ‘unenforceable’. It should be noticed that the European Commission for Democracy through Law (Venice Commission) evaluated the Amendment. The Commission held that it is not against international law to empower the Constitutional Court to control the conformity with the Constitution of decisions of international bodies. However, it is contrary to international law, especially Art. 46 of the ECHR and customary rules stemming from Art. 26 and 27 of the Vienna Convention on Law of Treaties of 1969, that a negative result of the constitutionality review makes the judgment ‘unenforceable’ and prevents the execution of the judgment in any manner in Russia.

In April 2016 the Russian Constitutional Court, upon request of the Ministry of Justice, resolved another case concerning enforcement of the decision of the

case constitute grounds for a reduction in protection of compared to whose already available under national law, but on the contrary may and must constitute an effective instruments for expanding such protection.” The constitutional Court also stressed that ordinary courts are obliged to verify conformity of national law with the ECHR.

³²⁷ The Russian Constitutional Court declared that “in the resolution of such conflicts it is necessary not to seek self-isolation, but proceed from the necessity of dialogue and constructive engagement. Only in this way can a truly harmonious relationship between the legal systems in Europe be built, based on mutual respect rather than submission.”

³²⁸ See: Art. 125(4) of the Constitution of the Russian Federation.

³²⁹ *Anchugov and Gladkov v Russia*, App. nos 11157/04 and 15162/05 (ECtHR, 4 July 2013).

³³⁰ *Neftyanaya Kompaniya Yukos v Russia*, App. no. 14902/04 (ECtHR, 31 July 2014).

ECtHR.³³¹ The case originated in *Anchugov and Gladkov v Russia* judgment in which the ECtHR found that the Russian Constitution, providing for general ban depriving prisoners right to vote or to stand for election, violated voting rights granted in Protocol 1(3) of the ECHR by Russian law, and Art. 32(3)³³² of the Russian Constitution. Taking into account a possible constitutional dimension of its own decision, the ECtHR indicated that “[i]n the present case, it is open to the respondent Government to explore all possible ways in that respect and to decide whether their compliance with Art. 3 of Protocol No. 1 can be achieved through some form of political process or by interpreting the Russian Constitution by the competent authorities – the Russian Constitutional Court in the first place – in harmony with the Convention in such a way as to coordinate their effects and avoid any conflict between them.”

The Russian Constitutional Court, using new powers and broadly referring to the previous decision of 2015, deemed execution of a judgement in *Anchugov and Gladkov* as to both general and individual measures impossible. Although the Court employed in its argumentation pluralistic vocabulary (mainly judicial dialogue, constitutional identity, mutual trust), the outcome of the judgement is far from being pluralist, since the Court determined that there was a complete impossibility of execution of the ECtHR decision. The execution was excluded by the Court not only in the light of the Russian Constitution, but also from the point of view of international public law, especially the norms of the law of treaties. Moreover, the findings of the ECtHR with regard to existing European standard were considered as unjustified in the light of both previous ECtHR decisions and development of protection of right to vote in the State parties to the ECHR. In consequence the Court held that

[i]n the Judgment in the case of *Anchugov and Gladkov v Russia* the European Court of Human Rights attributed to Art. 3 of Protocol No. 1 to the Convention the meaning, implicitly contemplating alteration of Art. 32 (Section 3) of the Constitution of the Russian Federation, to which Russia as a High Contracting Party to the multilateral international treaty, which is the Convention for the Protection of Human Rights and Fundamental Freedoms, gave no consent during its ratification, so far as assumed (including bearing in mind absence of any objections on the part of the Council of Europe) that Art. 32 (Section 3) of the Constitution of the Russian Federation and Art. 3 of Protocol No. 1 to the Convention did not contradict each other.³³³

³³¹ Case 12-П/2016 (Russian Constitutional Court, 19 April 2016). See also comments: I. Nuzov, *Russia's Constitutional Court Declares Judgment of the European Court "Impossible" to Enforce* (Int'l J. Const. L. Blog 2016), <<http://www.iconnectblog.com/2016/04/russias-constitutional-court-declares-judgment-of-the-european-court-impossible-to-enforce>> (access: July 2016).

³³² Art. 32(3) of the Russian Constitution “citizens detained in a detention facility pursuant to a sentence imposed by a court’ to vote or to stand for election.”

³³³ See: para. 4.2.

This statement means that any further discussion on an imperative ban, according to which all convicted persons serving sentence of deprivation of liberty defined by the criminal law have no electoral rights with no exception, is impossible. The Court even denied payment of just satisfaction adjudicated by the ECtHR, which means general devaluation of any legal force of this decision. The suggested possibility of further implementation of the judgment affected by the interpretation of terms ‘sentence imposed by the court’, ‘detained’ and ‘detention facility’, seems to be unsatisfactory in the light of the outcome of the judgment.

The judgement of the Constitutional Court seems to be a dangerous precedent within the system of the ECHR. One must agree that Russia has adopted a policy of partial or *à la carte* compliance.³³⁴ It must be noticed that there is a clear position that withdrawal from the Convention is not an option. Rather, it is expected by the Russian authorities that the European system is to be modified with a due regard to the Russian sovereign will determined not in objective way on the basis of the content of the ECHR as international treaty binding upon the Russian Federation but as defined subjectively in the Russian Constitution as interpreted by the Russian Constitutional Court.³³⁵ It is stressed that

the question is not validity or invalidity for Russia of an international treaty as a whole, but simply of the impossibility to implement its provision in the interpretation attributed to it by an authorized intergovernmental body within the framework of consideration of a specific case, to the extent to which this interpretation has rendered this provision concrete in such a way that it has come into conflict with the provisions of the Constitution of the Russian Federation.³³⁶

Valeri Zorkin, the President of the Constitutional Court even pointed out that “it is not in the contradiction to the European Court of Human Rights, but, on the contrary, it is based on the aspiration to safeguard ourselves from situations,

³³⁴ C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2016), p. 113.

³³⁵ As the Council of Europe Secretary General Thorbjørn Jagland noticed “our states have consistently demonstrated that perceived tensions between the Convention and core constitutional principles can be resolved without open conflict. This is the only way to preserve our common, legal pan-European space. The alternative is a blatant challenge to the binding effect of the European Court’s judgments, which would mark the beginning of the end for our unique human rights protection system. I trust that this is not the intention of the Russian Federation, nor of any other State or any institution in Europe.” Speech during the conference held in Sankt Petersburg in 2015, <http://www.coe.int/en/web/secretary-general/speeches/-/asset_publisher/gFMvI0SKOUrv/content/international-conference-enhancing-national-mechanisms-for-effective-implementation-of-the-european-convention-on-human-rights-> (access: May 2016).

³³⁶ V. Zorkin, ‘Challenges of Implementation of the Convention on Human Rights’, <<http://www.ksrf.ru/en/News/Documents/Report%20for%202022%20October.docx>> (access: June 2016).

fraught with serious complication of the relations of Russia with the ECtHR and with the Council of Europe as a whole. The question regards the situations when the ECtHR decisions, intruding into the sphere of the national sovereignty of Russia, are fraught with more substantial violations of rights of Russian citizens than those, which the Strasbourg Court is objecting to. As a matter of fact, the Constitutional Court, which possesses of a large experience of constructive interaction and mutually respectful dialogue with the ECtHR, has taken upon itself the burden of settlement of conflicts of this sort.”³³⁷

All the above-mentioned explanations employ pluralistic vocabulary, however, the outcome of the judgment is in obvious opposition to the idea.

4. Concluding Remarks

The CEE Constitutional Courts, just as other European courts, face the authority of international courts. Since constitutions of these states incorporate international treaty regimes (by means of a general clause as a part of international law like in Czech Republic, Lithuania, Poland, Russia or Ukraine or by specific incorporation like in Hungary) authority of the highest courts established within this regimes must be taken into account by constitutional courts not only in the process of application of international law but also in interpretation of national constitutions and other acts of internal law. The ECC constitutional Courts have built their own relation with international courts on the basis of international obligations of the State and its constitutional framework. Since in all states under consideration there is a strong sovereignty dimension in constitutional provisions connected with supremacy of the constitution as the highest law of the land it was necessary to interpret national constitutions with due openness to international law and revision of an absolute understanding of state sovereignty. Participation in international organisations and undertaking international obligations is seen by the courts as a means of execution of sovereignty, and not as its limitation.

In practice, constitutional courts are in the position to rather avoid conflict with the highest courts of other legal orders. They do so through consistent interpretation of their own constitutions, giving due consideration to the decisions of international courts and building up the court-to-court relations including own scope of jurisdiction under national law. Constitutional courts use judicial dialogue, especially but not exclusively with the ECtHR and CJEU, to achieve this purpose. In the field of human rights protection the legally binding nature of the ECHR

³³⁷ Ibidem.

is not the only reason of such practice. The jurisprudence of the ECtHR is recognized as an indicator of established European standards of protection of human rights. That's why constitutional courts refer to the case law of the ECtHR not only when applying the ECHR but also in the process of interpretation of national law. For the same reason the constitutional courts in difficult cases broadly refer also to practice of foreign courts. Such attitude seems to confirm that courts recognize themselves as members of community of judges ensuring, within a pluralistic legal community, the effective protection and preservation of universal values.

The Constitutional Courts of Czech Republic, Hungary, Lithuania and Poland clearly distinguish scope of their own jurisdiction from jurisdiction of the ECtHR and the CJEU. While they are solely responsible for interpretation and application of the Constitution including review of constitutionality of any applicable law, the European Courts have exclusive power to decide on interpretation of particular international treaties as well as on violation of treaty obligations. This attitude makes the coexistence of different autonomous constitutional orders possible even in conflict situation. However, the courts proclaimed constitutional identity as a boundary beyond which the influence of the external coexisting legal orders on their constitutions is not permissible.

The ECC constitutional Courts preserve their own function as guardians of national constitutions, which means that also implementation of decisions of international courts may be subject of constitutionality review. The approach of the Czech, Lithuanian, Hungarian and Polish Constitutional Courts is similar to this adopted by the CJEU in *Kadi*.³³⁸ All international obligations of a State must be performed in conformity with its constitution. However, even if execution of some means of the judgment of a European court is impossible in the light of the national constitution in force, like in *Paksas* case, it does not mean that it is not possible at all. The distinction between (an indirect) control of constitutionality of a decision of international court and a control of its validity is crucial for constitutional pluralism, since it makes dialogue (in the meaning of both speaking and listening) possible. It also shows that not only common understandings but also real differences are possible. It also shows that judicial practice, even based on due mutual respect, is not able to resolve all problems of complex reality of constitutional pluralism. Sometimes intervention of other, political, bodies is necessary to avoid conflict. As it was indicated at the beginning of the paper, a concept of a dialogue does not mean everyone at the table agree with one another and pluralism involves the commitment to being at the table – with one's commitments. *Slovak Pensions* shows that lack of due consideration of the authority of the highest court of other legal order and lack of will to engage in a dialogue at the beginning may result in exclusion of participation in further discussion. In case of Russia the argument of state sovereignty as *jus cogens* norm of international law evocable against a treaty

³³⁸ C-402/05 P and C-415/05 P *Kadi v Council and Commission* (CJEU, 3 September 2008).

obligation shows that perception of international law in Russia differs from other CEE states.³³⁹

The practice of the CEE constitutional courts shows also that the line between dualism and pluralism is fluent and nuanced. As in case of practices of Western European courts one may wonder whether argumentation based on mutual trust, friendly coexistence of legal systems and dialogue amounts to the constitutional pluralism or is it simply dualism cloaked as pluralism.³⁴⁰

³³⁹ It must be emphasised that a strong belief that state sovereignty is the fundamental principle in international law is characteristic for Russian understanding of international law. In the same time, sovereignty is absolute, indivisible and cannot be limited. It leads to critique of constitutionalisation of international law and very idea of legal pluralism. L. Mälksoo, *Russian Approaches to International Law* (Oxford University Press 2015) 100.

³⁴⁰ Phrase used by A.L. Paulus with regard to the German Federal Constitutional Court in 'From Dualism to Pluralism: The relationship between international law, European law, and domestic law', [in:] P.H.F. Bekker, R. Dolzer, M. Waibel (eds), *Making Transnational Law Work in the Global Economy, Essays in Honour of Detlev Vags* (Cambridge University Press 2010), p. 134.

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III. Administrative Courts and Judicial Comparativism in Central and Eastern Europe

Joanna Krzemińska-Vamvaka*

1. Introduction

Administrative law is no longer what it used to be. Two major transformative forces shape it: the rise of global governance¹ and the increased international co-operation and linkages. The international economic, social and political interdependence has led to the emergence of transnational laws and structures. In addition, national administrations and courts have been confronted with an increased number of cross-border cases.

* Dr iur.; Head of Unit in the Trade Defence Services of the Directorate General for External Trade, European Commission, Brussels. Views presented are personal views of the author. I am deeply indebted to the Latvian, Estonian and Hungarian Supreme Courts for their invaluable input and comments. I greatly benefited from discussions with Maria Javorova. I also appreciate the help of Alexei Trochev and Sergei Marochkin. Translations from Estonian: courtesy of Triin Pakkonen.

¹ B. Kingsbury, N. Krisch, R. Stewart, 'The Emergence of Global Administrative Law' (Global Administrative Law Project 2005), <<http://www.iilj.org/wp-content/uploads/2016/08/Kingsbury-et-al-The-Emergence-of-Global-Administrative-Law-2004-2.pdf>> (access: 17 May 2016) 17; see also more general on judicial dialogue A.M. Slaughter, 'A Global Community of Courts' (2004) 44 *Harvard International Law Journal*, p. 194.

This contribution explores one aspect of how administrative courts respond to those new challenges. It deals with judicial comparativism, i.e. the practice whereby courts voluntarily decide to look at foreign law.² The concept of judicial comparativism is broader than that of judicial dialogue and covers cases of voluntary judicial recourse to foreign law (legislation, case law, commentaries). It does not cover cases governed by foreign law under the choice of law rules of the forum State. Judicial comparativism is also not limited to instances of judicial dialogue where national courts refer to foreign judgments, i.e. engage in a dialogue with foreign courts.

2. Cases with a Foreign Element

It is difficult to find comparative judgments in the case law of administrative courts. It proves much more difficult than searching the databases of Constitutional Courts.³ Not only do administrative courts typically have a very high exposure to cases with cross-border elements, but the mere number of judgments of administrative courts is a challenge in itself.

The exposure to cases with a foreign element is difficult to measure. A search in the database of the Polish administrative courts gives some indications. A search based on a selected country names yields a high number of results (in the tune of 20 000).⁴ By way of comparison, the same search performed in the database of the Polish Constitutional Court yields a list of around 500 judgments. A similar observation is also true for other countries.⁵ To identify comparative judgments from among such a high number of cases is particularly challenging.

² J. Krzemińska-Vamvaka, 'Courts as Comparatists: References to Foreign Law in the case-law of the Polish Constitutional Court' (2012) Jean Monnet Working Paper 05/12, <<http://www.jeanmonnetprogram.org/wp-content/uploads/2014/12/JMWP05Krzeminska-Vamvaka.pdf>> (access: 17 May 2016) 2.

³ This conclusion is based predominantly on research conducted for J. Krzemińska-Vamvaka, *ibidem*.

⁴ For example, a search for 'Germany' returns 14 727 judgments. A search for 'France' returns 3281 judgments. A search for 'Italy' – 1161 judgments. A search for 'UK' – 3561. A more targeted search with names of foreign courts, notably highest courts, yields a much more limited number of judgments. The representativity of such a search, however, would be limited as would have left out references to foreign legislation, scholarship or those simple references to a country by its name. It would also not account for those instances where the comparing court does not precisely follow a method of quotation in the legal system to which it refers.

⁵ In Slovakia, a search in the database of the Supreme Court for 'France' yields a result of 1091 judgments, a search for 'cour' – 476 judgments.

The research for this paper involved a detailed search in the database of the Polish administrative courts for the years 2010–2014.⁶ The comparative analysis is based on information from a number of countries: Estonia, Lithuania, Latvia, Hungary, and Russia.

3. The EU Administrative Law and Judicial Comparativism

While judicial comparativism is not an EU phenomenon, the EU law is an excellent foundation for the development of an intense judicial dialogue. In fact, the research conducted for the purposes of this paper shows that the Polish administrative courts refer to law of other EU Member States ('MS') often in the context of application of EU law.

The general principle of implementing Union law is that of indirect administration.⁷ Apart from few instances of direct application by EU institutions (e.g. competition⁸), the task of implementing Union law lies predominantly with the EU Member States.⁹ In some instances the EU legislator will entrust the Commission with the direct management of some provisions or adoption of implementing rules to ensure uniform and consistent application.¹⁰ The European administrative law¹¹ encompasses both the administrative law rules related to the application of Union law by the EU institutions, as well as national rules for the application of Union law by the MS.

The particular set up of the EU, with the overarching principle of uniform application of Union law and the interdependence between MS' systems of administrative law, lays excellent foundations for the judicial dialogue between EU

⁶ Baza orzeczeń Naczelnego Sądu Administracyjnego [Case Law Database of the Supreme Administrative Court] <<http://orzeczenia.nsa.gov.pl>> (access: 17 May 2016).

⁷ J.C. Piris, *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge University Press 2010), p. 97.

⁸ Articles 105 and 106 of the Treaty on the Functioning of the European Union (TFEU), as well as Art. 108 TFEU.

⁹ Article 4(3) of the Treaty on the European Union states that the MSs shall take any appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Article 291(1) TFEU states that MSs shall adopt all measures of national law necessary to implement legally binding Union acts.

¹⁰ J.C. Piris (n. 7), p. 98.

¹¹ See: J. Schwarze, *Europäisches Verwaltungsrecht* (Nomos 2005); P. Craig, *EU Administrative Law* (Oxford University Press 2012); J.B. Auby, J.D. de la Rochere, *Traité de droit administratif européen* (Bruylant 2014).

administrative courts. Indeed, administrative law in Europe has been converging for quite a while now.¹² This convergence comes about due to the role played by the EU Court of Justice (‘CJEU’) but also to MSs voluntarily extending Union standards to purely domestic situations.¹³

Much has been happening in the area of administrative procedure. In 2010, the European Parliament’s Committee on Legal Affairs founded a Working Group on EU Administrative Law.¹⁴ The Group’s task was to take stock of the body of the existing EU administrative law and, possibly, propose legislative interventions. Following the work of the Group, in 2013, the European Parliament adopted a resolution requesting the European Commission to submit on the basis of Article 298 of the Treaty on the Functioning of the European Union (TFEU) a proposal for a regulation on European Law of Administrative Procedure.¹⁵ In 2014, a research network on EU administrative law (Renual) published its model rules on administrative procedure,¹⁶ supported by the European Ombudsman.¹⁷ Furthermore, in 2012, Renual joined forces with the European Law Institute and started to work on a joint project “Towards Restatement and Best Practices Guidelines on EU Administrative Procedural Law.” The objective of the cooperation is to steer the debate on European administrative procedural law as well as to develop restatements and best practices, which could be transformed into legislative proposals.¹⁸

12 See: ‘Developing administrative law in Europe: Natural convergence or imposed uniformity?’ (Conference proceedings, the Hague, 29 November 2013), <<http://www.aca-europe.eu/index.php/en/evenements-en/443-the-hague-29-november-2013-seminar-developing-administrative-law-in-europe-natural-convergence-or-imposed-uniformity>> (access: 17 May 2016).

13 R.J.G.M. Widdershoven, ‘Developing administrative law in Europe: Natural convergence or imposed uniformity? Setting the Scene: Introduction and Aim of the Seminar’, <http://www.aca-europe.eu/seminars/DenHaag2013/Introduction_Widdershoven.pdf> (access: 17 May 2016).

14 Working Group on EU Administrative Law, ‘Working Document, State of Play and Future Prospects for EU Administrative Law’ (European Parliament), <<http://www.europarl.europa.eu/document/activities/cont/201210/20121025ATT54550/20121025ATT54550EN.pdf>> (access: 17 May 2016).

15 European Parliament, ‘Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL))’, <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0004&language=EN#BKMD-4>> (access: 17 May 2016).

16 Research Network on EU Administrative Law Homepage <<http://www.reneual.eu/>> (access: 17 May 2016).

17 Research Network on EU Administrative Law, ‘Renual Model Rules on EU Administrative Procedure, Foreword by the European Ombudsman’, <<http://www.reneual.eu/images/Home/forewordeuombudsman.pdf>> (access: 17 May 2016).

18 European Law Institute, ‘Towards Restatement and Best Practices Guidelines on EU Administrative Procedural Law’, <[https://www.europeanlawinstitute.eu/projects/current-projects-contd/article/towards-restatement-and-best-practices-guidelines-on-eu-administrative-procedural-law-1/?tx_ttnews\[backPid\]=137874&cHash=6c603409d-6765725530b3ab7bfd06b9d](https://www.europeanlawinstitute.eu/projects/current-projects-contd/article/towards-restatement-and-best-practices-guidelines-on-eu-administrative-procedural-law-1/?tx_ttnews[backPid]=137874&cHash=6c603409d-6765725530b3ab7bfd06b9d)> (access: 17 May 2016).

There is thus an on-going process of convergence of administrative law in Europe: top down, bottom up, structured or spontaneous. It is linked to national application of Union law but goes also beyond that context to purely domestic situations. The EU triggers a perception of belonging to one legal culture and it prompts EU courts to cooperate. This paper will explore how the process of convergence of the European administrative law influences judicial cooperation in Europe and how it manifests itself, in particular, in Central and Eastern Europe ('CEE'). It is mainly concerned with the formal framework and statistical overview of such cooperation.

4. The Cooperation of Administrative Courts and Judges in the EU

The European administrative judges cooperate and interact in the framework of two major European associations: Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union ('ACA')¹⁹ as well as Association of European Administrative Judges ('AEAJ').²⁰ Another important association is the Network of the Presidents of the Supreme Judicial Courts of the European Union.²¹

The interaction principally takes the form of periodic meetings, often dedicated to specific issues (asylum, sources of law, administrative justice, E-justice). AEAJ's cooperation is divided largely into four main thematic blocks (asylum-immigration, environmental law, independence-efficiency and taxation).

This structured cooperation of judges, i.e. such that takes place within the framework of judicial organizations, constitutes a form of judicial dialogue. It is also present in other areas of law or cross-cutting different areas (Conference of European Constitutional Courts,²² Network of the Presidents of the Supreme Judicial Courts of the European Union (the Network of the

¹⁹ The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union <<http://www.aca-europe.eu/index.php/en>> (access: 17 May 2016).

²⁰ The Association of European Administrative Judges Homepage <<http://www.aej.org>> (access: 17 May 2016). Other organizations include the European Union Forum of Judges for the Environment <<http://www.eufje.org/index.php/en/>> (access: 17 May 2016).

²¹ The Network of the Presidents of the Supreme Judicial Courts of the European Union Homepage <<http://www.network-presidents.eu/>> (access: 17 May 2016).

²² Conference of European Constitutional Courts Homepage <<http://www.confueconstco.org/home.html>> (access: 17 May 2016).

Presidents)²³). Some aspects of judicial cooperation have also been formalized under the auspices of the EU (Eurojust,²⁴ European Judicial Network in Civil and Commercial Matters,²⁵ European Judicial Network in Criminal Matters²⁶), or the Council of Europe (the European Commission for Democracy through Law, known as Venice Commission,²⁷ the European Commission for the Efficiency of Justice,²⁸ Consultative Council of European Judges²⁹). Finally, some organizations focus on international training for judges (International Organization for Judicial Training,³⁰ as well as the European Judicial Training Network³¹). On the UN level in 1994 the Commission on Human Rights appointed a Special Rapporteur on the Independence of Judges and Lawyers, who monitors the independence of the judiciary,³² especially in view of the Ba-

23 The Network of the Presidents of the Supreme Courts <<http://www.network-presidents.eu/>> (access: 17 May 2016).

24 See: Eurojust Homepage <<http://eurojust.europa.eu/Pages/home.aspx>> (access: 17 May 2016) and <<http://eurojust.europa.eu/about/legal-framework/Pages/eurojust-legal-framework.aspx>> (access: 17 May 2016). Eurojust stimulates and improves the co-ordination of investigations and prosecutions between the competent authorities in the Member States.

25 See: The European Judicial Network in civil and commercial matters Homepage <http://ec.europa.eu/civiljustice/index_en.htm> (access: 17 May 2016). The European Judicial Network in civil and commercial matters (EJN-civil) is a flexible, non-bureaucratic structure, which operates in an informal mode and aims at simplifying judicial cooperation between the Member States.

26 See: A network of national contact points for the facilitation of judicial co-operation in criminal matters <<http://www.ejn-crimjust.europa.eu/ejn>> (access: 17 May 2016).

27 See: The Venice Commission Homepage <<http://www.venice.coe.int>> (access: 17 May 2016). The Venice Commission is the Council of Europe's advisory body on constitutional matters. Established in 1990, it has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage. Initially conceived as a tool for emergency constitutional engineering, it has become an internationally recognised independent legal think-tank. Today it contributes to the dissemination of the European constitutional heritage, based on the continent's fundamental legal values while continuing to provide 'constitutional first-aid' to individual states.

28 See: The European Commission for the Efficiency of Justice Homepage <http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp> (access: 17 May 2016). The aim of the CEPEJ is the improvement of the efficiency and functioning of justice in the member states, and the development of the implementation of the instruments adopted by the Council of Europe to this end.

29 See: The Consultative Council of European Judges Homepage <http://www.coe.int/t/DGHL/cooperation/ccje/default_en.asp> (access: 17 May 2016). The Consultative Council of European Judges is an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges. It is the first body within an international organization to be composed exclusively of judges.

30 The International Organization for Judicial Training Homepage <<http://www.iojt.org>> (access: 17 May 2016).

31 The European Judicial Training Network Homepage <<http://www.ejtn.eu/>> (access: 17 May 2016).

32 See: UNHCR, 'Issues: the Judiciary', <<http://www2.ohchr.org/english/issues/judiciary>> (access: 17 May 2016); see in particular UNHRC, Res 8 (2006), <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_6.pdf> (access: 17 May 2016).

sic Principles on the Independence of the Judiciary.³³ Another initiative is the Judicial Integrity Group³⁴ whose aim is to strengthen the integrity of the judicial systems and which elaborated the, so-called, Bangalore Principles of Judicial Conduct.³⁵

It is, however, not possible to measure the impact of the structured judicial cooperation on the application of domestic law in concrete cases. The endorsement of transnational cooperation can be deduced from public communications made by different courts (notably on their websites) and active participation in international forums.

The courts often publicly stress their involvement in international relations with other courts. The Polish Supreme Administrative Court reports in detail on international contacts and visits (events, conferences, topics covered).³⁶ The Estonian Supreme Court lists all the international associations of which it is a member.³⁷ Similar information can be found on the website of the Curia of Hungary³⁸ and the Slovakian Supreme Court.³⁹ The Latvian Supreme Court describes how it joined the European judiciary.⁴⁰ The Lithuanian Supreme Administrative Court presents a detailed list of all international events, principally international conferences, in which the Lithuanian judges participated.⁴¹ Judges cooperate also in the framework of specific programs together with the academia. For example, the Centre for Judicial Cooperation at the European University Institute conducts research on judicial dialogue and targeted training sessions.⁴²

³³ Basic Principles on the Independence of the Judiciary <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>> (access: 17 May 2016).

³⁴ The Judicial Integrity Group <<http://www.judicialintegritygroup.org/index.php/jig-group>> (access: 17 May 2016).

³⁵ The Bangalore Principles of Judicial Conduct <<http://www.judicialintegritygroup.org/index.php/jig-principles>> (access: 17 May 2016).

³⁶ The Polish Supreme Administrative Court Homepage, 'Współpraca Międzynarodowa', <<http://www.nsa.gov.pl/wspolpraca-miedzynarodowa-1.php>> (access: 17 May 2016).

³⁷ The Estonian Supreme Court Homepage <<http://www.riigikohus.ee/?id=1291>> (access: 17 May 2016).

³⁸ The Curia Homepage, 'International Relations', <<http://www.lb.hu/en/english/international-relations/>> (access: 17 May 2016).

³⁹ The Slovakian Supreme Court Homepage, 'International activities', <<http://www.nssr.gov.sk/international-activities/>> (access: 17 May 2016).

⁴⁰ The Latvian Supreme Court Homepage, 'Joining the European Judiciary', <<http://at.gov.lv/en/the-history/joining-the-european-judiciary/>> (access: 17 May 2016).

⁴¹ The Lithuanian Supreme Administration Court, 'The National and International Cooperation', <<http://www.lvat.lt/en/national-and-international-cooperation.html>> (access: 17 May 2016).

⁴² European University Institute, Centre for Judicial Cooperation Homepage <<http://www.eui.eu/Projects/CentreForJudicialCooperation/Home.aspx>> (access: 17 May 2016). For details on methodology see the 'Methodology' section, <<http://www.eui.eu/Projects/CentreForJudicialCooperation/MethodologyandResearch/Index2.aspx>> (access: 17 May 2016).

4.1. Sharing of Comparative Information

Besides meetings, the associations also enable and facilitate exchange of comparative information. In particular, ACA, AEAJ, the Network of Presidents, run on their websites databases of national case law.⁴³ Those databases principally serve as platforms for exchange of case law and information on the national application of EU law.

The ACA's Dec.Nat. database contains national decisions related to preliminary rulings. It is based on resources of national decisions maintained by the CJEU's Research and Documentation Department. ACA developed an interface for public web consultation of the database in English and French.

The ACA's JuriFast database (the fast information system for case law) contains references to preliminary questions of national courts and the national court's decisions following the CJEU's answer. The database also contains other national decisions on the interpretation of EU law. It is fuelled directly by the Research and Documentation Centres of the ACA members (Supreme and Supreme Administrative Courts).

The Network of the Presidents of the Supreme Judicial Courts of the European Union has also a portal of national case law. It goes beyond administrative law and is a search engine of national case law that simultaneously queries several national search engines.

The ACA's newsletter is another medium of sharing comparative information.⁴⁴ Practicing judges present topical issues from the viewpoint of national and EU legislation. Through its website, ACA also makes available the CJEU's *Reflets* (publication on legal development of interest to the European Union, including commentary of the national case law).⁴⁵

The project of the Centre for Judicial Cooperation has a database of national decisions.⁴⁶ It gathers case law from 19 jurisdictions, across different areas of law, but with the common denominator of reference to the Council of Europe's Convention on Human Rights and Fundamental Freedoms (ECHR) or the Charter of Fundamental Rights of the EU (CFR).

Of course, the success of sharing the comparative information is only as good as the continuous involvement of individual courts and judges. In fact, ACA

⁴³ See for instance: The Network of the Presidents of the Supreme Judicial Courts of the European Union, 'Common portal of case law', <<http://network-presidents.eu/rpcsju>> (access: 17 May 2016).

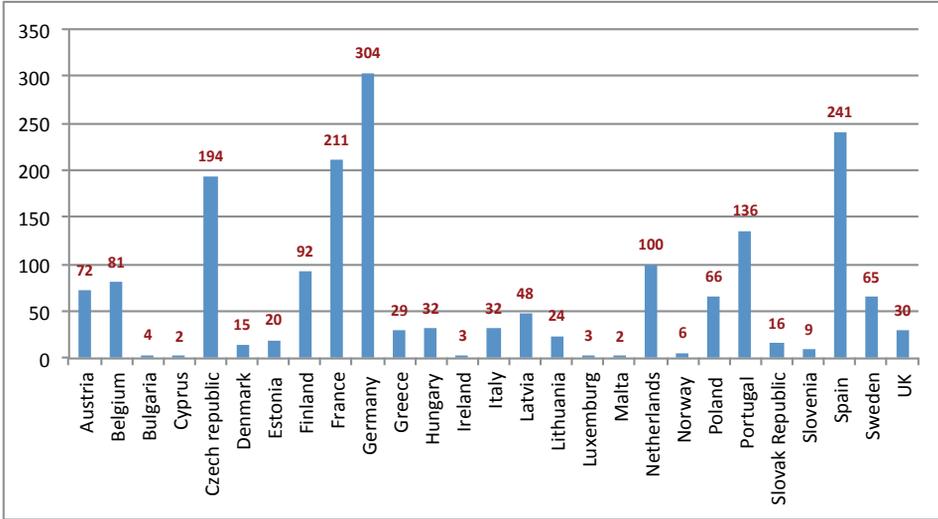
⁴⁴ Association of Councils of States and Supreme Administrative Jurisdictions, 'Newsletter', <<http://www.aca-europe.eu/index.php/en/newsletter-en>> (access: 17 May 2016).

⁴⁵ Association of Councils of States and Supreme Administrative Jurisdictions, 'Reflets', <<http://www.aca-europe.eu/index.php/en/reflets-en>> (access: 17 May 2016).

⁴⁶ European University Institute Centre for Judicial Cooperation, 'Case Law Database', <<http://www.eui.eu/Projects/CentreForJudicialCooperation/CJCDatabase/Database.aspx>> (access: 17 May 2016).

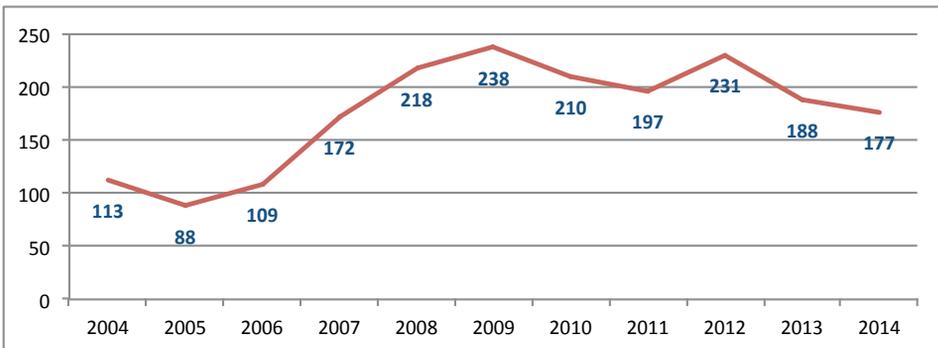
identified lack of contributions as one of the biggest risks for the development of its JuriFast database. Figure 1 below illustrates the number of contributions per member country:⁴⁷

Fig. 1. The number of contributions per member country



While the data presented in the figure above has to be set against the background of the size of the country (number of inhabitants influencing the number of court cases), it does give a fairly reasonable view of contributions per member country.

Fig. 2. The number of annual entries by the courts



⁴⁷ Data as for 21 April 2015.

The comparative aspect of the database is also visible in the share of entries not related to preliminary rulings. Out of 1837 entries, 1408 do not concern preliminary rulings (76%).⁴⁸

The mere fact that courts actively participate and continuously feed the database, in itself, proves that there is an interest in transnational cooperation and exchange. Indeed, the number of annual entries by the courts has been steadily growing:

ACA measured the success of the JuriFast database by the number of visits to the website (3069 in 2014 from 2698 in 2013, increase by 14% in just one year).⁴⁹ ACA considers that the success was due to the timely uploading of the decisions directly by the courts and the direct access by users.⁵⁰ Despite some quality issues, the database is a success. This is also due to the fact that national courts provide information in English or French, including summaries of decisions.

The access to national decisions as well as personal or institutional contacts between judges are key for a successful development of judicial dialogue. Language plays an important role in enabling access, so the summaries of decisions are extremely important. However, a summary is always just a first step to a more in-depth analysis embedded in a broader context of a particular legal system. The access to full decisions of national courts in English or French is difficult to obtain. While some landmark decisions will always be available (even on the websites of national courts), the on-going structured cooperation is key for fast access to the best sources of information. Databases created by the different organizations of judges are the best sources of information on a particular case or a legal provision, but also the most efficient way to obtain a broader view of a particular legal system. Those two elements are necessary for a methodologically sound comparative approach.

4.2. Internet-Enabled Continuous Communication

ACA has also developed another – more dynamic, instant and direct – communication tool. It is the ACA-Europe Information Network (ACA Forum). It is a password-protected system available to judges only: an immediate and spontaneous communication tool between judges.⁵¹

The communication takes place within two major channels: a direct on-line and via the so-called national correspondents. The first channel operates as

⁴⁸ Data as for 21 April 2015.

⁴⁹ E. Thibaut, 'Presentation of the JuriFast Project', <http://www.aca-europe.eu/seminars/2014_Brno/RT2_JuriFast_THIBAUT_EN.pdf> (access: 17 May 2016), p. 4.

⁵⁰ *Ibidem*, p. 5.

⁵¹ ACA-Europe Information Network Proposed operating process for the ACA Forum <http://www.aca-europe.eu/seminars/2014_Brno/RT1_Dutheillet%20-%20Forum_EN.pdf> (access: 17 May 2016).

a typical on-line forum. Participants can engage in exchanges on specific topics. The second channel is coordinated by the so-called national correspondents who ensure that questions posed to their court are replied to in a timely manner.

It appears, however, that the Forum was not fully utilized due to time constraints on the part of the judges to respond to queries from abroad.⁵²

4.3. Exchange Programs for Practicing Judges

ACA organizes also short-term exchange programmes for judges to participate in activities of a court in another Member State. Guest judges attend hearings, take part in deliberations and assist in writing judgments.

Fifty-seven judges so far participated in the exchange program. While the number is small in relation to the total number of judges, the comparative and EU aspects of the exchange are very telling. All judges appreciated the opportunity to get acquainted with foreign legal systems. Interestingly, each judge has to identify a practice in the host institution, which s/he would like to 'export' to their home country. Those mainly relate to organizational matters but judges discuss also in detail substantive or procedural law of the host country. According to one report, the comparative aspect of the exchange provides a fresh viewpoint of the home administrative law and contributes to approximation of legal standards in Europe. It also ensures uniform application of EU law.

The level of participation by CEE countries in the exchange programme is overall low, both in terms of hosting a judge from another country as well as in terms of sending a judge to complete a program in another country. From among 57 judges, 14 came from the CEE countries (24%). Only 6 of the 57 judges (10%) decided to complete their exchange program in a court of a CEE country (Hungary, Czech Republic, Slovenia, Poland).

All judges that completed the ACA exchange program expressed very positive views about the advantages of the comparative experience for their domestic practice. Those opinions are indeed very telling. In fact, the collection of exchange reports on the ACA's website is probably the best available tribute to judicial dialogue coming from practicing judges.

4.4. The Structured Cooperation as a Backbone of Judicial Comparativism

There are two main objections against the use of judicial comparativism. One is that judges lack knowledge about the legal system they refer to and simply cherry-pick provisions of foreign law they refer to. The other objection pertains to social, political, cultural, economic and historical differences between countries.

⁵² L. Záhradníková, 'The Forum: Shared Pool of Information Round Table', <http://www.aca-europe.eu/seminars/2014_Brno/RT1_Forum_LUCIA.pdf> (access: 17 May 2016).

For example, in the U.S., judicial comparativism is sometimes described as undemocratic because “[j]udges in foreign countries do not have the slightest democratic legitimacy in a U.S. context.”⁵³ The fear is that judges would be selective and potentially arbitrary in their choices of foreign law.⁵⁴ Because of the lack of normative framework such ‘cherry-picking’ could lead to disregarding social, political, cultural, economic and historical differences between countries. Disregard of such broader context in which law operates is the main objection to judicial comparativism. A related argument is that national judges are largely unaware of those complex social, political, cultural, economic and historical backgrounds behind decisions of their foreign counterparts.⁵⁵ Richard Posner states that

[t]o know how much weight to give a decision of the German Constitutional Court in an abortion case, one would want to know such things as how the judges of that court are appointed, how they conceive of their role, and, most important and most elusive, how German attitudes toward abortion have been shaped by peculiarities of German history, notably the abortion jurisprudence of the Weimar Republic, thought to have set the stage for Nazi Germany’s program of involuntary euthanasia.⁵⁶

While the socio-economic and political differences are important, they should not overwhelm the comparative activity. They have to be identified, acknowledged and taken into account. Montesquieu was also one of the advocates of such holistic approach to comparative activity of judges. While he warned against the use of foreign law on account of socio-political, economic and other differences between States,⁵⁷ he insisted that comparisons should consider legal

⁵³ R.A. Posner, ‘Foreword: A Political Court’ (2005) 119 *Harvard Law Review*, p. 31.

⁵⁴ J. Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts* (Location 4130 of 8217, Kindle Edition, Yale University Press 2012); B. Markesinis, J. Fedtke, *Judicial Recourse to Foreign Law. A New Source of Inspiration?* (Routledge 2007), p. 61.

⁵⁵ R.A. Posner (n. 53), p. 86; for a summary of the problem of cultural differences between legal systems see: P. de Cruz, *Comparative Law in a Changing World* (3rd Edition, Routledge-Cavendish 2007), p. 222.

⁵⁶ R.A. Posner (n. 53), p. 86.

⁵⁷ “[Laws] should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government [...]. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs.” C. de Secondat (Baron de Montesquieu), *The Spirit of Laws* (Kindle Edition, Location 251–259 of 10328, Halcyon Classic Series 1752); Waldron (n. 54), Location 4254 of 8217; O. Khan-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 *Modern Law Review*, p. 27; M. Tushnet, ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 *Yale Law Journal*, p. 1225.

systems “in their entirety.”⁵⁸ Comparativists should duly consider differences between legal systems that affect comparability. However, such differences are not as such a ‘conversation stopper’ in the discussion on judicial comparativism.⁵⁹ While there is a clear need for methodological standards for comparative activity, the requirements should not be overwhelming but reasonable for a non-native lawyer.

The structured cooperation in all its manifestations and forms, as discussed above, is key to overcome the methodological difficulties of comparative activity. The ongoing, structured cooperation is a source of information on particular decisions, legislation, and background information about the legal system as well as socio-economic and political aspects that need to be considered.

4.5. The CEE Cooperation

There is no structured cooperation between the CEE administrative courts or judges beyond the pan-European cooperation. Since the cooperation of EU courts is linked predominantly to the exchange of experiences and best practices with regard to the application of EU law, the CEE courts joined the existing European associations.

However, there are examples of some bilateral CEE cooperation. The Polish Supreme Administrative Court, for example, organizes regular workshops with the Czech administrative judges.⁶⁰ The Romanian High Court of Cassation and Justice mentions on its website cooperation with Moldova.⁶¹ These examples are very rare and insignificant compared to the extent of the pan-European cooperation.

It is indeed surprising that the cooperation between CEE courts and judges is so limited. Since the CEE countries share a common recent history, one could assume that the ties between them would be tighter. These countries went through the process of rebuilding their democracies and market economies as well as legislative overhauls to harmonize their legislation with the EU requirements. And yet, it would seem that their focus and attention is concentrated on the established, influential legal systems of Europe. Indeed, the empirical data paints a legal landscape of Europe where powerful centres of legal thought (Germany, France) provide inspiration to individual CEE countries. There

⁵⁸ “Wherefore, to determine which of those systems is most agreeable to reason, we must take them each as a whole and compare them in their entirety.” Montesquieu, *ibidem*, Kindle Edition, Location 8627 of 10328.

⁵⁹ Waldron (n. 54), Kindle Edition, Location 4260 of 8217.

⁶⁰ The Polish Supreme Administrative Court, ‘Grupy Robocze’, <<http://www.nsa.gov.pl/grupy-robocze-sedziow.php>> (access: 17 May 2016).

⁶¹ High Court of Cassation and Justice in Romania, International Cooperation Relations and Programmes <<http://www.scj.ro/en/693/International-cooperation-relations-and-programs>> (access: 17 May 2016).

is not much (at least not much accessible) evidence of cooperation, or experience-sharing between the CEE countries. And yet they are exposed to one of the biggest dangers of applying comparative method in developing or shaping their legal systems.

The countries in transition that rebuild their legal systems often accept solutions adopted in other countries (especially in the Western established democracies) at face value, without the necessary scrutiny of the context. They face the risks identified by Günter Frankenberg who claimed that comparatists often fail to properly distance themselves from their own legal system and either perceive the other legal system through the lenses of their own or over-identify themselves with the compared legal system. Günter Frankenberg stated that “[a]s long as we understand foreign places as like or unlike our own, we cannot begin to fully appreciate them.”⁶² According to Frankenberg, comparatists have to engage in an inner dialogue to reconcile the new and the settled knowledge whereby their respective claims to completeness and truth are “mutually questioned and tested.”⁶³ Günter Frankenberg claims that comparisons are guided and controlled by the comparatist’s home legal system: “[t]he comparatist’s own ‘system’ is never left behind or critically exposed in the light of the new [...]. The comparatist travels strategically, always returning to the ever present and idealized home systems: Other societies or legal systems are ‘not yet’ developed, but may be considered on their way.”⁶⁴ Those thoughts are echoed by other authors who postulate that comparatists should always free themselves from any preconceptions based on their native system.⁶⁵

The ‘Frankenberg’s comparatists’ from established legal systems and those from the CEE countries face different challenges. The former would be more inclined to perceive the foreign legal systems through the ‘domestic lenses’. The latter, on the other hand, face the reverse problem of over-identifying themselves with the foreign legal system and accepting foreign models at face value without adapting them to local conditions. While the CEE countries individually drew inspiration from the established centres of legal thought, like Germany or France, they faced the same challenge of rebuilding their legal systems. They could potentially share valuable experiences of how to introduce new solutions and adapt them to local conditions. While the CEE countries refer to foreign law as a source of inspiration or legitimization, they face a similar challenge of striking a balance between reliance on Western models and building national self-identity.

⁶² G. Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (1985) 26 *Harvard International Law Journal*, pp. 411–412.

⁶³ *Ibidem*, p. 413.

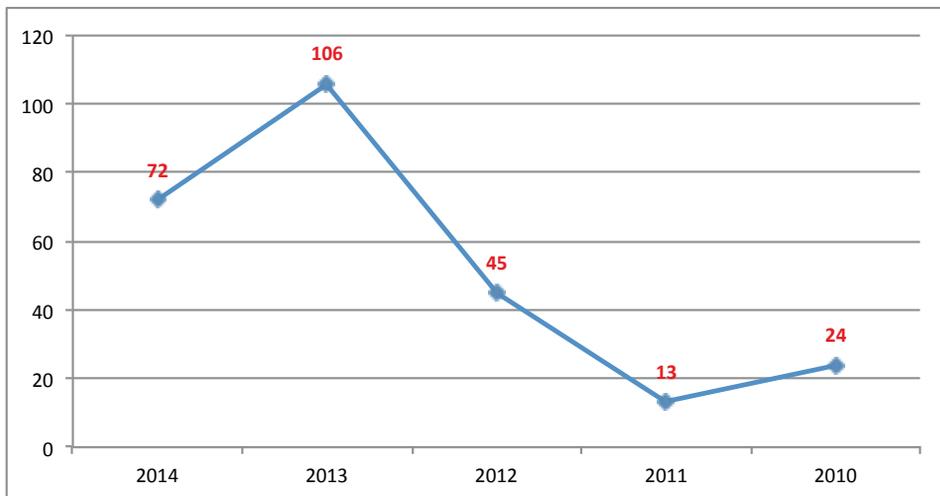
⁶⁴ *Ibidem*, p. 433.

⁶⁵ K. Zweigert, H. Koetz, *Introduction to Comparative Law* (Clarendon Press, Oxford 1998), p. 35.

5. The Overview of the References to Foreign Law by the Polish Administrative Courts

The results of the empirical analysis of comparative judgments (those with any type of reference to foreign law) of the Polish administrative courts for the years 2010–2014 are difficult to analyse. Overall, there is quite a number of comparative judgments and they have been increasing between 2010 and 2014. In absolute terms, they increase from 24 comparative judgments in 2010 to 106 in 2013 and 72 in 2014. The increase between 2010 and 2013 is the most pronounced. It is less pronounced between 2010 and 2014: a drop from 24 comparative judgments to 72.⁶⁶

Fig. 3. Comparative judgments 2010–2014



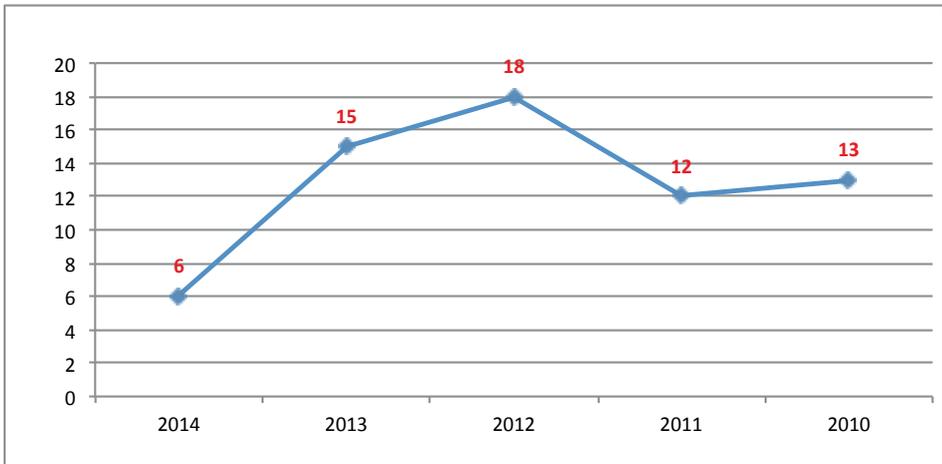
However, many of the comparative judgments are repetitive. They are based on similar facts and so repeat the exact same references to foreign law. In an attempt to better reflect the comparative activity of the courts, another set of data demonstrates only those judgments with original reference, without repetitions.

This set of data paints a mixed picture in terms of trend of comparative judgments. They are at roughly the same level in 2010 and 2011, 13 and 12 respectively.

⁶⁶ Other countries not included in the graph are the following: Italy (19), Portugal (41), the UK (21), USA (5), Japan (3), Denmark (70), Malta (63), Montenegro (63), Czech Republic (14), Ireland (12), Canada (1), Austria (33), Romania (1), Serbia (1), Australia (7), Cyprus (18), Argentina (1), Malaysia (1), China (1), Spain (10), Greece (8), Luxemburg (9), Slovakia (2). The figures are based on a very detailed search of the database of the case law of the Polish administrative courts but a small margin of error cannot be excluded.

They raise between 2011 and 2012 from 12 to 18 to then fall again to 15 in 2013 and only 6 in 2014.

Fig. 4. Comparative judgments 2010–2014



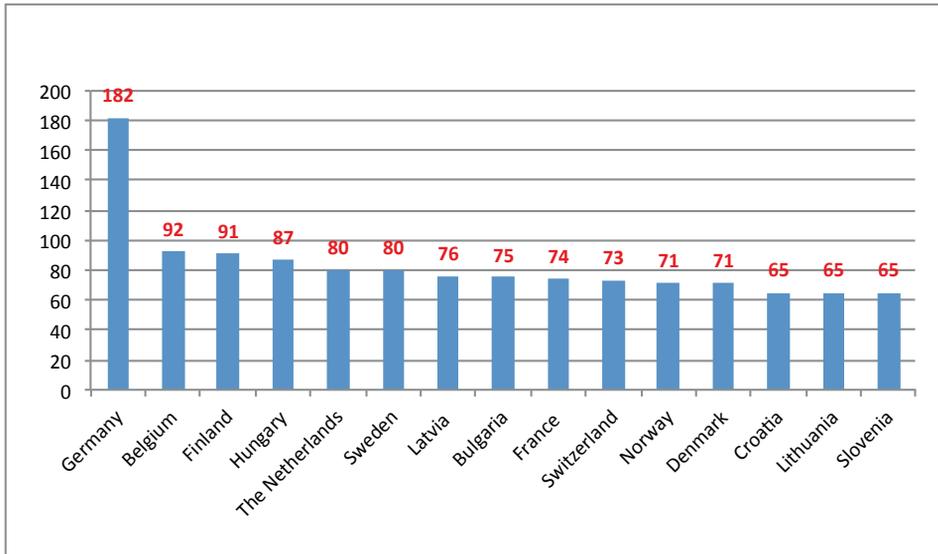
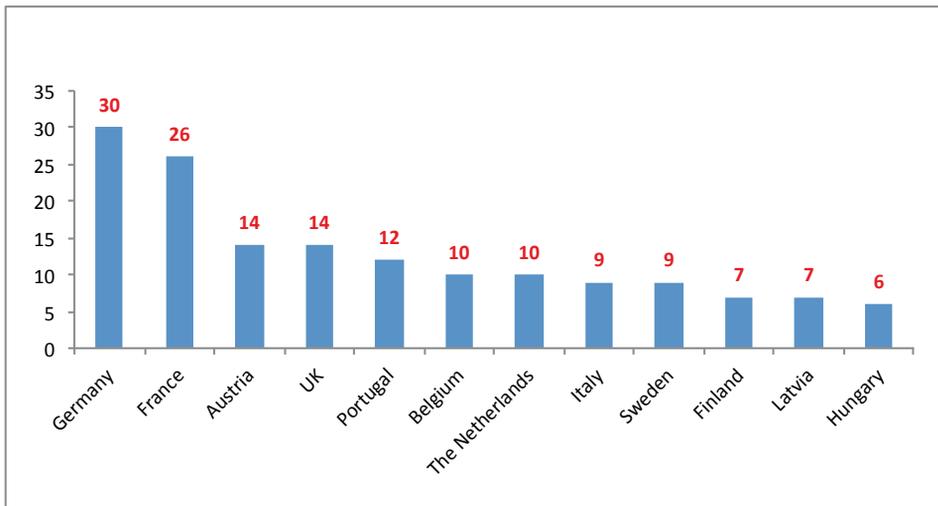
The most characteristic feature of the comparative activity is that in the vast majority of cases judges make references to multiple jurisdictions. Figure 5 below shows the number of references per country. If all references are included, Germany is the most frequent country of reference. Other top countries include Belgium, Finland, Hungary, The Netherlands, Sweden, Latvia, Bulgaria, France.⁶⁷

However, the problem of repetitive references affects also the dataset illustrated in the figure above and the exclusion of repetitive references paints a different picture. Germany is still the top country of reference but it is closely followed by France, then Austria, UK, Belgium, Portugal, the Netherlands, and Italy.⁶⁸ The strong position of Germany in both datasets reflects the situation observed for the Polish Constitutional Court.⁶⁹ Similarly, the Polish Constitutional Court refers equally often to French case law as administrative courts. The distance between Germany, France and the third country of reference is also similar.

⁶⁷ The countries not included in the graph are the following: Italy (21), Portugal (42), UK (21), USA (5), Japan (3), Malta (64), Montenegro (64), Czech Republic (14), Ireland (13), Canada (1), Austria (39), Romania (1), Serbia (1), Australia (1), Cyprus (19), Argentina (1), Malaysia (1), China (1), Spain (10), Greece (8), Luxemburg (9), Slovakia (2).

⁶⁸ Norway (5), Switzerland (4), Croatia (2), Bulgaria (1), Denmark (5), Malta (1), Montenegro (1), Lithuania (2), Slovenia (2), Ireland (4), USA (4), Canada (1), Cyprus (2), Greece (2), Spain (3), Luxembourg (2), Slovakia (2), Japan (1), Romania (1), Serbia (1), Australia (1), Argentina (1), Malaysia (1), China (1).

⁶⁹ J. Krzemińska-Vamvaka (n. 2).

Fig. 5. Countries in comparative judgments 2010–2014**Fig. 6.** Countries in comparative judgments 2010–2014

5.1. Types of References

Specificity, intensity and visibility of references are key concepts in analysing judicial comparativism.⁷⁰ Intensity refers to the level of detail in the analysis of foreign law. It is strongly linked to visibility. The more detailed the analysis of foreign law, the more visible it becomes in the text of a judgment. A reference with low visibility will typically be very short and intertwined with the analysis of national law. Longer and typically more detailed analysis can be very visible, taking even a whole section of a judgment, dedicated to the analysis of foreign law. Specificity, finally, refers to the formal presentation of foreign law: is the court referring to the constitution of Germany or French law or is it including a precise reference to a German or French legislative act or a judgment?

Another way of categorizing comparative judgments is by a number of jurisdictions to which the court refers. In Poland, administrative courts typically refer to multiple legal systems. The same is true for the Polish Constitutional Court.⁷¹

Specificity, intensity and visibility as well as the number/variety of countries to which the national court refers, categorize comparative judgments by ‘what’ and ‘how’, i.e. by the content and the mechanics of the reference. Another important categorization criterion is ‘why’ national courts refer to foreign law. Foreign law can be used as an external authority (external source of legitimization) or as a source of inspiration. It is the why aspect of judicial comparativism that is the most controversial.

5.2. Reasons for Resorting to Foreign Law

The Polish administrative courts use foreign law mainly as a source of inspiration and external authority (external source of legitimization).

For instance, in case IFSK 375/12 the Polish administrative court stated that a judgment of a British court constituted an ‘additional support’ for the line of argumentation assumed.⁷² In another case, the court stated that in the light of examples from foreign law, a specific interpretation of Polish law was “all the more correct.”⁷³ Foreign law will also be used as a legitimizing tool in particularly controversial cases, like these concerning same sex-marriage.⁷⁴

⁷⁰ *Ibidem*, p. 32.

⁷¹ *Ibidem*, p. 22.

⁷² Case I FSK 375/12 (Supreme Administrative Court, 1 March 2013). References in this section are to judgments of the Polish Administrative Courts.

⁷³ Case II GSK 1069/11 (Supreme Administrative Court, 30 August 2012).

⁷⁴ Supreme Administrative Court cases: II FSK 2082/10 (20 March 2012), II FSK 2083/10 (20 March 2012).

One of the primary reasons for resorting to foreign law will be linked to interpretation and implementation of EU law.⁷⁵ Some references will jointly invoke foreign law and the European Convention on Human Rights.⁷⁶

The courts might sometimes explicitly state that they refer to a particular country legislation or case law because that country's is an EU MS.⁷⁷ Otherwise the reference is made to 'European States'.⁷⁸ Such references are practical inasmuch as the court draws both inspiration from the practice of other European States and reinforces a sense of belonging to the common European legal culture. Even if the administrative courts do not explicitly state that they refer to the practice of other European States, *de facto*, the references are almost exclusively made to other European (EU) States. Such 'European dimension' of comparative judgments is also very prominent in the comparative activity of the Polish Constitutional Court and evidences the need to stress a sense of belonging to the European legal culture in the post-communist era.⁷⁹ In addition it is used as a strong legitimizing factor.

⁷⁵ Gliwice Administrative Court cases: III SA/GI 393/14 (27 August 2014), III SA/GI 1938/11 (30 August 2011), III SA/GI 1939/11 (14 June 2012), III SA/GI 1940/11 (23 February 2012), III SA/GI 1935/11 (23 February 2012), III SA/GI 1936/11 (4 January 2012), III SA/GI 1937/11 (11 June 2012); Warsaw Administrative Court cases: III SA/Wa 1561/11 (22 July 2011), III SA/Wa 2081/12 (24 May 2012), III SA/Wa 990/12 (1 June 2012), III SA/Wa 486/12 (9 November 2012), III SA/Wa 862/12 (26 April 2012), III SA/Wa 1562/11 (22 July 2011), III SA/Wa 1536/11 (26 October 2011), III SA/Wa 1912/11 (17 January 2012), III SA/Wa 2476/12 (28 March 2012), II SA/Wa 2305/09 (10 March 2010), III SA/Wa 1974/09 (2 March 2010), III SA/Wa 2065/09 (2 March 2010), III SA/Wa 1480/09 (2 March 2010), III SA/Wa 1973/09 (2 March 2010); case I SA/Po 1756/07 (Poznan Administrative Court, 30 May 2008).

⁷⁶ Lublin Administrative Court cases: I SA/Lu 1053/13 (23 October 2013), I SA/Lu 896/10 (11 March 2011); case II FSK 2017/11 (Supreme Administrative Court, 5 July 2013).

⁷⁷ Bydgoszcz Administrative Court cases: I SA/Bd 447/14 (19 November 2014), I SA/Bd 450/14 (18 February 2015), I SA/Bd 591/14 (18 February 2015), I SA/Bd 594/14 (14 July 2014), I SA/Bd 354/14 (29 May 2014); Warsaw Administrative Court cases: III SA/Wa 997/14 (3 September 2014), III SA/Wa 1276/14 (3 July 2014), III SA/Wa 2476/12 (28 March 2013), III SA/Wa 640/13 (13 November 2013), III SA/Wa 1567/12 (16 January 2013), III SA/Wa 1450/09 (11 February 2010); Krakow Administrative Court cases: I SA/Kr 1529/13 (12 December 2013), I SA/Kr 1530/13 (12 December 2013), I SA/Kr 1528/13 (12 December 2013), I SA/Kr 1529/13 (12 December 2013), I SA/Kr 1530/13 (12 December 2013), I SA/Kr 1531/13 (12 December 2013), I SA/Kr 1750/11 (20 December 2011), I SA/Kr 2049/10 (17 February 2011); Gliwice Administrative Court cases: III SA/GI 2070/11 (27 June 2012); Supreme Administrative Court cases: I FSK 773/10 (12 May 2011), II OSK 1873/08 (12 February 2010); Wroclaw Administrative Court cases: I SA/Wr 935/12 (28 September 2012); Lodz Administrative Court cases: I SA/Ld 968/10 (21 December 2010), I SA/Ld 970/10 (21 December 2010), I SA/Ld 987/10 (21 December 2010), I SA/Ld 975/10 (21 December 2010), I SA/Ld 976/10 (21 December 2010), I SA/Ld 977/10 (21 December 2010), I SA/Ld 978/10 (21 December 2010).

⁷⁸ Gliwice Administrative Court cases: III SA/GI 962/12 (16 October 2012), III SA/GI 960/12 (26 October 2012), III SA/GI 2434/10 (6 May 2011), III SA/GI 2166/10 (16 August 2011); Supreme Administrative Court: I FSK 1019/11 (8 January 2013), I FSK 1036/11 (9 May 2012).

⁷⁹ J. Krzemińska-Vamvaka (n. 2).

5.3. Sources of Knowledge on Foreign Law

In most cases the administrative courts refer directly to foreign law but without pointing to a specific source. In some cases a reference is made indirectly, through Polish comparative law scholarship.⁸⁰ At other instances, the reference is made through quoting reports of the European Commission.⁸¹ There are also references to commentaries in foreign language.⁸²

5.4. Specificity

Most of the comparative judgments provide a very general reference to foreign law by naming only a country at stake. In fact, many judgements offer a kaleidoscopic enumeration of different countries.⁸³ In a number

⁸⁰ See Warsaw Administrative Court cases: III SA/Wa 854/14 (6 October 2014), III SA/Wa 2272/11 (22 May 2012); Bydgoszcz Administrative Court cases: I SA/Bd 447/14 (19 November 2014), I SA/Bd 450/14 (12 November 2014), I SA/Bd 591/14 (12 November 2014), I SA/Bd 354/14 (5 November 2014); case I FSK 1019/11 (Supreme Administrative Court, 9 May 2012); case I SA/Wr 935/12 (Wrocław Administrative Court, 28 September 2012).

⁸¹ Warsaw Administrative Court cases: III SA/Wa 997/14 (3 September 2014), III SA/Wa 1276/14 (3 July 2014); Krakow Administrative Court cases: I SA/Kr 1529/13 (12 December 2013), I SA/Kr 1530/13 (12 December 2013), I SA/Kr 1528/13 (12 December 2013), I SA/Kr 1529/13 (12 December 2013), I SA/Kr 1531/13 (12 December 2013), I SA/Kr 1533/13 (20 December 2013), I SA/Kr 1532/13 (20 December 2013), I SA/Kr 1534/13 (20 December 2013).

⁸² Gliwice Administrative Court cases: III SA/Gl 1938/11 (14 June 2012), III SA/Gl 1939/11 (14 June 2012), III SA/Gl 1940/11 (14 June 2012), III SA/Gl 1935/11 (11 June 2012), III SA/Gl 1936/11 (11 June 2012), III SA/Gl 1937/11 (11 June 2012).

⁸³ Case III SA/Lu 376/13 (Lublin Administrative Court, 24 October 2014); Wrocław Administrative Court cases: III SA/Wr 616/13 (19 December 2013), III SA/Wr 715/13 (12 December 2013), III SA/Wr 373/13 (4 October 2014), III SA/Wr 362/13 (9 October 2013), III SA/Wr 409/13 (26 September 2013), III SA/Wr 343/13 (3 October 2013), III SA/Wr 345/13 (3 October 2013), III SA/Wr 355/13 (3 October 2013), III SA/Wr 413/13 (26 September 2013), III SA/Wr 412/13 (26 September 2013), III SA/Wr 416/13 (26 September 2013), III SA/Wr 330/13 (26 September 2013), III SA/Wr 274/13 (19 September 2013), III SA/Wr 294/13 (19 September 2013), III SA/Wr 283/13 (19 September 2013), III SA/Wr 348/13 (5 September 2013), III SA/Wr 276/13 (21 August 2013), III SA/Wr 370/13 (21 August 2013), III SA/Wr 401/13 (21 August 2013), III SA/Wr 406/13 (21 August 2013), III SA/Wr 410/13 (21 August 2013), III SA/Wr 261/13 (21 August 2013), III SA/Wr 379/13 (21 August 2013), III SA/Wr 253/13 (21 August 2013), III SA/Wr 258/13 (28 June 2013), III SA/Wr 260/13 (28 June 2013), III SA/Wr 123/13 (26 June 2013), III SA/Wr 198/13 (26 June 2013), III SA/Wr 296/13 (26 June 2013), III SA/Wr 119/13 (26 June 2013), III SA/Wr 175/13 (26 June 2013), III SA/Wr 182/13 (11 June 2013), III SA/Wr 181/13 (6 June 2013), III SA/Wr 174/13 (6 June 2013), III SA/Wr 190/13 (5 June 2013), III SA/Wr 202/13 (4 June 2013), III SA/Wr 195/13 (4 June 2013), III SA/Wr 150/13 (31 May 2013), III SA/Wr 120/13 (31 May 2013), III SA/Wr 121/13 (31 May 2013), III SA/Wr 151/13 (22 May 2013), III SA/Wr 152/13 (22 May 2013), III SA/Wr 83/13 (17 April 2013), III SA/Wr 88/13 (17 April 2013), III SA/Wr 87/13 (12 April 2013), III SA/Wr 49/13 (4 April 2013), III SA/Wr 52/13 (4 April 2013), III SA/Wr 89/13 (3 April 2013), III SA/Wr 41/13 (27 March 2013), III SA/Wr 51/13 (20 March 2013), III SA/Wr 14/13 (28 February 2013), III SA/Wr

of cases the reference will be to a specific provision of foreign law or specific judgments of foreign courts.⁸⁴

5.5. Visibility and Intensity

Since the majority of references are not specific, they will be typically intertwined with the analysis of national law. Visibility of analysis will typically go hand in hand with intensity. More detailed analysis will expand within the judgment and become more visible.⁸⁵ Visibility of the reference to foreign law is an important parameter of judicial comparativism. Visible references demonstrate how open the courts are with their comparative approach. The same is true with regard to the comparative judgements of the Polish Constitutional Court as some judgments included even a comparative chapter.

496/12 (6 February 2013), III SA/Wr 495/12 (6 February 2013), III SA/Wr 15/13 (28 February 2013), III SA/Wr 5/13 (28 February 2013), III SA/Wr 13/13 (28 February 2013), III SA/Wr 4/13 (28 February 2013), III SA/Wr 493/12 (6 February 2013), III SA/Wr 494/12 (6 February 2013), III SA/Wr 535/12 (6 February 2013), III SA/Wr 534/12 (6 February 2013); Warsaw Administrative Court: III SA/Wa 1659/13 (14 November 2013), III SA/Wa 1660/13 (14 November 2013), III SA/Wa 3061/11 (14 September 2012), III SA/Wa 3062/11 (14 September 2012), III SA/Wa 3063/11 (4 September 2012), III SA/Wa 2476/12 (28 March 2013), III SA/Wa 1466/12 (17 January 2013), III SA/Wa 1476/12 (17 January 2013), III SA/Wa 1567/12 (16 January 2013), III SA/Wa 505/12 (15 January 2013), III SA/Wa 1197/12 (14 December 2012), III SA/Wa 1561/11 (28 June 2012), III SA/Wa 1562/11 (28 June 2012), III SA/Wa 1912/11 (28 June 2012); Krakow Administrative Court cases: I SA/Kr 1030/12 (17 September 2012), I SA/Kr 1031/12 (17 September 2012), I SA/Kr 1533/13 (20 December 2013), I SA/Kr 1532/13 (20 December 2013), I SA/Kr 1534/13 (20 December 2013); case II SA/Bd 524/13 (Bydgoszcz Administrative Court, 11 September 2013); Poznan Administrative Court cases: I SA/Po 788/12 (7 February 2013), III SA/Po 378/12 (6 December 2012), III SA/Po 379/12 (6 December 2012), III SA/Po 380/12 (6 December 2012), III SA/Po 381/12 (26 October 2012), III SA/Po 383/12 (25 September 2012); Opole Administrative Court cases: I SA/Op 271/12 (7 November 2012), I SA/Op 265/12 (21 June 2012), I SA/Op 266/12 (9 January 2013).

⁸⁴ Gliwice Administrative Court cases: III SA/Gl 393/14 (27 August 2014), III SA/Gl 962/12 (16 October 2012), III SA/Gl 960/12 (26 October 2012), III SA/Gl 2166/10 (16 August 2011), III SA/Gl 2434/10 (6 May 2011); Warsaw Administrative Court cases: III SA/Wa 640/13 (13 November 2013), III SA/Wa 2476/13 (24 June 2014), III SA/Wa 1567/12 (16 January 2013), II SA/Wa 1562/11 (28 June 2012), III SA/Wa 1563/11 (28 June 2012), III SA/Wa 1912/11 (28 June 2012), III SA/Wa 2476/12 (28 March 2013), III SA/Wa 1271/10 (23 November 2010), III SA/Wa 1217/10 (4 February 2011); Lublin Administrative Court cases: I SA/Lu 1053/13 (23 October 2013), I SA/Lu 896/10 (11 March 2011); Supreme Administrative Court cases: I FSK 375/12 (1 March 2013), II FSK 2017/11 (5 July 2013), II FSK 2082/10 (20 March 2012), II FSK 2083/10 (20 March 2012).

⁸⁵ Gliwice Administrative Court cases: III SA/Gl 393/14 (27 August 2014), III SA/Gl 962/12 (16 October 2012), II GSK 1069/11 (30 August 2012), III SA/Gl 960/12 (26 October 2012), III SA/Gl 2434/10 (16 August 2011), II SA/Gl 2166/10 (16 August 2011).

5.6. Contributors to the Judicial Comparativism

In the vast majority of cases, the administrative courts refer to foreign law seemingly on their own initiative. In some cases, parties to the proceedings invoke foreign law to support their position.⁸⁶ Overall, the comparative activity is clearly driven by the administrative courts themselves.

6. Administrative Courts Commenting on their Comparative Activity

In most cases the Polish administrative courts do not comment on their comparative activity but simply refer to foreign law. They do not formally comment on the methodology used for their comparisons. This practice, unfortunately, is not unusual among courts citing foreign law.⁸⁷

There are exceptions, however. In one case, a regional administrative court acknowledged that while it was not bound by the judgment of the German Federal Financial Court, it endorsed the position of that court in relation to the principle of uniform application of Union law in accordance with the case law of the CJEU.⁸⁸ The Polish court supported how the German court ruled on the conformity of national provisions with Union law.

7. Comparative Overview of CEE Judicial Dialogues in Administrative Law

The CEE courts are in general receptive towards foreign influences. They are at the forefront of implementation of EU law and have also a significant exposure to cases with foreign element. It is a strong foundation for judicial comparativism.

⁸⁶ Poznan Administrative Court cases: III SA/Po 1614/13 (17 December 2014), III SA/Po 1615/13 (17 December 2014), III SA/Po 1617/13 (17 December 2014), III SA/Po 1596/13 (6 November 2014), III SA/Po 1594/13 (6 November 2014), III SA/Po 1595/13 (6 November 2014), III SA/Po 1555/13 (6 November 2014), III SA/Po 1556/13 (6 November 2014), III SA/Po 1557/13 (6 November 2014), III SA/Po 1558/13 (6 November 2014), III SA/Po 1597/13 (6 November 2014) (and a number of other decisions with an identical reference), II IV SA/Po 999/10 (12 May 2011); case II SA/Ld 845/13 (Lodz Administrative Court, 10 December 2013).

⁸⁷ J. Krzemińska-Vamvaka (n. 2), p. 8; J. Waldron, 'Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity', [in:] S. Muller, S. Richards (eds), *Highest Courts and Globalisation* (Hague Academic Press 2010), p. 100.

⁸⁸ III SA/GI 393/14.

The research conducted for the purposes this contribution demonstrates that in general the CEE courts are open to judicial dialogues and comparative approach.

One exception is the Curia of Hungary, which confirmed that except for the rulings of the CJEU, the administrative courts in practice do not invoke or refer to foreign judgments.⁸⁹ Still, the references to the case law of the CJEU and the European Court of Human Rights are common.

The Latvian Supreme Court responded that references to foreign judgments do happen but by far not as often as the references to the case law of the CJEU, which is commonplace in the judgments of administrative courts.⁹⁰ The references to foreign judgments would practically all be to judgments of German courts. This, according to the members of the Court, can be explained by the similarity of laws, as well as traditional interest in the German theory of administrative law. This is also in line with the strong position of Germany as a country of reference for the Polish administrative courts.

In Estonia, similarly as in Poland, there is no academic debate about judicial comparativism.⁹¹ Neither in relation to comparativism by administrative courts, nor, in fact, any other courts. Although specific comparative judgments by administrative courts could not be identified, the Estonian courts seem to consider foreign case law and scholarship when weighing possible legal interpretations. However, they do not explicitly point to that foreign case law and scholarship in their judgments. The situation is slightly different in criminal and civil law fields. The general part of the Estonian Criminal Code, for example, is largely based on the general part of the German Criminal Code. According to the information provided by the Legal and Information Department of the Supreme Court of Estonia, the relevant case law largely coincides with the German case law, although the Estonian courts would normally not include any specific reference to German law. Interestingly, however, in criminal cases, Estonian courts might refer to foreign commentaries. Similarly, in civil cases, judicial comparativism is more present. The Civil Chamber of the Supreme Court of Estonia established a principle that national courts can rely on foreign case law as long as there is no national case law concerning a specific question. This principle is mostly applied

⁸⁹ Based on information provided by the court; the e-mail on file with the author (4 March 2015).

⁹⁰ Based on information provided by the court; e-mail on file with the author (10 April 2015) references to the following examples were provided: case SKA-172/2007 (Latvian Supreme Court, 15 March 2007), in particular paras 14 and 15 (admissibility of evidence/administrative court's duty to establish facts in a dispute related to calculation of pension rights); case SKA-388/2007 (Latvian Supreme Court, 18 May 2007), in particular para. 17 (release to the owner of a car that was seized by authorities when the owner was caught smuggling excise goods); case SKA-524/2007 (Latvian Supreme Court, 6 November 2007), in particular paras 10 and 11.2, 14 (service in Latvian National Guard); case SKA-278/2010, (Latvian Supreme Court, 13 May 2010), in particular para. 13 (disciplinary punishment imposed on a notary).

⁹¹ Based on a reply provided by the Legal Information Department of the Supreme Court of Estonia. E-mail on file with the author (29 March 2015).

in cases with international dimension (e.g. private international law, intellectual property law).

A very good case in point is the case 3-2-1-145-04.⁹² While the Civil Chamber of the Estonian Supreme Court confirmed there that foreign jurisprudence cannot be automatically 'taken over' and the case before it has to be solved on the basis of Estonian law, it accepted that the court may draw inspiration from relevant field of international law and recognized current practice. It referred to its earlier decision in case No. 3-2-1-9-03, where it held that similar laws in other states and the practice may be taken into account as reference material, for at least private law norms, for the purpose of ascertaining the meaning and purpose of the Act, even if they are not a ratio of private international law. This is particularly true in a situation where we have no implementing case law, but elsewhere an implementing case law related to a similar provision has settled. This applies in particular to the countries, which have a broadly similar legal system and the practice of the implementation of laws, particularly the European Union, the other Member States and in particular, European countries belonging to the European continental law family. In particular, it is necessary when interpreting and implementing the national law on the basis of the European Union law.⁹³

According to the Estonian Supreme Court, there is room to apply a similar principle in administrative law cases, given that there are many areas in administrative law where there is international harmonization (in the EU: public procurement, environmental law).⁹⁴

Indeed, comparative law is a backbone of different unification and harmonization processes.⁹⁵ Those processes might concern specific subjects (e.g. international trade, international sale of goods⁹⁶) or regions (notably the EU). Comparative study lies at the heart of those efforts because:

⁹² Judgment 3-2-1-145-04, 21 December 2004, available at <<http://www.nc.ee/?id=11&tekst=RK/3-2-1-145-04>> (access: 17 May 2016), para. 39.

⁹³ Case RT III 2003, 5, 57 (Estonian Supreme Court, 11 February 2003), <<http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-9-03>> (access: 17 May 2016), para. 30. In that case the Civil Chamber of the Estonian Supreme Court held that disputes arising out of economic transactions have to be assessed on the basis of laws as well as customs and practices. In order to establish the international practice on warranty transactions, the applicant relied on UN 1995 Convention on independent guarantees and stand-by letters of credit and relevant explanations on Convention, as well as on International Chamber of Commerce's Uniform Rules for Demand Guarantees.

⁹⁴ The Legal Information Department of the Estonian Supreme Court referred to publications like *Juridica International*, 'Learning from the Neighbours' Experiences: Property and Consumer Credit, <https://www.juridica.ee/juridica_en.php?document=en/articles/2014/8/244881.SUM.php> (access: 17 May 2016).

⁹⁵ U.A. Mattei, T. Ruskola, A. Gidi, *Schlesinger's Comparative Law, Cases-Text-Materials* (Foundation Press 2009), p. 70.

⁹⁶ See: United Nations Convention on Contracts for the International Sale of Goods <<http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>> (access: 17 May 2016).

the terms of any instruments aiming at international unification or harmonization of legal rules must be fitted into the substantive and procedural law of the participating countries. In consequence, the drafters of such instruments can do their work only on the basis of the most painstaking comparative studies.⁹⁷

Legal harmonization is probably the most prominent example of a field where comparative method is used currently. Many scholarly projects in Europe explore the common core of legal principles and rules between European States.⁹⁸ Proliferation of such projects demonstrates that European legal systems interact and share common features. Indeed, scholarly cooperation on specific projects has been strengthened by the creation of permanent structures like the European Law Institute.⁹⁹ The CEE countries actively participate in those projects but are still underrepresented.¹⁰⁰ Their participation in the associations of judges is much more noticeable. The openness towards foreign influences of the CEE courts is probably mainly manifested in activities of the courts' legal research offices.

The CEE countries have extensive experience with approximation of law. Foreign law has been used there as a source of inspiration in the transition process and legislative overhaul. The EU pre-accession process consisted primarily of approximation of national law to that of the EU. It is probably due to that past that the practice of looking at foreign law continues in those countries exists is readily admitted. For example, the Supreme Court of Estonia pointed out that foreign law is often thoroughly analysed in the legislative process and used as a source of inspiration.¹⁰¹ In the 2014 Annual Report of the Supreme Administrative Court of Lithuania, the President of the Court discusses how different

⁹⁷ U.A. Mattei, T. Ruskola, A. Gidi, (n. 96), p. 72.

⁹⁸ Examples include: Common Core of European Private Law <<http://www.common-core.org>> (access: 17 May 2016); M. Bussani, U. Mattei (eds), *The Common Core of European Private Law Project* (Cambridge University Press 2004); main features of the project are also described in U.A. Mattei, T. Ruskola, A. Gidi (n. 96), p. 221; Fundamental Rights and Private law in the European Union – G. Brueggemeier, A. Colombi-Ciacchi, G. Comandè (eds), *Fundamental Rights and Private Law in the European Union* (Cambridge University Press 2010).

⁹⁹ European Law Institute <<https://www.europeanlawinstitute.eu/>> (access: 17 May 2016).

¹⁰⁰ For example, the representatives from CEE countries are clearly underrepresented among editors and national contributors for the on-going projects of the Common Core of European Private Law. See: <<http://www.common-core.org/node/36>> (access: 17 May 2016). The same conclusion can be drawn on the basis of the members and the steering committee of the Renewal <<http://www.renewal.eu/>> (access: 17 May 2016), where CEE countries are underrepresented.

¹⁰¹ The Legal Information Department of the Estonian Supreme Court referred to publications like Juridica International 'Learning from the Neighbours' Experiences: Property and Consumer Credit, <https://www.juridica.ee/juridica_en.php?document=en/articles/2014/8/244881.SUM.php> (access: 17 May 2016). See also: C. Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2003) and S. Belov, 'Russia: Foreign Transplants in the Russian Constitution and Invisible Foreign Precedents in Decisions of the Russian Constitutional Court', [in:] T. Groppi,

legal systems influence each other and makes a highly interesting link between the process of transition and globalization.¹⁰² It is in fact a tribute to the comparative method. While the openness of the Lithuanian legislature and judiciary to foreign influences is rooted in transition, it continues today due to globalization. However, the limits to globalization-induced approximation are set by the need to preserve a national legal culture. As the President of the Lithuanian Court puts it “[a]lthough globalization creates economic and cultural integrity of the world’s community, however, it does not set up uniformity of nations.”¹⁰³ Therefore, another way to see the limits of absorption of foreign influences is a balance between tradition and innovation.

There are therefore two main axes of comparative activity: global problems (technology, environment) that call for global solutions and fundamental principles of democracy and human rights protection. As far as the latter is concerned, the ECHR¹⁰⁴ is a prominent example of core standards for protection of human rights and fundamental freedoms across Europe. Courts across CEE region readily refer to the Convention and probably the most visible comparative cases are those in the area of human rights.¹⁰⁵

8. Conclusions

The growth of a structured transnational co-operation between administrative judges lays strong foundations for transnational judicial borrowings. While the CEE courts confirm that they are open to judicial dialogues and comparativism, it is not always confirmed by the actual references to foreign law in their judgments. If such references can be identified, they evidence a practice that is spontaneous and thus unsystematized and undisciplined. The Polish administrative courts do not formally comment on the methodology used for their comparisons.

M.C. Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013), p. 347.

¹⁰² Supreme Administrative Court of Lithuania, ‘Annual Report 2014’, <http://www.lvat.lt/download/1952/metinis_2014-en-web.pdf> (access: 17 May 2016) 2.

¹⁰³ *Ibidem*, p. 3.

¹⁰⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

¹⁰⁵ For example, for Poland see: J. Krzemińska-Vamvaka (n. 2); for Russia see: A. Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (Oxford 2011), p. 44; S. Marochkin, ‘International Law in the Courts of the Russian Federation. Practice of Application’ (2007) 6 *Chinese Journal of International Law* 2, p. 341.

It is not unusual among courts citing foreign law.¹⁰⁶ Exceptionally, the Civil Chamber of the Estonian Supreme Court did define a general methodological framework for judicial comparativism, which can be transferred to the field of administrative law.

Of course, judicial comparativism is target of the same theoretical criticisms as comparative law in general (limited role of theory in comparative law).¹⁰⁷ Those methodological criticisms are more pertinent in the case of the CEE countries where academic underpinnings of comparative law are not well developed. Although in the interwar period, comparative law had quite a tradition in Poland,¹⁰⁸ it was significantly crippled during the communism.¹⁰⁹ While the comparative law experienced a revival after 1989, mainly due to the international dimension of the transition process, there is still a mismatch between the practice and the theory. Comparative law is extensively used in legislating and by the judiciary,¹¹⁰ but it is quite underdeveloped in academia.¹¹¹ The lack of scholarly discussion reflects the lack of theoretical underpinnings for the judicial comparativism. Indeed, the rules governing the selection of foreign law are desirable to make sure that judicial comparativism is not selective and arbitrary.

Those CEE courts that engage in a (visible) comparative activity recognize that foreign law has no binding force domestically but it is a useful source of inspiration or confirmation for possible legal interpretations. In the field of implementation of EU law, judicial comparativism can bring significant efficiency gains. Courts can save scarce and valuable resources by drawing inspiration and taking information from their foreign EU counterparts that faced a similar legal problem. If a problem is new for a specific country, it can draw from the wealth of practical information abroad on practical consequences and experiences with a particular solution. The access to information on various possible approaches to the same problem that were tested in practice is invaluable. This is probably why the CEE countries engaged in the practice of judicial comparativism when faced with major legislative overhauls and the process of harmonization to EU requirements.

¹⁰⁶ J. Krzemińska-Vamvaka (n. 2), p. 8; J. Waldron, 'Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity', [in:] S. Muller, S. Richards (eds), *Highest Courts and Globalisation* (Hague Academic Press 2010), p. 100.

¹⁰⁷ G. Frankenberg (n. 62), p. 416.

¹⁰⁸ In the interwar period, as the codification and unification processes were underway, law practitioners had to cope on a daily basis with several legal systems in force simultaneously. After 1918, depending on the region and branch of law, up to 5 different legal systems were in force in Poland (French, Austrian, German, Russian, Hungarian). This was due to the pre-war division of the Polish territory; see: J. Bardach, B. Lesnodorski, M. Pietrzak, *Historia ustroju i prawa polskiego* (PWN 1994), p. 461, in particular, p. 552.

¹⁰⁹ Z. Kuhn, 'Development of Comparative Law in Central and Eastern Europe', [in:] M. Reimann, R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), p. 215.

¹¹⁰ For the Polish Constitutional Court see: J. Krzemińska-Vamvaka (n. 2).

¹¹¹ Z. Kuhn (n. 110), p. 235.

Judicial comparativism, or comparative approach in general, represented significant efficiency gains in the fast-changing environment of transition.

The potential for efficiency gains for courts goes beyond the implementation of EU law. The legal borders between countries become more and more porous because of the growing legal convergence due to interlinkages between economies and transnational problems that call for uniform transnational solutions.

The fact that the CEE countries have been receptive towards foreign influences and engaged in judicial comparativism spontaneously constitutes a valuable experience. While the judicial comparativism can bring gains to courts beyond the CEE region, that region has an untapped potential to transform a spontaneous practice into a methodologically sound exercise. Practical experiences of recent times evidence gains and traps of judicial comparativism. From a methodological point of view, it is important to preserve the integrity of a legal system. A systemized approach and a more systemic knowledge of foreign legal systems are key to striking a balance between the ever-growing legal convergence and national legal identity.

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IV. The Dialogue between Selected CEE Courts and the ECtHR

Marcin Górski*

1. Introduction

Although the idea of ‘dialogue’ entails a form of reciprocal exchange of arguments between the actors,¹ in this contribution the notion of ‘dialogue’ (‘judicial dialogue’) will be construed specifically as any form of (unilateral) reference in the reasoning of domestic court to the case law of the European Court of Human Rights.² Therefore, not only non-mandatory references to the authority of ECtHR³ are presented, but also the instances where national courts are obliged to refer to the Strasbourg case law and such cases, where a reference should have been made but is missing (as a negative example of lack of judicial dialogue). In other words, both dialogue as conversation (with no specific goal apart from the dialogue itself) and dialogue as deliberation (a form of dialogue

* Dr iur., Assistant Professor at the Department of European Constitutional Law, Faculty of Law and Administration, University of Lodz

1 See: F. Cafaggi (ed.), *Judicial interaction techniques – their potential and use in European fundamental rights adjudication. Final handbook* (Centre for Judicial Cooperation 2014), <www.nsa.gov.pl/download.php?id=165> (access: 20 February 2016) 38.

2 See e.g.: D.S. Law, W.-C. Chang, ‘The Limits of Global Judicial Dialogue’ (2011) 86 *Washington Law Review*, p. 523.

3 On the non-mandatory references to foreign law and case law, see: M. Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013).

aimed at reaching a common agreement)⁴ will be presented. In all cases the contribution will focus only on such references that concentrate on the interpretation of the ECHR.

This contribution will not add to the discussion as to the position of the judicial dialogue as a phenomenon of legal reasoning. It must be emphasised though that the author strongly believes that judicial dialogue (in its widest possible understanding which is assumed in this paper) contributes *ex definitione* towards the quality of adjudication. The dialogue extends horizons while identifying the law and fundamental values at its foundations. Still, the question whether judicial dialogue as a form of legal reasoning is indeed positive or just a silly ‘sophistry’ as labelled by the late Justice Antonin Scalia⁵ will not be addressed here.

Apart from the abovementioned classifications of dialogue (against the criteria of mandatoriness and purpose) one may distinguish the categorisation of deliberative dialogue *vis-à-vis* the criterion of interrelatedness i.e. the relation between the referring decision⁶ and decision to which the reference is made. Here one may point out at unifying (affirmative), and engaged dialogue. The latter can be either concurring or diverging (dissenting). The first type occurs when the national (referring) court simply accepts the reasoning and interpretation proposed by another court. This type of reference to case law of other court or courts can be qualified as ‘judicial dialogue’ only if one applies the definition of a dialogue which has been assumed in the present contribution, i.e. a very broad one (dialogue as any form of reference to reasoning of another court). The second type – engaged dialogue – is more interesting since it assumes a more active approach of a national court: Not only does it internalise and present the case law of another court, but it does so critically, either by generally departing from the interpretative standpoint underpinning the decision of another court (dissenting dialogue) or by accepting it in principle, but nuancing the details of the legal analysis (concurring dialogue). This type of dialogue, if reciprocal (i.e. dialogue *sensu stricto*), contributes substantially towards the development of a more elaborate interpretation of law.⁷ In addition, the engaged

4 See: L. Tremblay, ‘The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures’ (2005) 3 *International Journal of Constitutional Law*, p. 617.

5 See: N. Dorsen, ‘The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer’ (2005) 3 *International Journal of Constitutional Law*, p. 519 and Law D.S., ‘Judicial Comparativism and Judicial Diplomacy’ (2015) 4 *University of Pennsylvania Law Review*, p. 164. D.S. Law notes that Justice Scalia, although not eager to refer to foreign precedents while interpreting American constitutional law, was at the same time a frequent visitor of foreign constitutional courts, interested in their practice.

6 I.e. the decision entering into a dialogue with another decision.

7 Let us mention in this respect the famous *Von Hannover v Germany* saga involving the dialogue between the ECtHR and the German Constitutional Court as described in e.g. B. Peters, ‘The Rule of Law Dimensions of Dialogues Between National Courts and Strasbourg’, [in:]

dialogue constitutes a perfect expression of constitutional pluralism building the truly common constitutional identity (resulting from genuine ‘unification in diversity’).⁸ If it happens to be one-sided though (i.e. the ‘dialogue’ consisting of establishing the interpretative consensus by international court without the follow-up of implementation of the interpretative position of international court by its national counterparts), it may lead to fragmentation of ‘interpretative regimes’ and dysfunction of the systems aimed at enhancing the coherence (such as the ECHR).

The judicial dialogue – generally having the function of eliminating interpretative divergences between different judicial authorities and avoiding impediments to law certainty – may serve the solution to different types of conflicts: conflicts of jurisdictions,⁹ conflicts of systems¹⁰ or conflict of particular norms.¹¹ Therefore, one may propose the classification of judicial dialogue *vis-à-vis* the criterion of a conflict solution (the categorisation of dialogue, as generally serving the solution of different forms of conflicts, into groups distinguished by reference to the type of conflict which a given form of dialogue intends to resolve).

Finally, one may classify the judicial dialogue *vis-à-vis* the criterion of appropriateness understood as the accuracy of the referring court’s reasoning seeking (or failing) to involve references to other courts’ case law. From this perspective one may categorise dialogue as proper (i.e. referring to accurately collected case law of other courts and analysing it properly from methodological point of view¹²), fake or decorative (i.e. pretending to refer to the case law of other courts but in fact just decorating the reasoning by random references to inappropriately collected and inaptly analysed decisions), failed (i.e. missing the opportunity to refer to the case law of other courts at all where one should reasonably expect that such jurisprudence is presented) and other (i.e. non-classifiable to other categories, e.g. veiled¹³). This classification shall be applied in this contribution because it seems to be the most meaningful from the practical perspective. It explains

M. Kanetake, A. Nollkaemper (eds), *The Rule of Law at the National and International Levels* (OUP 2016), p. 222.

⁸ Otherwise the system as a whole could be questioned.

⁹ Judicial dialogue as the solution to the conflicts of jurisdictions was proposed e.g. by K. Oellers-Frahm, ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions’ (2001) 5 Max Planck UNYB 67.

¹⁰ W.W. Burke-White “points at ‘interjudicial dialogue’ as a method of counterbalancing the danger of fragmentation of international law” (W.W. Burke-White, ‘International Legal Pluralism’ (2004) 961 Faculty Scholarship 971).

¹¹ See: F. Cafaggi (ed.), ‘Judicial interaction techniques’ (n. 1), pp. 13–14 and the writings referred to therein, in particular the F. Kelsen, ‘Derogation’, [in:] H. Klecatsky, R. Marcic, H. Schambeck (eds.), *Die Wiener Rechtstheoretische Schule* (1968).

¹² This form of dialogue can be unifying, diverging or concurring.

¹³ A veiled (or a hidden) dialogue is a form of dialogue where a national court actually does refer to other courts’ case law but does not admit it.

whether national courts actually engage in dialogue with the ECtHR, pretend, or simply fail to do so.

One cannot but note that these classifications (*vis-à-vis* the criteria of mandatoryness, purpose, interrelatedness, conflict solution and appropriateness) are to a certain extent mutually overlapping. For example, diverging dialogue can be proper (if based on thorough analysis and accurate methodology) whereas affirmative dialogue can be a fake one.

The forms of judicial dialogue were categorised in this contribution as proper (actually implementing the ECtHR case law or dissenting with the Strasbourg Court after thorough analysis of its jurisprudence), fake (Strasbourg 'precedents' employed as a mere decoration of reasoning without any attempts to establish properly the actual interpretative consensus of the Convention) and failed (where no reference was made and ECtHR case law was simply ignored). Finally, separate category will be proposed for decisions, which do not fit either of these three categories.

The first part of this work describes the normative framework of judicial dialogue, referring to the impact of the ECtHR case law on the Polish legal system in general, the issue of the duty of observance of the Strasbourg Court's case law (resulting either from explicit provisions adopted to that end or from a general normative framework as construed by supreme national judicial authorities) and the question of reopening of proceedings as a consequence of an ECtHR ruling.

The second part of this contribution is devoted to the practice of courts in CEE States in as much as they enter into a dialogue with the European Court of Human Rights. Special attention is paid to the Polish experience for obvious reasons – the author speaks Polish and the databases of jurisprudence are easily accessible to him. However, one should stress that in none of the CEE States, which will be presented in this contribution (apart from Poland, also Czech Republic, Hungary, Lithuania, Russian Federation and Ukraine) there exist accessible databases of jurisprudence translated into English. It makes the tasks of description of dialogue of CEE courts with the ECtHR particularly difficult. The second part of the contribution will thus focus on the classification of case law of domestic courts of six CEE States *vis-à-vis* the criterion of appropriateness and thus it will distinguish domestic courts' decisions according to whether they belong to a proper, fake and failed dialogue category and finally will identify and describe rulings which are not non-classifiable.

The concluding remarks will attempt to provide a general assessment of the accomplishment of the duty of the domestic courts to enter into dialogue with the ECtHR *acquis* and to explain reasons for occasional failures as well as to suggest instruments aimed at enhancing the dialogue (also the *sensu stricto* judicial dialogue i.e. reciprocal references) of national courts with the Strasbourg Court.

The methodology of this contribution consists of the desk analysis of the national legislation and case law of domestic courts (supreme courts, ordinary courts and administrative courts).¹⁴ The references to jurisprudence of national constitutional courts will only be made exceptionally in order to depict the difference between constitutional courts *acquis*, which often evoke the Strasbourg decisions and practice of other national courts where references are sparse. References to constitutional courts' practice will appear in this contribution since a) the practice of the Polish Constitutional Court concerning the application of the ECtHR case law was already presented by the author of this contribution elsewhere¹⁵ and because b) it is indispensable to make the reference to constitutional courts' practice of other CEE States in order to draw conclusions concerning the practice of other courts in these countries.

Pursuant to the principle of subsidiarity, States Parties to the ECHR – and their courts – are primarily responsible for an effective protection of rights and freedoms guaranteed by the Convention and its Protocols.¹⁶ In order to fulfil this duty, national courts must develop a regular dialogue with the ECtHR in order to reflect in their decisions the evolving interpretation of the Convention. This study is focused on whether this task is effectively accomplished.

This contribution will take the normative framework as the starting point. This part of the analysis will first provide a brief overview of the impact of the ECtHR case law on the Polish legal system in order to highlight the significance of the Strasbourg jurisprudence for the Polish legislative authority. It will also present the CEE States' domestic legal provisions, guidelines or decisions adopted by supreme judicial bodies concerning the duty of observance of the ECHR and the Strasbourg Court's case law. Such presentation is necessary in order to conclude that there exist different normative (adequate provisions) or systemic (key decisions of supreme judicial authorities) instruments in all these States in order to assure effective implementation of the Convention standard. It must be noted that the case law of national courts does not always fit this general normative framework. Finally, the issue of reopening of proceedings following an adverse ruling of the ECtHR shall be discussed as an ultimate response of domestic courts to the Strasbourg decisions.

¹⁴ The research of the databases was aimed at finding references to the ECHR and to the ECtHR case law.

¹⁵ See: M. Górski, 'Уже лучше, но все еще недостаточно хорошо: опыт применения Европейской конвенции в практике Конституционного Трибунала Республики Польша' (2013) 4 Сравнительное конституционное обозрение (Institute of Law and Public Policy), p. 84.

¹⁶ See e.g.: *Melnichuk and Others v Romania*, App. nos 35279/10 and 34782/1 (ECtHR, 5 May 2015), para. 77.

2. The Normative Framework

2.1. The Polish Example of the Influence of the ECtHR Case Law on the Domestic Legal System

The guaranteeing of the effectiveness to the Convention standard – for which the States Parties to the ECHR are primarily responsible – entails two types of obligations. The one concerns the implementation of adverse decisions against Poland (which may include individual measures such as the *restitutio in integrum* and general measures such as, in the first place, amendment of national legislation). The other entails the duty of national bodies (with the pivotal role of national courts) to ‘take into account’ the standard of interpretation developed by the ECtHR while adjudicating.

In case of Poland, since its accession to the Convention in 1993, the ECtHR delivered 1099 judgments including 925 finding at least one violation.¹⁷ The biggest negative score concerned the length of proceedings (434 adverse judgments) and the right to liberty and security (299 judgments). More than 100 adverse decisions concerned the right to private and family life (107) and the right to a fair trial (106).

The case law of the ECtHR had an overwhelming impact on both Polish law and judicial practice. It is hard to find nowadays an area of the Polish public law, which has not been affected by the Strasbourg case law. The duty of legislative implementation of the ECtHR case law is also accepted by the Polish legal scholarship.¹⁸ Only a few major changes in the Polish legal system are mentioned here as examples proving that the influence of the ECtHR jurisprudence on Polish law is indeed overwhelming and profound.

Until 2001 when the new Law on the procedure concerning petty offences¹⁹ entered into force, the first instance bodies adjudicating in petty offences cases were the so-called magistrates’ courts for petty offences (*kolegia do spraw wykroczeń*), subordinate to the executive branch of state authority (ministry) and composed of non-lawyers who were not independent and did not enjoy guarantees of independence, in particular, immunities. The 1997 Constitution abolished the magistrates’ courts for petty offences and transferred their jurisdiction to ordinary courts. That change was introduced in order to ensure (among others) compatibility with Art. 6 ECHR. As noted by the Constitutional Court,²⁰

¹⁷ All statistics come from Council of Europe, ‘Statistics of violations 1959–2015’, <http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf> (access: 28 February 2016).

¹⁸ See: instead of many others, Biuro Analiz Sejmowych, *Wykonywanie wyroków Europejskiego Trybunału Praw Człowieka przez Sejm* (Warszawa 2012).

¹⁹ Law of 24 August 2001 on the procedure concerning petty offences, O.J. 2001 No. 106, item 1149 as amended.

²⁰ Case K 6/94 (Polish Constitutional Court, 21 November 1994), para. 4.

it is the very essence of the administration of justice that adjudication must be a sole privilege of courts and other branches of state power must not interfere with their activities or participate in them. It is the consequence of a special role of the judiciary in the protection of rights and freedoms of individuals and it is confirmed by [...] Art. 6 of [ECtHR].²¹

The Swiss experience of *Bezirksanwalten* in *Schiesser*²² and the Dutch experience of *auditeur-militaires* in *de Jong, Baljet and van den Brink*²³ and the disqualification of the latter organs as “other officers authorised by law to exercise judicial power” in the meaning of Art. 5(3) ECHR was the major reason why the new Polish Code of Criminal Procedure assumed that prosecutors are no longer authorised by law to order pre-trial detention.²⁴ As a part of the executive, they did not have sufficient independence, which is required from state officers responsible for applying such form of deprivation of liberty. Moreover, they were also parties to criminal proceedings at the judicial stage of the process. The approach taken by the drafters of the new procedural regulation in criminal cases was later confirmed by the ECtHR in *Niedbala* where the Court noted that “prosecutors, in the exercise of their functions, are subject to supervision of an authority belonging to the executive branch of the Government” and “their position in the criminal proceedings as provided for by law as it stood at the material time [...], must be seen as that of a party to these proceedings.”²⁵

Following the *Broniowski* decision,²⁶ the first pilot judgment of the ECtHR, Poland introduced the law on the so-called Bug River claims,²⁷ which was a successful implementation of the Court’s ruling.²⁸ Those entitled to compensation from the State for the property left beyond the eastern border of Poland after the II World War (territories previously constituting a part of the Republic of Poland and now belonging to Ukraine or Belarus) may now obtain adequate sums and have their claims settled.

²¹ In Polish: “do istoty wymiaru sprawiedliwości należy, by sprawowany on był wyłącznie przez sądy, a pozostałe władze nie mogły ingerować w te działania czy w nich uczestniczyć. Wynika to ze szczególnego powiązania władzy sądowniczej z ochroną praw i wolności jednostki i znajduje potwierdzenie zarówno w szczegółowych normach Konstytucji (zwłaszcza Art. 56 ust. 1 przepisów konstytucyjnych), jak i w konwencjach międzynarodowych (zwłaszcza Art. 6 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności).”

²² *Schiesser v the Netherlands*, App. no. 7710/76 (ECtHR, 4 December 1979), para. 31.

²³ *De Jong, Mr. Baljet and Mr. van den Brink v the Netherlands*, App. nos 8805/79, 8806/79 and 9242/81 (ECtHR, 22 May 1984), in particular para. 49.

²⁴ See: P. Hofmański, [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1–18* (Wydawnictwo CH Beck 2010) 201.

²⁵ *Niedbala v Poland*, App. no. 27915/95 (ECtHR, 4 July 2000), paras 52–53.

²⁶ *Broniowski v Poland*, App. no. 31443/96 (ECtHR, 22 June 2004).

²⁷ Law of 8 July 2005 on the implementation of the right to compensation for property left outside of present borders of the Republic of Poland [Ustawa o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej], O.J. 2014, item 1090.

²⁸ *E. G. v Poland and 175 other applications*, App. no. 50425/99 (ECtHR, 23 September 2008).

After another pilot judgment in the *Hutten-Czapska* case,²⁹ which concerned the systemic violation of the right to property by laws imposing on landlords restrictions in respect of rent increases and the termination of leases, the new scheme of subsidies was created for the restoration of private property.³⁰ The owners of property are eligible for the so-called ‘premiums’ paid from public funds that reduce the costs of renovation and investment in private property. Moreover, the Constitutional Court decided³¹ that limitation of liability of the local government *vis-à-vis* private estate owners for the non-provision of social housing for persons evicted from their buildings violated the Constitution. Since then the owners of houses, from which the eviction of tenants was ordered but due to shortage of social housing the eviction was not enforced, get compensations from the local government under Art. 417 of the Polish Civil Code. Subsequently to this amendment other cases concerning the analogous problem to that of the *Hutten-Czapska* decision were struck out from the list of cases.³²

The *Kudła* judgment³³ in which the ECtHR ruled that “the applicant had no domestic remedy whereby he could enforce his right to a ‘hearing within a reasonable time’ as guaranteed by Art. 6(1) of the Convention” triggered the adoption of the Law on the right to compensation for delayed court proceedings and criminal preliminary proceedings.³⁴ The act at stake was then subsequently amended which was a consequence of further rulings of the ECtHR³⁵ where the Court did not find the legislation under the said Law an effective measure.³⁶

²⁹ *Hutten-Czapska v Poland*, App. no. 35014/97 (ECtHR, 19 June 2006).

³⁰ Law of 21 November 2008 on supporting thermo-modernisation and renovation, O.J. 2014, item 712.

³¹ Case SK 51/05 (Polish Constitutional Court, 23 May 2006), see also: Case P 14/06 (Polish Constitutional Court, 11 September 2006).

³² See e.g.: *The Association of Real Property Owners in Łódź v Poland*, App. no. 3485/02 (ECtHR, decision, 8 March 2011).

³³ *Kudła v Poland*, App. no. 30210/96 (ECtHR, 26 October 2000).

³⁴ Law of 17 June 2004 on the complaint available in case of the violation of the right of the party to have the case heard in reasonable time by the prosecutor in preliminary proceedings and by the court in judicial proceedings [Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki], O.J. 2004 No. 179, item 1843 as amended.

³⁵ See: *Tur v Poland*, App. no. 21695/05 (ECtHR, 23 October 2007) and *Zwoźniak v Poland*, App. no. 25728/05 (ECtHR, 13 November 2007).

³⁶ See: the statement of reasons presented by the Government to the Parliament while proposing the bill on the amendment of the Law on the complaint available in case of the violation of the right of the party to have the case heard in reasonable time by the prosecutor in preliminary proceedings and by the court in judicial proceedings, document of the *Sejm* of the Republic of Poland of VI Term, no. 1281 of 30 October 2008 2 where the Government noted that “Europejski Trybunał Praw Człowieka w ostatnio wydanych wyrokach w sprawach *Tur przeciwko Polsce* (wyrok z dnia 23 października 2007 r., skarga nr 21695/05) oraz *Zwoźniak przeciwko Polsce* (wyrok z dnia 13 listopada 2007 r., skarga nr 25728/05), pomimo skorzystania przez skarżących z możliwości złożenia skargi na przewlekłość postępowania, nie uznał

Unfortunately, the practice of Polish courts was rather disappointing because they did not, while applying the provisions of the Law, manage to assure that the complaint on delayed proceedings would constitute an “appropriate and sufficient redress.” It resulted in the delivery of another pilot judgment in *Rutkowski and others v Poland*.³⁷

The *Tysiąc* ruling³⁸ that concerned the lack of effective remedy for patients willing to challenge the doctor’s decision concerning the diagnosis and therapy (violation of positive procedural obligation resulting from Art. 8 ECHR) resulted in the adoption of the Law on patients’ rights.³⁹ It provides for the patient’s right to file an objection against doctor’s decision, which is adjudicated by special committees established by the Ombudsman for patients’ rights.

The very liberal 2015 Law on Assemblies⁴⁰ was directly inspired by *Bączkowski*⁴¹ of the ECtHR and the Constitutional Court’s decision K 44/12 which was itself substantially driven by the Strasbourg case law.⁴² The new Law – among others – provides for an unformalized procedure of notification concerning the intention to organise an assembly (including ‘simplified procedure’ where the public authority cannot ban a planned assembly) and strengthens the mechanism of judicial review of administrative decisions regarding assemblies.

2.2. The Duty of Observance of the ECtHR Case Law

If interpreted literally, Polish law does not provide for a duty to amend the law in order to bring it in line with the case law of the ECtHR (unlike in the Czech Republic or Ukraine⁴³). Nor there exist any guidelines⁴⁴ adopted by e. g.

ustawy z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki (Dz.U. Nr 179, poz. 1843) za skuteczny środek krajowy w rozumieniu Art. 13 Konwencji i stwierdził, że doszło do naruszenia wskazanego przepisu.”

³⁷ *Rutkowski and others v Poland*, App. nos 72287/10, 13927/11 and 46187/11 (ECtHR, 7 July 2015).

³⁸ *Tysiąc v Poland*, App. no. 5410/03 (ECtHR, 20 March 2007).

³⁹ Law of 6 November 2008 on patients’ rights and Ombudsman for patients’ rights [Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta], O.J. 2016, item 186.

⁴⁰ Law of 24 July 2015 on Assemblies, O.J. 2015, item 1485. In the statement of reasons of the bill it was noted that “przedmiotowy projekt ustawy stanowi realizację wyroku Trybunału Konstytucyjnego z dnia 18 września 2014 r., sygn. akt K 44/12 oraz wytycznych wskazanych przez Europejski Trybunał Praw Człowieka w wyroku z dnia 3 maja 2007 r. w sprawie *Bączkowski i inni przeciwko Polsce* (skarga nr 1543/06).”

⁴¹ *Bączkowski v Poland*, App. no. 1543/06 (ECtHR, 3 May 2007).

⁴² Case K 44/12 (Polish Constitutional Court, 18 September 2014) where the Constitutional Court referred to the *Bączkowski* decision of the ECtHR.

⁴³ See further remarks on the Czech and Ukrainian legislations concerning the implementation of the ECtHR case law.

⁴⁴ Understood as a single document synthesising the approach of the highest judicial authorities.

the Constitutional Court or the Supreme Court encouraging courts to follow the jurisprudence of the Strasbourg Court (unlike in Russia). Of course, while interpreting the norms of Polish law systematically, one must take into consideration that pursuant to Art. 9 of the Polish Constitution of 1997 Poland observes its international obligations and according to Art. 91 of the Constitution ratified international agreement constitute part of the domestic legal order and shall be applied directly having precedence over conflicting statutes. Since the ECtHR is an authoritative interpreter of the Convention whose decisions establish the compulsory mode of understanding the scope of obligations deriving from the Convention, Polish courts are bound to observe the provisions of the Convention and its Protocols exactly as the ECtHR interprets them.

The implementation of ECHR is not limited to the consequences of Art. 46 ECHR (i.e. to abide the final judgment of the ECtHR in case to which a given State was a party) but rather it constitutes a wider problem of abiding by the Convention standard in accordance with Art. 1 ECHR. Consequently, the States Parties to the Convention are to assure effectively rights and freedoms guaranteed by the ECHR. This does not lead inextricably to the obligation to undertake a dialogue with the Strasbourg court, nonetheless it is hard to imagine ‘observance’ as defined above without a ‘dialogue’.

Polish courts accepted their duty to take into consideration the Strasbourg case law while deciding cases. The Supreme Court ruled that

the duty to respect the decisions of the European Court of Human Rights lays also on the courts. It is not just a question of taking the position of the ECtHR into account while interpreting the Convention and construing the domestic law in accordance with that interpretation, but equally of taking concrete steps aimed at implementing the judgment of the ECtHR.⁴⁵

However, the quotation comes from the judgment concerning the reopening of proceedings in consequence of an adverse judgment of the ECtHR – the issue, which was later addressed differently by the Supreme Court⁴⁶ and which will be discussed later. In general, the Supreme Court already back in 1995 declared in its landmark decision that “since the accession of Poland to the Council of Europe, the jurisprudence of the European Court of Human Rights in Strasbourg may and ought to be taken into account while interpreting national law.”⁴⁷ The Court

⁴⁵ Case V CSK 271/08 (Supreme Court, 28 November 2008). In Polish: “obowiązek respektowania wyroków Europejskiego Trybunału Praw Człowieka spoczywa zatem także na sądach. Chodzi tu nie tylko o uwzględnianie stanowiska Trybunału przy wykładni postanowień Konwencji i tłumaczenie przepisów prawa krajowego w zgodzie z tą wykładnią, lecz o podjęcie konkretnych działań zmierzających do zadośćuczynienia wyrokowi Trybunału.”

⁴⁶ Case III CZP 16/10 (Supreme Court, resolution of the panel of 7 judges, 30 November 2010).

⁴⁷ Case III ARN 75/94 (Supreme Court, order, 11 January 1995). In Polish: “od momentu wstąpienia Polski do Rady Europy orzecznictwo Europejskiego Trybunału Praw

further added that the Strasbourg case law should serve as a “significant source of interpretation while interpreting provisions of Polish law.” That statement was later invoked on many occasions both by the Supreme Court itself⁴⁸ and ordinary⁴⁹ and administrative courts.⁵⁰

The duty of observance of the ECtHR case law must not be construed as meaning that domestic courts are bound to follow the Strasbourg judgments without taking into account the specific circumstances of cases pending before national courts in contrast to the ones at the base of the ECtHR decisions. This duty must be understood as the need to follow the Strasbourg standard of interpretation of the Convention and not as mechanically transcribing the ECtHR findings on – sometimes specific – circumstances of a given case decided by the national court. Guaranteeing effectiveness of the ECtHR case law must be understood as two separate obligations of national courts which one must distinguish: while national courts must assure effective implementation of an adverse Strasbourg judgment in a given case (to the greatest possible extent by the *restitutio in integrum*), in their regular practice of interpretation and application of the national law they must “take into account” the Convention standard so as to avoid violations of the ECHR.

In Czech Republic, pursuant to Art. 1.2 of the Constitution of 16 December 1992, “the Czech Republic shall observe its obligations resulting from international law.” According to Art. 95.1 of the Czech Constitution, “in his/her decision-making, a judge is bound by the law and international agreements constituting part of the legal order; he/she is entitled to assess the conformity of a different legal regulation with the law or with such international agreement.” Article 87.1(d) and (i) of the Czech Constitution reads that “the Constitutional Court shall rule on [...] constitutional complaints filed against final decisions and other interventions by agencies of public authority, violating constitutionally guaranteed fundamental rights and freedoms” and “measures essential for the implementation of a ruling by an international court, which is binding for the Czech Republic, unless it can be implemented in a different manner.”⁵¹

According to § 118.1 of the Constitutional Court Act,

if an international court finds that an obligation resulting for the Czech Republic from an international treaty has been infringed by the encroachment of a public authority, especially that, due to such an encroachment, a human right or fundamental freedom of a natural or

Człowieka w Strasburgu może i powinno być uwzględniane przy interpretacji przepisów prawa polskiego.”

⁴⁸ See e.g. Supreme Court cases: I BU 14/12 (3 April 2013); III UK 101/11 (22 May 2012); II KKN 295/98 (9 November 1999).

⁴⁹ Cases: III AUz 476/13 (Szczecin Court of Appeal, order, 16 December 2013); III AUa 413/13 (Court of Appeal in Poznań, 1 August 2013).

⁵⁰ Case I OSK 1116/07 (Supreme Administrative Court, 2 September 2008).

⁵¹ All quotations from: Office of the President of the Czech Republic, ‘Constitution of the CR’, <<https://www.hrad.cz/en/czech-republic/constitution-of-the-cr>> (access: 7 June 2016).

legal person was infringed, and if such infringement was based on a legal enactment in force, the government shall submit to the Court a petition proposing the annulment of such legal enactment, or individual provisions thereof, if there is no other way to assure it will be repealed or amended. In such a case, § 35 para. 1 on the admissibility of petitions instituting a proceeding in matters which the Court has already decided, shall not apply.

Also, § 119 of the Constitutional Court Act provides for the possibility of rehearing the decision of the Constitutional Court,

should the Constitutional Court have decided in a matter in which an international court found that, as the result of the encroachment of a public authority, a human right or fundamental freedom was infringed in conflict with an international treaty.⁵²

In Ukraine the Supreme Court is the highest judicial body within the system of courts of general jurisdiction ensuring the uniformity of judicial practice in the procedure and manner prescribed by the procedural law.⁵³ Since 2010 the decisions of the Supreme Court of Ukraine in cases regarding different application of the same provision of the material law by the cassation instance are binding on all state authorities applying the law and on all courts.⁵⁴ The constitution of Ukraine provides for the supremacy of the ECHR over domestic statutory norms.⁵⁵ Pursuant to Art. 17 of the 2006 Law of Ukraine on the Enforcement of Judgments and the Application of the Case law of the European Court of Human Rights,⁵⁶ “while adjudicating cases courts shall apply the Convention and the case law of the Court as a source of law.” According to the Ukrainian Constitution, “the Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it”,⁵⁷ however “international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.”⁵⁸

⁵² Ibidem.

⁵³ Source: Supreme Court of Ukraine, ‘About the Supreme Court of Ukraine’, <[http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/\(documents\)/183E20947C3F5F67C2257ADB0031F80A](http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/(documents)/183E20947C3F5F67C2257ADB0031F80A)> (access: 25 December 2015).

⁵⁴ Source: Baker McKenzie, ‘Dispute Resolution Around the World, Ukraine 2011’, <http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Dispute%20Resolution/Dispute%20Resolution%20Around%20the%20World/dratw_ukraine_2011.pdf> (access: 25 December 2015).

⁵⁵ A. Nussberger, ‘The Reception Process in Russia and Ukraine’, [in:] H. Keller, A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) 630.

⁵⁶ Law No. 3477-IV of 23 February 2006.

⁵⁷ Art. 8 of the Ukrainian Constitution.

⁵⁸ Art. 9 of the Ukrainian Constitution. It is not clear though whether the model of reception on international agreements in Ukraine is based on monism or dualism – see views quoted by I. Ilchenko, ‘The implementation of the 1950 European Convention on Human Rights and the case law of the European Court of Human Rights: Ukraine’s and Poland’s Governments practice’, [in:] M. Balcerzak et al. (eds), *Europejska Konwencja Praw Człowieka i jej system kontrolny*

In 2012, as reported by Nesterenko, “95% of ECtHR decisions against Ukraine concerning the failure to observe the Convention standards were not implemented and the Committee of Ministers’ proceedings were pending and, as regards the judicial practice, national judges in their vast majority [were] not using of the ECtHR’s practice because of their ignorance, or [sought] to circumvent them.”⁵⁹ According to the ECtHR statistics, the Court delivered 1053 judgments in cases against Ukraine until 31 December 2015, finding at least one violation in 1036 (most of them concerned right to a fair trial – 494, protection of property – 336, length of proceedings – 303 and right to liberty and security – 235).⁶⁰

The Russian Federation accepted the jurisdiction of the ECtHR on 5 May 1998. Since then until 31 December 2015 the Court delivered 1720 decisions in cases against Russia,⁶¹ finding at least one violation in 1612 cases. The largest numbers of violations concerned Arts. 6, 3 and Article 1 of Protocol No. 1 to the ECHR. Article 15(4) of the Constitution of the Russian Federation reads that

the universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.⁶²

As regards the implementation of the Convention standard in cases other than the ones in which the ECtHR found a violation of the Convention, the Russian Supreme Court adopted a sort of the guidelines for general courts,⁶³ stating among others that:

- a) the legal positions of the European Court of Human Rights contained in the final judgments of the Court delivered in respect of the Russian Federation are obligatory for the courts;⁶⁴

(Katedra Praw Człowieka, Wydział Prawa i Administracji, Uniwersytet Mikołaja Kopernika 2011), p. 306.

⁵⁹ P. Nesterenko, ‘Some Issues Concerning Application of the Practice of the European Court of Human Rights in Ukraine’ (2012) 6 *European Integration Studies*, p. 43.

⁶⁰ Source: Council of Europe, ‘Violations by Article and respondent State 1959–2015’, <http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf> (access: 28 February 2016).

⁶¹ The statistics provided here reflect the state of 31 December 2015. Source: Council of Europe, ‘Violations by Article and by State – 1959–2014’, <http://www.echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf> (access: 28 February 2016).

⁶² See also: R. Petrov, P. Kalinichenko, ‘The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russian and Ukraine’ (2011) 60 *International and Comparative Law Quarterly*, p. 341.

⁶³ Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 21 on Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols thereto by the Courts of General Jurisdiction <<http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=9155>> (access: 22 March 2015).

⁶⁴ However, in its ruling no. 21-P (14 July 2015), the Constitutional Court of the Russian Federation pointed out that neither the European Convention, nor the ECHR’s legal position

- b) in order to effectively protect human rights, the courts take into consideration the legal positions of the European Court expressed in its final judgments taken in respect of other States which are parties to the Convention. However this legal position is to be taken into consideration by court if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by the European Court.⁶⁵

However, in December 2015 the Russian Federation adopted the new law⁶⁶ concerning the implementation of ECtHR rulings in the Russia. According to this new law the Russian Federal Constitutional Court shall be competent to hear the applications of the government or the President of the Russian Federation concerning the implementation of the ECtHR decisions. The Federal Constitutional Court then may either decide on the possibility of execution in whole or in part, in accordance with the Constitution of the Russian Federation, of the decision of “interstate body for the protection of human rights and freedoms,” or on the impossibility of such execution. If the Constitutional Court adopts the latter decision any action (acts) aimed at the fulfilment of the relevant decisions of an interstate body for the protection of human rights and freedoms cannot be carried out in the Russian Federation.⁶⁷ It means that neither individual domestic redress of applicants who obtained a judgment of the ECtHR adverse to Russia nor any future application of the standard arising from such ‘unenforceable’ decisions are permissible. This new law has already been applied by the Russian Constitutional Court in the case following up on the ECtHR ruling *Anchugov and Gladkov*⁶⁸ in which the Strasbourg Court held that the Russian constitutional

in specific cases based on it can override the pre-eminence of the Constitution of the Russian Federation within the Russian legal system and, therefore, will be implemented only subject to acknowledgment of the precedence of the Constitution of the Russian Federation and added that the Russian Federation may derogate from its obligations related to enforcement of a ruling of the ECHR as a contingency measure if such derogation is the only way to avoid violation of the fundamental principles and norms of the Constitution of the Russian Federation.

⁶⁵ Ruling of the Plenary Session of the Supreme Court of the Russian Federation no. 21 on Application of the Convention for the Protection of Human Rights...

⁶⁶ Federal Constitutional Law of 14 December 2015, N 7-FKZ, on Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation (Rus.: Федеральный конституционный закон от 14.12.2015 N. 7-ФКЗ “О внесении изменений в Федеральный конституционный закон ‘О Конституционном Суде Российской Федерации’”).

⁶⁷ Article 104(4) of the Federal Constitutional Law on the Constitutional Court of the Russian Federation as amended on 14 December 2015 reads that “b случае, если Конституционный Суд Российской Федерации принимает постановление, предусмотренное пунктом 2 части первой настоящей статьи, какие-либо действия (акты), направленные на исполнение соответствующего решения межгосударственного органа по защите прав и свобод человека, в Российской Федерации не могут осуществляться (приниматься).”

⁶⁸ *Anchugov and Gladkov v Russia*, App. nos 11157/04 and 16162/05 (ECtHR, 4 July 2013).

ban on prisoners' voting rights⁶⁹ was incompatible with Art. 3 of Protocol No. 1 to the ECHR. The ECtHR stressed that

the Government's argument that the present case is distinguishable from *Hirst (no. 2)*, as in Russia a provision imposing a voting bar on convicted prisoners is laid down in the Constitution – the basic law of Russia adopted following a nationwide vote – rather than in an 'ordinary' legal instrument enacted by a parliament, as was the case in the United Kingdom [...]. In that connection the Court reiterates that, according to its established case law, a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations [...]. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a member State's 'jurisdiction' – which is often exercised in the first place through the Constitution – from scrutiny under Convention. The Court notes that this interpretation is in line with the principle set forth in Article 27 of the 1969 Vienna Convention on the Law of Treaties.⁷⁰

The Russian Constitutional Court, at the request of the Minister of Justice, ruled that the ECtHR decision was unenforceable. It stressed that "Russia was and remains an integral part of the European legal space, which implies equal dialogue and readiness to compromise. The Constitutional Court has always played a leading role in integrating the ECHR positions in the Russian legal system."⁷¹ However, although the "measures aimed at ensuring fairness, proportionality and auxiliary application of limits to the voting rights of convicted prisoners are possible and achievable in the Russian legislation and judicial practice in accordance with the ECtHR judgment", "the Federal legislator has the right to optimize the system of criminal sanctions."⁷²

The new Russian Law on the 're-evaluation' of the ECtHR decisions was criticized by the Venice Commission⁷³ who stressed that declaration of the Russian Constitutional Court on the 'unenforceability' of the ECtHR ruling does not eliminate international obligations binding upon Russia and that this new

⁶⁹ Article 32(3) of the Russian Constitution reads that "citizens recognized by court as legally unfit, as well as citizens kept in places of confinement by a court sentence shall be deprived of the right to elect and be elected."

⁷⁰ *Ibidem*, para. 108.

⁷¹ Case 12-П/2016 (Constitutional Court of the Russian Federation, 19 April 2016) "по делу о разрешении вопроса о возможности исполнения в соответствии с Конституцией Российской Федерации постановления Европейского Суда по правам человека от 4 июля 2013 года по делу «Анчугов и Гладков против России» в связи с запросом Министерства юстиции Российской Федерации."

⁷² *Ibidem*.

⁷³ Interim opinion no. 832/2015 on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation adopted by the Venice Commission at its 106 Plenary Session, 11–12 March 2016; CDL-AD(2016)005.

law is incompatible with Russia's obligations under international law. The Venice Commission also recommended the amendments to the law governing the Constitutional Court of the Russian Federation including the removal of the provision allowing the Constitutional Court to rule on the 'enforceability' of international decisions and instead the introduction of a provision allowing this court to rule on the compatibility of a 'modality of enforcement' with the Russian Constitution (save for situations where the ECtHR specifically defined the measure of execution). Further, the Venice Commission recommended that the Russian Constitutional Court makes clear that assessment of constitutionality does not extend to individual measures of execution such as the payment of just satisfaction. Finally, where the Constitutional Court rules on the unconstitutionality of a particular measure of enforcement, executive authorities should be obliged to find alternative measures of enforcement, including amendment of legislative framework, including the Constitution of the Russian Federation.

In Lithuania, under Art. 104 of the Constitution of the Republic of Lithuania judges of the Constitutional Court should 'follow the Constitution', Art. 135(1) of the Constitution assumes the duty of observance of international law by national courts and Art. 138(3) of the Constitution makes international treaties ratified by the Seimas a constituent part of the Lithuanian legal system. The latter provision constitutes normative basis of i.a. the dialogue of the Constitutional Court with the ECtHR. The ECHR is the international treaty most frequently referred to by the Constitutional Court – mentioned around 50 times so far.⁷⁴ The Court recognised the identical nature of values forming the foundations of the Convention and the Lithuanian constitution and the identity of their goals in the area of human rights.⁷⁵

As regards Hungary, its 2011 Constitution reads that "Hungary shall contribute to the creation of European unity"⁷⁶ and "Hungary shall ensure that Hungarian law be in conformity with international law."⁷⁷ The jurisdiction of the Constitutional Court of Hungary includes the review of "any legal regulation for conflict with any international treaties."⁷⁸

⁷⁴ National Report of Lithuania for the XVIth Congress of the Conference of European Constitutional Courts 5 and 6.

⁷⁵ The Lithuanian Constitutional Court's conclusion of 24 January 1995. See also broadly in the contribution by E. Kuzborska in this book.

⁷⁶ Article E.1 of the Hungarian Constitution.

⁷⁷ Article Q.2 of the Hungarian Constitution.

⁷⁸ Article 24.2.f of the Hungarian Constitution.

2.3. Reopening of Proceedings Following an Adverse Ruling of the ECtHR

There are, in principle, three types of consequences to States Parties after an adverse ruling from the ECtHR:

- (1) to pay the awarded compensation;
- (2) if necessary, to take further individual measures in favour of the applicant, that is to put a stop to a violation found by the Court and to place the applicant, as far as possible, into the situation existing before the breach (*restitutio in integrum*);⁷⁹ and
- (3) to take measures of a general character in order to ensure non-repetition of similar violations in the future⁸⁰ (in case of pilot judgments or quasi-pilot judgments⁸¹).

Pursuant to Arts. 1 and 46 ECHR, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention and they undertake to abide by the final judgment of the Court in any case to which they are parties. It means in particular that any judgment finding the violation of the Convention should, in principle and where it is possible, lead to the *restitutio in integrum*.⁸²

As a matter of principle, after an adverse judgment of the ECtHR in a case against Poland, the proceedings that resulted in stating the violation should be reopened. This is a normative framework for the most elementary foundations of the dialogue with the ECtHR. The procedural codes (Code of Criminal Procedure,

⁷⁹ *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland 2*, App. no. 32772/02 (ECtHR, 30 June 2009), para. 89.

⁸⁰ *Broniowski v Poland*, App. no. 31443/96 (ECtHR, 22 June 2004), para. 193.

⁸¹ Quasi pilot judgments or pilot-like judgments are those where ECtHR finds a systemic violation but abstains from ordering the adoption of general measures. *Wizerkaniuk v Poland*, App. no. 18990/05 (ECtHR, 5 July 2011) can serve as example, where the Court ruled para 84 that “the Press Act was adopted in 1984, twenty-seven years ago. It was adopted before the collapse of the communist system in Poland in 1989. Under that system, all media were subjected to preventive censorship. The Press Act 1984 was extensively amended on twelve occasions (see paragraph 29 above). However, the provisions of sections 14 and 49 of that Act, on which the applicant’s conviction was based, were never subject to any amendments, in spite of the profound political and legal changes occasioned by Poland’s transition to democracy. It is not for the Court to speculate about the reasons why the Polish legislature has chosen not to repeal those provisions. However, the Court cannot but note that, as applied in the present case, the provisions cannot be said to be compatible with the tenets of a democratic society and with the significance that freedom of expression assumes in the context of such a society.” See also: I.C. Kamiński, R. Kownacki, K. Wierczyńska, ‘Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w polskim systemie prawnym’, [in:] A. Wróbel (ed.), *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym* (Wolters Kluwer 2011) 101 and cases mentioned there.

⁸² See: O. Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge 2015), p. 2.

Code of Civil Procedure, the Law on the Procedure before Administrative Courts) regulate the problem of re-opening of proceedings differently. The Code of Criminal Procedure provides explicitly that “the proceedings shall be re-opened to the benefit of the accused where such need arises from the decision of an international body acting under international treaty ratified by the Republic of Poland.”⁸³ Moreover, the re-opening is not limited to the accused who actually applied to the ECtHR and obtained the judgment but it is extended to “other cases where a violation of the Convention occurred in the construction of factual and legal circumstances identical to the one which was found in the judgment of the ECtHR adverse to Poland”⁸⁴ as the Supreme Court rightly held basing its argumentation on Art. 1 ECHR. However, where the accused was sentenced for sanction other than unconditional deprivation of liberty, the violation of the ECHR does not constitute sufficient grounds of admissibility of cassation complaint as the latter would be inadmissible in such circumstances if not brought by the Minister of Justice, Prosecutor General or the Ombudsman.⁸⁵

The Law on the Procedure before Administrative Courts contains provisions similar to the Code of Criminal Procedure, although the right to plead for re-opening is open to every party to the proceedings.⁸⁶

However, the Code of Civil Procedure does not provide for the possibility of re-opening of proceedings following the adverse judgment of the ECtHR.⁸⁷ The resolution of 7 judges of the Supreme Court⁸⁸ held that “the final judgment of the European Court of Human Rights finding the violation of the right to fair

⁸³ Art. 540(3) of the Code of Criminal Procedure.

⁸⁴ Case 14/14 (Supreme Court, resolution of 7 judges, 26 June 2014): “potrzeba wznowienia postępowania, o której mowa w Art. 540(3) k.p.k., może dotyczyć nie tylko postępowania w sprawie, do której odnosi się rozstrzygnięcie Europejskiego Trybunału Praw Człowieka o naruszeniu Konwencji o ochronie praw człowieka i podstawowych wolności, ale także do innych postępowań karnych, w których zaistniało naruszenie postanowień Konwencji tożsame w układzie okoliczności faktyczno-prawnych do stwierdzonego w orzeczeniu tego Trybunału wydanym przeciwko Polsce.”

⁸⁵ See: Art. 523(2) and (4) and Art. 521(1) of the Code of Criminal Procedure. The official title of the Polish Ombudsman is “the Commissioner for Citizens’ Rights” (*Rzecznik Praw Obywatelskich*), see: Sejm, ‘The Constitution of the Republic of Poland’, <<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>> (access: 16 December 2016).

⁸⁶ Art. 272(3) of the Law on the Procedure before Administrative Courts (“można żądać wznowienia postępowania również w przypadku, gdy potrzeba taka wynika z rozstrzygnięcia organu międzynarodowego działającego na podstawie umowy międzynarodowej ratyfikowanej przez Rzeczpospolitą Polską”).

⁸⁷ As rightly pointed out by P. Grzegorzcyk, “The decision to allow for annulment of the final and valid judgment following the judgment of the ECtHR lays within the power of the legislature” in P. Grzegorzcyk, ‘Naruszenie art. 6 ust. 1 Europejskiej Konwencji o Ochronie Praw Człowieka jako podstawa wznowienia postępowania cywilnego z powodu nieważności’ (2011) 3 *Radca Prawny*, p. 83.

⁸⁸ Case III CZP 16/10 (Supreme Court, resolution of 7 judges, 30 November 2010). See the comment in A. Paprocka, ‘Glosa do uchwały SN z dnia 30 listopada 2010 r., III CZP 16/10’ (2011) 7 *Państwo i Prawo* 153.

trial before the court guaranteed by Art. 6 § 1 ECHR [...] shall not constitute the ground of re-opening of the civil proceedings.”⁸⁹ The Supreme Court analysed the case law of the ECtHR and found that the ECHR does not require the re-opening of proceedings in civil cases although the *restitutio in integrum* is highly desired⁹⁰ and added that the ECtHR does not tend to find violations of Art. 6(1) ECHR where legislation in a State Party does not provide for a possibility of re-opening of proceedings.⁹¹

Moreover, where the ECtHR finds a violation resulting from certain provisions of Polish law (normative violation), even in a pilot judgment procedure, such ECtHR judgment is not treated as a preliminary ruling opening path for claims of compensation for normative injustice (as Art. 417¹ of the Polish Civil Code requires that the plaintiff in a case concerning compensation for normative injustice consisting of the adoption of normatively defective provisions first obtains a preliminary ruling finding that certain provision violated a higher-ranked norm).⁹²

According to Art. 46 ECHR States are bound to abide by final judgments where the ECtHR found a violation of the Convention. It means that they are obliged to put an end to the violation immediately. This obligation may be – depending on the circumstances – binding also upon domestic courts, if national procedures allow them to put an end to the violation in their decisions. Sometimes one is not required to re-open the proceedings. This is the case, if the violation of the Convention still exists and can be remedied by *ex-post* decision of a national court.

⁸⁹ Polish: “ostateczny wyrok Europejskiego Trybunału Praw Człowieka, w którym stwierdzono naruszenie prawa do sprawiedliwego rozpatrzenia sprawy przez sąd, zagwarantowanego w art. 6 ust. 1 konwencji o ochronie praw człowieka i podstawowych wolności, sporządzonej dnia 4 listopada 1950 r. w Rzymie (Dz.U. z 1993 r. Nr 61, poz. 284 ze zm.), nie stanowi podstawy wznowienia postępowania cywilnego.”

⁹⁰ See in this respect *Bouchan v Ukraine*, App. no. 22251/08 (ECtHR, 5 February 2015).

⁹¹ Polish: “charakterystyczne jest poza tym, że Trybunał ostrzej traktuje te państwa, które wprowadziły do swego systemu prawnego wyraźną podstawę wznowienia postępowania cywilnego w związku z jego wyrokiem. W takich wypadkach, jak to wynika z orzecznictwa Trybunału, do sankcji dochodzi ze względu na niewłaściwe zastosowanie przepisów regulujących to postępowanie, natomiast państwom, które tego nie uczyniły, nie wytyka się ponownie naruszenia art. 6 ust. 1 konwencji jedynie dlatego, że do wznowienia postępowania, mimo określonego wyroku Trybunału, nie doszło.”

⁹² Case I CSK 577/11 (Supreme Court, 14 June 2012) where the Supreme Court ruled that “ostateczny wyrok Europejskiego Trybunału Praw Człowieka wydany w sprawie ze skargi indywidualnej przeciwko Rzeczypospolitej Polskiej, stwierdzający naruszenie przez Polskę art. 1 protokołu 1 do Konwencji o ochronie praw człowieka i podstawowych wolności (prawo do poszanowania mienia) w związku z utrzymywaniem przez polskiego ustawodawcę szeregu regulacji prawnych, które ograniczały prawo własności właścicieli nieruchomości, w tym uniemożliwiały swobodne ustalenie poziomu czynszów, nie jest tożsamy ze stwierdzeniem niezgodności aktu normatywnego z Konstytucją, ratyfikowaną umową międzynarodową lub ustawą w rozumieniu art. 417[1]§ 1 k.c.” This judgment was criticised by K. Wójtowicz in ‘Glosa do wyroku SN z dnia 14 czerwca 2012 r., I CSK 577/11’ (2013) 1 Zeszyty Naukowe Sądownictwa Administracyjnego, p. 173.

However, one may provide example where Polish courts encountered troubles with this seemingly simple consequence of Art. 46 ECHR.

On 29 July 2008 the European Court of Human Rights delivered judgment in *Choumakov (no. 1)*⁹³ and found that the applicant's detention exceeded a reasonable time. The applicant's lawyer requested the Provincial Court in Elbląg to release the applicant – as detention should be waived at any time if circumstances occur justifying such waiver.⁹⁴ He invoked in this respect the decision of the ECtHR. On 5 December 2008 the Elbląg Provincial Court refused the applicant's lawyer's request. The Court considered that the grounds for the applicant's detention remained valid (thus it disregarded the findings of the ECtHR) and, therefore, the continued detention of the applicant did not violate the procedural guarantees safeguarded by Arts. 5 and 6 ECHR (contrary to the finding of the ECtHR). As regards the ECtHR judgment, the Provincial Court expressed the opinion that neither the Convention nor the Code of Criminal Procedure placed an obligation on the court to release an applicant following a judgment of the European Court of Human Rights. The Provincial Court noted that the applicant had been granted 1,500 euros (EUR), which constituted sufficient just satisfaction for the violation found. The Gdańsk Appellate Court while hearing the appeal from that decision added that the judgment of the ECtHR was of a "declaratory nature" and "did not constitute a source of law but rather an application of the law."⁹⁵ Obviously, the decision of the domestic courts should be different. Since the ECtHR found that the continued detention of the applicant violated the Convention, the only lawful decision of the domestic court should be to release the applicant immediately (provided that no new circumstances occurred – as it was in this case).

As for assuring conformity with Art. 46 ECHR, the Russian Federation encountered problems with the *restitutio in integrum*. Before 2010 in Russia although the re-opening of different types of court proceedings has certain common features, re-opening further to an ECtHR judgment is not regulated in a uniform manner. Most importantly, unlike the Commercial Procedure Code and the Criminal Procedure Code, the Civil Procedure Code does not expressly provide a ground for the re-opening a case on the basis of an ECtHR judgment. As a result, the Russian courts had been dismissing requests to re-open court proceedings, until the matter was raised by the Constitutional Court who found⁹⁶ that

⁹³ *Choumakov v Poland*, App. no. 33868/05 (ECtHR, 29 July 2008).

⁹⁴ Art. 253(1) of the Code of Criminal Procedure: "Preventive measure should be changed or waived if circumstances justifying its application cease to exist and/or if circumstances occur justifying its change or waiver."

⁹⁵ See: *Choumakov v Poland*, App. no. 55777/08 (ECtHR, 1 February 2011), paras 18–21.

⁹⁶ Case 4-P (Constitutional Court of the Russian Federation, 26 February 2010) in a case concerning the review of the constitutionality of Art. 392(2) of the Code of Civil Procedure in connection with complaints lodged by A.A. Doroshok, A.Ye. Kot and Ye.Yu. Fedotova.

Russia's obligations to enforce ECtHR judgments under the Convention include the adoption of individual and general measures, where required [...]. A person whose rights were found by the ECtHR to be breached should have an opportunity to have his or her case re-examined by the national courts. Therefore, the lack of a provision in the Civil Procedure Code could not justify the refusal to re-open proceedings, especially considering that the Commercial Procedure Code did provide for the possibility of such a re-opening in commercial proceedings. There is no objective reason for the discrepancies between the Commercial Procedure Code and the Civil Procedure Code in this respect. The courts of general jurisdiction should have applied relevant provisions of the Commercial Procedure Code by analogy when deciding on the issue of re-opening proceedings. Furthermore, the Constitutional Court stated that the implementation of national procedures ensuring that national judicial decisions were re-examined in view of violations of the Convention would be an appropriate general measure in this situation. Therefore, the Civil Procedure Code should be amended accordingly.⁹⁷

In consequence of the judgment of the Constitutional Court of Russia, pursuant to the Art. 392(4)(4) of the Russian Civil Procedural Code (as amended), "effective judicial decisions may be reviewed due to newly discovered or new facts", whereas one of the new facts is "establishing by the European Court of Human Rights a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms when trying by a court the specific case in connection with whose solving the applicant has filed a petition with the European Court of Human Rights."⁹⁸ Article 392(4)(4) of the Russian Civil Procedural Code was later reviewed by the Constitutional Court, which held that

should court of general jurisdiction come to the conclusion about impossibility of execution of the judgment of the European Court of Human Rights without recognition as not conforming to the Constitution of the Russian Federation of legislative provisions, concerning which the Constitutional Court of the Russian Federation earlier established absence of violation by them of constitutional rights of the petitioner in a concrete case, it is entitled to suspend proceeding and petition the Constitutional Court of the Russian Federation with a request to review constitutionality of these legislative provisions.⁹⁹

⁹⁷ Both citations from M. Issaeva, I. Sergeeva, M. Suchkova, 'Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges' (2011) 15 *International Journal of Human Rights*, <http://www.surjournal.org/eng/conteudos/getArtigo15.php?artigo=15,artigo_04.htm> (access: 15 March 2015) 67.

⁹⁸ The Russian Civil Procedural Code, 'Civil Procedural Code', <<http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru081en.pdf>> (access: 22 March 2015).

⁹⁹ Judgment of the Constitutional Court of the Russian Federation No. 27-П of 6 December 2013, <<http://www.ksrf.ru/en/Decision/Judgments/Documents/2013%20December%206%2027-P.pdf>> (access: 22 March 2015) – exact quotation from the website of the Russian Constitutional Court. See also the comment in G. Vaypan, 'Acquiescence affirmed, its limits left undefined: The Markin judgment and the pragmatism of the Russian Constitutional Court vis-à-vis the European Court of Human Rights' (2014) 3 *Russian Law Journal* Vol. II 130.

In Hungary, the reopening of criminal proceedings after an adverse judgment of ECtHR is possible in favour of the defendant if the ECtHR found “that the conduct of the proceedings or the final decision of the court” violated the Convention.¹⁰⁰ The Code of Civil Procedure does not provide for the reopening of proceedings following an adverse judgment of the ECtHR.¹⁰¹ In Czech Republic the retrial after the ECtHR judgment is possible in all types of cases.¹⁰² The same applies to Ukraine where the “appeal in the light of exceptional circumstances” is provided, however, as the *Bochan (no. 2)* case¹⁰³ illustrates, one may encounter impediments while using this instrument.

3. The Forms of Judicial Dialogue of the CEE States’ Courts with the ECtHR Classified *vis-à-vis* the Criterion of Appropriateness

After this short overview of national provisions and decisions of the highest national judicial authorities of the CEE States concerning the observance of the ECtHR case law, one could reasonably assume that the practice of domestic courts would smoothly implement the paradigm of judicial dialogue with the ECtHR. This section is focused on the verification of this assumption. It proves that the practice of national courts in the selected CEE States varies as regards the criterion of appropriateness of judicial dialogue. The following

¹⁰⁰ Pursuant to para. 406.1.b of the Criminal Procedure Code of Hungary, “terhelt javára felülvizsgálatnak van helye akkor is, ha nemzetközi szerződéssel létrehozott emberi jogi szerv megállapította, hogy az eljárás lefolytatása vagy a bíróság jogerős határozata megsértette a törvényben kihirdetett nemzetközi szerződés valamely rendelkezését, feltéve, hogy a nemzetközi emberi jogi szerv joghatóságának a Magyar Köztársaság alávetette magát és a felülvizsgálattal a jogsértés orvosolható.”

¹⁰¹ See: Arts. 270–275 of the Hungarian Code of Civil Procedure.

¹⁰² See: I. Pospíšil, *Comments on Reopening Proceedings in the Civil Matters after the ECtHR Judgments before the Constitutional Court of the Czech Republic* (Strasbourg 2015) available at <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805921c9>> (access: 24 April 2016).

¹⁰³ *Bochan v Ukraine*, App. no. 22251/08 (ECtHR, 5 February 2015). In this case, following the ECtHR judgment adverse to Ukraine, the applicant lodged with the Supreme Court an “appeal in the light of exceptional circumstances” pursuant in particular to Articles 353–355 of the Code of Civil Procedure of 2004. She asked the Supreme Court to quash the courts’ decisions in her case and to adopt a new judgment allowing her claims in full. She joined to her appeal copies of the Court’s judgment and of the domestic decisions. However, the Supreme Court in dismissed the applicant’s motion holding in particular that the European Court of Human Rights had concluded that the [domestic] courts’ decisions were lawful and well-founded.

subsections present examples of proper, fake and failed dialogue as well as such decisions of domestic courts, which are non-classifiable in view of the preconceived criterion.

3.1. The Proper Dialogue: Implementing the ECHR Standard by Domestic Courts or Consciously Questioning it after Thorough Analysis

Proper judicial dialogue exists when national courts either follow the interpretative standard of the Convention by actually implementing the ECtHR case law or when they dissent or concur with the Strasbourg Court after thorough analysis of the jurisprudence of the latter. Several examples of such practice will be mentioned below.

For obvious linguistic reasons Polish score of successful dialogue may appear to be the highest, however this impression results only from poor opportunities of accessing the databases of judgments in other CEE States. The same caveat shall apply to other types of dialogue classified in this chapter.

3.1.1. Poland

Trifling cases and the access to justice

In Poland the Supreme Administrative Court decided¹⁰⁴ to refer to the extended panel of 7 judges of the Supreme Administrative Court¹⁰⁵ in order to obtain resolution on whether an administrative court may dismiss the case as inadmissible when it constitutes an abuse of a right of access to the court because it concerns a matter which is transparently and flagrantly trifling (trivial). The Supreme Administrative Court referred quite extensively to the case law of the ECtHR developed under Art. 6 ECHR, quoting the ECtHR decision in *Korolev*¹⁰⁶ and the judgment in *Gagliano Giorgi*.¹⁰⁷

The case in which the Supreme Administrative Court requested the resolution of the panel of 7 judges arose in the circumstances where the applicant disputed the obligation to pay 0.42 PLN for the copy of documents whereas only the costs of legal aid (paid by the State Treasury) amounted to 516.60 PLN and they would have increased were the new proceedings to commence. In spite of all doubts as

¹⁰⁴ Case I OSK 1992/14 (Supreme Administrative Court, order, 16 October 2015).

¹⁰⁵ Art. 187(1) of the Law on the Procedure before Administrative Courts allows the panel hearing a case to refer to the extended panel of 7 judges of the SAC in order to obtain a resolution on a legal issue raising difficulties in the case law.

¹⁰⁶ *Korolev v Russia*, App. no. 25551/05 (ECtHR, decision as to the admissibility, 1 July 2010). The decision was delivered right after the entry into force of Protocol No. 14, which amended Art. 35 ECHR by adding that the case shall be declared inadmissible if the applicant has not suffered a significant disadvantage. The Court explained that in accordance with the principle *de minimis non curat pretor* an application must concern circumstances which show a “minimum level of severity to warrant consideration by an international court.”

¹⁰⁷ *Gagliano Giorgi v Italy*, App. no. 23563/07 (ECtHR, 5 March 2012), paras 51–66.

to whether the standard developed by the ECtHR in relation to assessment of admissibility of applications brought under Art. 35 ECHR can be directly applied to cases before national courts, one must note that the reference of the Court to the ECtHR jurisprudence was extensive and accurate. The Supreme Administrative Court highlighted the need of adjudication without an unnecessary delay, invoking in this respect *Philis (No. 2)*¹⁰⁸ and insisted that Art. 6 ECHR “imposes on Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time” and considered that adjudicating in trifling cases creates a workload which compromises the possibility of promptness of proceedings. The Court referred to the ECtHR judgments concerning the delayed proceedings in Poland (*Kudła*,¹⁰⁹ *Beller*¹¹⁰ and *Rutkowski*¹¹¹) and considered that the standard of the Convention allows for drawing negative consequences from the abuse of the right of access to the court, quoting in this respect *Winer*,¹¹² *W. v Germany*¹¹³ and *Stewart-Brady*¹¹⁴ and finally *Bock*¹¹⁵ which was discussed in greater details. Unfortunately the panel of seven judges refused to adopt a resolution¹¹⁶ for formal reasons. Namely, the issue of admissibility of the application in the material case was already reviewed by the Court *ex officio* since the case at hand had already been decided by the same Court in 2013.¹¹⁷ If the Supreme Administrative Court decided in 2013 that the case was admissible, this conclusion binds itself and the Regional Administrative Court.¹¹⁸ However, engagement with the jurisprudence of the ECtHR by the Court when requesting for the resolution of the panel of 7 judges was rather impressive. Its reasoning attempted to transfer the France-rooted concept of *pas d'intérêt, pas d'action*, which was integrated in the Convention practice by the ECtHR, to the framework of the Polish administrative courts' procedure.

¹⁰⁸ *Philis v Greece*, App. no. 19773/92 (ECtHR, 27 June 1997).

¹⁰⁹ *Kudła v Poland*, App. no. 30210/96 (ECtHR, 26 October 2000).

¹¹⁰ *Beller v Poland*, App. no. 51837/99 (ECtHR, 1 February 2005).

¹¹¹ *Rutkowski and others v Poland*, App. nos 72287/10, 13927/11 and 46187/11 (ECtHR, 7 July 2015).

¹¹² *Winer v United Kingdom*, App. no. 10871/84 (ECtHR 10 July 1986).

¹¹³ *W. v Federal Republic of Germany*, App. no. 11564/85 (European Commission of Human Rights, decision, 4 December 1985).

¹¹⁴ *Stewart-Brady v United Kingdom*, App. no. 28406/95 (European Commission of Human Rights, decision, 2 July 1997). The name of the applicant was misspelled by the SAC (“Steward” instead of “Stewart”).

¹¹⁵ *Bock v Germany*, App. no. 22051/07 (ECtHR, admissibility decision, 19 January 2010).

¹¹⁶ Case I OPS 3/15 (Supreme Administrative Court, order, 21 March 2016).

¹¹⁷ Case I OSK 2139/13 (Supreme Administrative Court, 1 October 2013).

¹¹⁸ By virtue of Art. 170 of Law on Procedure before Administrative Courts, the final decision of the court is binding upon this court and other courts and bodies of the State.

Freedom of assembly

The Polish Law on Assemblies was recently amended¹¹⁹ resulting most probably in one of the most liberal regulations on the continent. Before it happened Poland had encountered turbulences in the area protected by Art. 11 ECHR.¹²⁰ It is a well-settled case law of the ECtHR that a State is the ultimate guarantor of the principle of political pluralism. The genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere. A purely negative conception would not be compatible with the purpose of Art. 11 ECHR, nor with that of the Convention in general. There exists, thus, a positive obligation to secure the effective enjoyment of these freedoms.¹²¹ Therefore, a risk of disorder or threat to public safety is not, as such, an ultimate justification for any interference with the freedom of assembly.¹²² The Supreme Administrative Court¹²³ properly construed provisions of the (at that time in force) Law of Assembly of 1990 and invoked the *Fáber* decision of the ECtHR,¹²⁴ and stated that “organs of the state are obliged to assess the risks to safety and risk of interference and then to apply appropriate measures determined by that assessment. These measures must be the least restrictive and – as a matter of principle – enable to organise the assembly.”¹²⁵ The case law of the Strasbourg Court was invoked properly in order to establish

¹¹⁹ Law on Assembly adopted on 24 July 2015, O.J. 2015, item 1485. However, the Law was amended yet again in 2016, which resulted in substantial departure from the Convention standard.

¹²⁰ See: *Bączkowski v Poland*, App. no. 1543/06 (ECtHR, 3 May 2007).

¹²¹ *Ibidem*, para. 64.

¹²² See also: Case K 21/05 (Polish Constitutional Court, 18 January 2006).

¹²³ Case I OSK 2538/13 (Supreme Administrative Court, 10 January 2014).

¹²⁴ *Fáber v Hungary*, App. no. 40721/08 (ECtHR, 24 July 2012). The case concerned the violation of Art. 10 read in the light of Art. 11 ECHR. Mr. Fáber was held for 6 hours in custody and fined some 200 EUR for disobedience since he protested against the adjacent manifestation of the Hungarian Socialist Party and while doing so he was holding the Árpád-striped flag. The ECtHR concluded that although the police’s endeavour to prevent any clashes between the participants in the two assemblies falls within the authorities’ margin of appreciation granted in the prevention of violence and in the protection of demonstrators against fear of violence, nevertheless, the freedom to take part in a peaceful assembly is of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act on such an occasion and “in the absence of additional elements, the Court, even accepting the provocative nature of the display of the flag, which remains *prima facie* an act of freedom of expression, cannot see the reasons for the intervention against the applicant.” According to the ECtHR, “where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance” (para. 47 of the judgment).

¹²⁵ In Polish: “organy zobligowane są do dokonania oceny zagrożenia dla bezpieczeństwa oraz ryzyka zakłóceń, a następnie zastosowania odpowiednich środków dyktowanych przez ocenę takiego ryzyka. Środki te – jak podkreślił Trybunał – powinny być najmniej ograniczające i – co do zasady – umożliwiać przeprowadzenie demonstracji.”

the interpretative consensus concerning Art. 11 ECHR and thus the Supreme Administrative Court properly ‘took into account’ the ECtHR jurisprudence while interpreting domestic law. It was, therefore, a good example of a proper judicial dialogue: not only did the Court properly identify the relevant case law of the ECtHR but also it did manage to apply the relevant jurisprudence in the case at hand.

The duty of authorisation of statements made in interviews

In *Wizerkaniuk* case,¹²⁶ concerning the journalists’ duty of authorisation of statements made in interviews before they are published, the ECtHR explained that “an obligation to verify, before publication, whether a text based on statements made in the context of an interview and quoted verbatim is accurate can be said to amount, for the printed media, to a normal obligation of professional diligence”¹²⁷ and found that the criminal conviction of the journalist “without any regard being had to the accuracy and subject matter of the published text and notwithstanding his unquestioned diligence in ensuring that the text of the published interview corresponded to the actual statements [...], was disproportionate in the circumstances.”¹²⁸ The Provincial Court in Sieradz referred to this ruling in a case of journalist who was convicted by the first instance court for disregarding the request of the interviewee who insisted on authorisation of the interview. The Provincial Court emphasised that although the law (imposing the authorisation duty) was formally breached, yet, the proceedings should be discontinued because “even though the accused formally violated Art. 14.2 of the Press Law,¹²⁹ nevertheless the level of social noxiousness was insignificant”¹³⁰ as the journalist quoted the statements made by the interviewee verbatim. The Provincial Court properly noted and drew conclusions from the factual similarities of the case at hand and the circumstances, which appeared crucial for the *Wizerkaniuk* ruling of the ECtHR. It emphasized the key similarities of the case at hand and the *Wizerkaniuk* case stressing that “statements made by the injured party by e-mail were quoted in the disputed press material without any shortcuts or deformations. The accused in no way manipulated these statements.”¹³¹ Thus the Provincial Court managed to reflect the essential elements of the ECtHR reasoning in the circumstances of the case decided. The crucial element identified and transposed by the Provincial Court from the Strasbourg *acquis*

¹²⁶ *Wizerkaniuk v Poland*, App. no. 18990/05 (ECtHR, 5 July 2011).

¹²⁷ *Ibidem*, para. 66.

¹²⁸ *Ibidem*, para. 87.

¹²⁹ This provision introduces the duty of authorisation.

¹³⁰ Case II Ka 71/15 (Provincial Court in Sieradz, 22 April 2015).

¹³¹ In Polish: “wypowiedzi udzielone drogą mailową przez oskarżycielkę posiłkową zostały zacytowane w opublikowanym artykule bez żadnych skrótów i zniekształceń. Oskarżona w żaden sposób nie manipulowała tymi wypowiedziami.”

was the issue of imposition of a sanction in case of a purely formal breach of the authorisation duty. This judgment serves, therefore, as a good example of a proper judicial dialogue.

Eviction

In cases concerning eviction the defendants quite frequently invoke Art. 8 ECHR claiming that the right to inviolability of the home was infringed. The ECtHR in its case law¹³² accepted that eviction, which “benefits the economic well-being of the country” may be regarded as serving the ‘legitimate aim’ which is required in case of interference with the right to inviolability of the home. The Provincial Court of Gliwice¹³³ invoked the *Kryvitska* ruling and certain other decisions of the ECtHR *proprio motu* while assessing the legality of eviction ordered by the first instance court. It is noteworthy that the appellants did not raise pleas in law alleging the violation of Art. 8 ECHR. However, the Provincial Court found it appropriate to evaluate the decision of the lower court against the background of the provision of the ECHR. This form of reference to the case law of the ECtHR is particularly valuable since it shows that the court was aware of its role of guarantor of effectiveness of the Convention and knew that it ought to evaluate the compatibility of domestic provisions with the Convention standard even in the absence of invitation to do so from the parties to the proceedings.

3.1.2. Other CEE States

The Czech Constitutional Court frequently refers to the case law of the ECtHR, thus implementing the relevant standards of protection. One can point out at several examples.

In the judgment 2005/03/15 – I. ÚS 367/03 resulting from the constitutional complaint of Mr. J.R., the Czech Constitutional Court decided that “the 25 July 2002 judgment of the High Court in Prague, no. 1 Co 106/2002–69, and the 24 April 2003 judgment of the Supreme Court of the Czech Republic, no. 28 Cdo 2194/2002-89, resulted in a violation of the complainant’s fundamental rights and basic freedoms flowing from Art. 17(2) of the Charter of Fundamental Rights and Basic Freedoms and from Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms” and they were therefore quashed. The complainant, in an interview for the daily newspaper, *Lidové noviny*, expressed an opinion, which is based on the fact that in the 70’s and 80’s of the previous century, the field of popular music was restricted politically (and he employed for this purpose, and with a certain degree of exaggeration, the term ‘mafia’). The clue of the case was to decide on the degree to which public figures

¹³² *Kryvitska and Kryvitskyy v Ukraine*, App. No. 30856/03 (ECtHR, 2 December 2010), para. 46.

¹³³ Case III Ca 727/14 (Provincial Court in Gliwice, 1 October 2014).

must bear criticism. The Constitutional Court recalled the jurisprudence of the ECtHR stating among others that

where some statement constitutes a value judgment, the appropriateness of the interference with the rights of personhood can depend upon whether there exists a sufficient factual basis for the contested statement, since even a value judgment can be excessive, if it lacks any factual basis whatsoever [compare the decisions of the European Court of Human Rights in the matter, *De Haes a Gijssels v Belgium* (1997) and *Oberschlick v Austria (No. 2)* (1997)].¹³⁴

It further explained that

the Constitutional Court concurs with the jurisprudence of the European Court of Human Rights according to which the freedom of expression represents one of the most important foundations of democratic society and one of the main conditions of the advancement and development of each individual. As such the freedom of expression relates not only to 'information' or 'ideas' that are favourably received or considered as innocuous or insignificant, but even those which injure, shock, or disturb: such is required for pluralism, tolerance, and a spirit of openness, without which there would be no democratic society. Compare, for example, the decision, *Fuentes Bobo v Spain* (2000).¹³⁵

The Court concluded that "persons who are active in the public, politicians, public officials, media stars etc., must bear a greater degree of criticism than other citizens. The jurisprudence of the European Court of Human Rights is also built upon this principle [in greater detail, for example, in the matter of *Lingens v Austria* (1986)]." If one keeps in mind the *Oberschlick (No. 2)* standard ('idiot') and compares it to the circumstance of this case ('mafia'), then one has to conclude that the Constitutional Court managed to guarantee the sufficient level of protection of the freedom of expression.

In the judgment 2008/10/14 – Pl. ÚS 40/06 concerning the obligatory membership in Czech Medical Chamber the Constitutional Court developed thorough analysis of the ECtHR case law concerning the negative aspect of the right

¹³⁴ Case I. ÚS 367/03 (Czech Constitutional Court, 15 March 2005) 5. In Czech: "Tam, kde je nějaké prohlášení hodnotovým soudem, může přiměřenost zásahu do osobnostních práv záviset na tom, zda existuje dostatečný faktický podklad pro napadené prohlášení, protože i hodnotový soud, bez jakéhokoli faktického podkladu, může být přehnaný [srov. rozhodnutí Evropského soudu pro lidská práva ve věcech *De Haes a Gijssels proti Belgii* (1997) a *Oberschlick proti Rakousku* (č. 2) (1997)]."

¹³⁵ Ibidem, 6. In Czech: "Ústavní soud se ztotožňuje s judikaturou Evropského soudu pro lidská práva, podle níž svoboda projevu představuje jeden z nejdůležitějších základů demokratické společnosti a jednu z hlavních podmínek pokroku a rozvoje každého jednotlivce. Jako taková se svoboda projevu vztahuje nejen na 'informace' nebo 'myšlenky' příznivě přijímané či považované za neškodné či bezvýznamné, ale i na ty, které zraňují, šokují nebo znepokojují: tak tomu chtějí pluralita, tolerance a duch otevřenosti, bez nichž není demokratické společnosti. Srov. např. rozhodnutí *Fuentes Bobo proti Španělsku* (2000)."

of association (Art. 11 ECHR). The petitioners in this case expressed their awareness of the ECtHR decision holding that compulsory membership in professional associations, guaranteed by public law, was not to be considered through the prism of Art. 11 ECHR.¹³⁶ Nevertheless the petitioners claimed that these decisions were not applicable to the issue of obligatory membership in the Czech Medical Chamber since the latter “at present effectively resembles a trade union or an association of private law.” Their petition was ultimately denied. After a thorough analysis of both the case law of the ECtHR and the legal characteristics of the Czech Medical Chamber, the Constitutional Court concluded that the outcome of the analysis

affirms the opinion that it is an institution identifiable with those treated by the bodies of the Convention as public law corporations (see clauses 69 to 79 above), whilst it differentiates from associations as assessed by the European Court of Human Rights in the judgment [*Chassagnou*].¹³⁷

The Constitutional Court disqualified the petitioners’ pleas based on the Convention but before doing so it analysed the Convention standard and the relevant ECtHR case law.

As for the practice of ordinary courts in Czech Republic, the attempts to refer to the ECtHR case law diverge as regards their quality. However, in the case which concerned the delayed judicial proceedings, the Provincial Court in Hradec Králové¹³⁸ properly (although not too extensively) referred to the case law of the ECtHR concerning the damages in similar cases¹³⁹ and ruled that the compensation granted by national court for delayed proceedings can be regarded satisfactory only if it corresponds to sums granted by ECtHR in similar cases.¹⁴⁰ One cannot but conclude that this assessment reflects properly the Convention standard.¹⁴¹ Similarly, in another case, which concerned arrest warrant, the District

¹³⁶ See e.g.: ECtHR cases: *Le Compte, Van Leuven and De Meyere v Belgium* (23 June 1981); *Albert and Le Compte v Belgium* (decision on admissibility, 10 February 1983); *Popov and others, Vakarelova, Markov and Bankov v Bulgaria*, App. nos 48047/99, 48961/99, 50786/99, and 50792/99 (6 November 2003); *Simón v Spain*, App. no. 16685/90 (decision on admissibility, 8 July 1992); *Bota v Romania*, App. no. 24057/03 (decision on admissibility, 12 October 2004).

¹³⁷ *Chassagnou and others v France*, App. nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999).

¹³⁸ Case 18 Co 420/2010 (*Krajský soud v Hradci Králové*, 20 September 2010).

¹³⁹ It invoked judgments of ECtHR of 17 May 2005 in *H v Slovakia* and an undefined case *I v Italy* of unspecified date.

¹⁴⁰ In Czech: “podle judikatury Evropského soudu pro lidská práva lze kompenzační prostředek nápravy nepřiměřené délky řízení považovat za účinný pouze za podmínky, že výše přiznaného zadostiučinění je v rozumném poměru k částkám, které v obdobných případech Evropský soud pro lidská práva sám přiznává (např. rozsudek ESLP ve věci *H proti Slovensku* ze dne 17.5.2005)”.

¹⁴¹ See e.g.: *M.C. v Poland*, App. no. 23692/09 (ECtHR, 3 March 2015), para. 93 and authorities referred to therein.

Court in České Budějovice¹⁴² invoked the ECtHR case law¹⁴³ and ruled that pursuant to Art. 5 ECHR isolative measures (arrest warrant) must not be imposed where more meditative measures are sufficient to assure the proper conduct of proceedings.¹⁴⁴

The practice of Hungarian courts (like in Czech Republic, Lithuania or Poland) is composed of – on one hand – positive experience of the Constitutional Court, which seems to be open to the dialogue with the ECtHR, and rather saddening examples from the practice of ordinary courts. The situation in Hungary thus resembles the *status quo* in Poland where the Constitutional Court developed an extensive practice of references to the Strasbourg jurisprudence, whereas regular and administrative courts seem to encounter obstacles in entering into dialogue with the ECtHR. As noted by Chronowski and Csatlós, “ordinary courts frequently cite international courts decisions and mainly those of the ECtHR, but they rarely use the reasoning and the fundamental legal statements directly in the argumentation in their own cases.”¹⁴⁵

Again, the practice of the Constitutional Court appears encouraging though. On 3 March 2014, the Constitutional Court of Hungary delivered a ruling on the constitutionality of the provision of the Civil Code (Section 2:44 of the Act V on the Civil Code) providing – as the petitioner pointed out – that:

public figures can only be made subject to heavy criticism in the interest of enforcing the fundamental rights guaranteeing the debating of public affairs, in particular the freedom of opinion and the freedom of the press with the fulfilment of three conjunctive conditions: (1) if the criticism does not violate the human dignity of the person concerned, (2) if its extent is necessary and proportionate, and (3) if the existence of ‘acknowledgeable public interest’ can be verified.¹⁴⁶

The Court found the passage concerning the ‘acknowledgeable public interest’ requirement unconstitutional. It stressed that “the Constitutional Court applies

¹⁴² Case 3 To 12/2004 (*Krajský soud v Českých Budějovicích*, 9 January 2004).

¹⁴³ The Czech court invoked *Wemhoff v Germany*, App. no. 2122/64 (ECtHR, 27 June 1968).

¹⁴⁴ In Czech: “Je pochopitelné, že nebezpečí např. útěku nebo podobného maření trestního řízení může být tak vysoké, že žádná záruka nemůže vazbu nahradit. Není to však případ obžalovaného při jeho dosavadních zkušenostech s vazbou a s přístupem soudu prvního stupně k tomuto problému. Evropský soud pro lidská práva zmíněný čl. 5 odst. 3 Úmluvy vykládá dále, než naznačuje jeho slovní znění. Podle Soudu jde nikoli o možnost, ale o povinnost státu nahradit vazbu zárukou, jestliže přítomnost obžalovaného při hlavním líčení lze zajistit jiným, mírnějším způsobem, než je vazba, pokud nejde o ony extrémní případy. Jako jeden z celé řady příkladů je uváděn rozsudek *Wemhoff versus Německo*.”

¹⁴⁵ N. Chronowski, E. Csatlós, ‘Judicial Dialogue or National Monologue? The International Law and Hungarian Courts’ (2013) 1 ELTE Law Journal, p. 27.

¹⁴⁶ Case 7/2014 (Constitutional Court of Hungary, 3 March 2014). Available at: MKAB, ‘Judgement’, <http://www.mkab.hu/letoltesek/en_0007_2014.pdf> (access: 18 July 2016) 1, para. I of the judgment.

as the minimum requirements of protecting rights in the course of elaborating the Hungarian constitutional standards the aspects found in the judicial practice of ECHR on the interpretation of the Convention” and found that

the special protection of the freedom of political speech is a requirement in the judicial practice of ECHR penetrating the whole of the legal system, and it needs to be applied – by taking other aspects into account as well – in each case when the challenged expression is voiced in questions affecting the community in the course of debating public affairs.¹⁴⁷

It is interesting that the Constitutional Court not only referred broadly to the practice of the ECtHR, but to the case law of the US Supreme Court as well, quoting i.a. the decision in the *New York Times v Sullivan* case.¹⁴⁸

Positive examples of a proper dialogue could also be found in the practice of courts of Lithuania. In the 2011 judgment¹⁴⁹ the Supreme Court of Lithuania analysed the significance of Art. 6 ECHR in the area of enforcement proceedings. It studied/examined thoroughly the case law of ECtHR¹⁵⁰ and held that:

the ECtHR has consistently held in its practice that enforcement is an integral part of ‘hearing’ (Eng. ‘trial’) and it shall, subject to Art. 6 (right to a fair trial) serve its goals. The ECtHR found that it would be incomprehensible if Art. 6 of the Convention defined in detail the procedural guarantees i.e. the right to a fair and public hearing within a reasonable time, failing to protect the same in case of enforcement process. The right to justice is not merely a theoretical right to a final court decision, but it also includes the legitimate expectation flowing from this judgment. Effective legal protection and duty to restore legality presuppose an obligation of public authorities to comply with a binding decision (see. *H. v Greece*, Judgment of 19 March 1997, Reports 1997-II, p. 510, para. 40). The European Court of Human Rights confirmed that the final decision of the court cannot be prevented from execution, nor can

¹⁴⁷ Ibidem, 9, para. III of the judgment.

¹⁴⁸ *New York Times v Sullivan* 376 U.S. 254 (US Supreme Court, 1966). The case concerned a lawsuit between the editor of the *New York Times* newspaper and the Montgomery Public Safety Commissioner Mr. Sullivan. The *New York Times* published a full-page advertisement soliciting funds to defend Mr. Martin Luther King Jr. The article was critical against the police forces and included some minor discrepancies. The case became a landmark one since the Supreme Court developed the so-called actual malice test according to which public figures may only protect themselves against criticism from the press if the latter published critical information knowingly involving false facts or where they acted with ‘reckless disregard’ of whether information was false or not (which does not include mere neglect in following professional standards of fact checking).

¹⁴⁹ Case 2 SA-137-262/2011 (Supreme Court of Lithuania, 9 September 2011). Similarly, in Supreme Court of Lithuania cases: 3 K-7-90/2009 (23 April 2009) and 2 SA-209-623/2010 (20 September 2010).

¹⁵⁰ However, the mode of quotation of Strasbourg judgments is somewhat strange since, like in Poland, the Supreme Court decided to anonymize the surnames of applicants (e.g. *H. v Greece*, p. 510–511, para. 40; *B. v. Russia*, no. 59498/00, para. 34; *J. v Lithuania*, no. 41510/98).

it be invalidated or its execution could be unduly delayed (see. *Hornsby v Greece*, p. 510–511, para. 40; *Burdov v Russia*, no. 59498/00, para. 34; *Jasiūnienė v Lithuania*, no. 41510/98, Judgment of 6 March 2003, para. 27).¹⁵¹

Further passages of this judgment also contain extensive references to the ECtHR decisions. It is difficult to assess why in one case the dialogue with the ECtHR was possible whereas in another case, where applicant also pleaded infringement of the Convention, the Supreme Court of Lithuania limited itself to a brief remark that “the provision was not breached.”¹⁵² Perhaps the reason lied in different composition of judicial panels in both cases.

¹⁵¹ In Lithuanian: “Europos Žmogaus Teisių Teismas savo praktikoje yra ne kartą nurodęs, kad teismo sprendimo vykdymas yra sudėtinė ‘bylos nagrinėjimo’ (angl. ‘trial’) dalis, atsižvelgiant į Konvencijos 6 straipsnio (teisė į teisingą bylos nagrinėjimą) tikslus. Europos Žmogaus Teisių Teismo jurisprudencijoje nustatyta, jog būtų nesuvokiama, jei Konvencijos 6 straipsnis detalai apibrėžtų procesines bylinėjimosi šalių garantijas, t.y. teisę į teisingą, viešą bylos nagrinėjimą per įmanomai trumpiausią laiką, neapsaugodamas sprendimų vykdymo proceso. Teisė į teismą nėra vien teorinė teisė galutiniu teismo sprendimu užsitikrinti atitinkamos teisės pripažinimą, bet taip pat ji apima teisėtą lūkestį šį sprendimą įvykdyti. Veiksminga bylinėjimosi šalių apsauga ir teisėtumo atkūrimas suponuoja valstybinės valdžios institucijų pareigą įvykdyti privalomą sprendimą (žr. *H. v Greece*, judgment of 19 March 1997, *Reports 1997-II*, p. 510, para. 40). Europos Žmogaus Teisių Teismo praktika patvirtina, kad galutiniam teismo sprendimui įgyvendinti negali būti užkirstas kelias, jis negali būti pripažintas negaliojančiu ar nepagrįstai uždelstas jo vykdymas (žr. cituotą *H. v Greece*, p. 510–511, para. 40; *B. v Russia*, no. 59498/00, para. 34; *J. v Lithuania*, no. 41510/98, judgment of 6 March 2003, para. 27).”

¹⁵² Case 3 K-3-358/2009 (Supreme Court of Lithuania, 29 September 2009). It is worth noting that the Supreme Court found no violation of Article 6 in the situation where the defendant raised that the adjudicating judge previously had worked for five years in the same law firm as the legal representative of the claimant. The Supreme Court briefly noted that this situation did not amount to the violation of the right to fair trial in the meaning of Art. 6 ECHR (in Lithuanian: “Kasatoriai savo teiginį, kad buvo pažeista jų teisė į nešališką teismą, motyvuoja tuo, kad pirmosios instancijos teisme bylą nagrinėjusi teisėja Ona Valentukevičiūtė ir ieškovo atstovas advokatas Aidas Venckus apie penkerius metus (iki 2005 metų) dirbo toje pačioje Kauno advokatų kontoroje. Ši aplinkybė, kasatorių teigimu, yra pagrindas svarstyti objektyviojo teisėjo nešališkumo kriterijaus klausimą. [...] Aidas Venckus bei Ona Valentukevičiūtė Kauno advokatų kontoroje dirbo individualiai, juos vienijo advokatų kontora kaip teisinė advokatų veiklos forma, kurios pagrindinė paskirtis – užtikrinti tinkamas advokatų darbo vietas sąlygas. Esant šioms aplinkybėms bei įvertinus tai, kad nuo teisėjos darbo Kauno advokatų kontoroje pabaigos (2005 metų sausis) iki bylos nagrinėjimo pradžios (2008 m. balandis) praėjo daugiau kaip treji metai, nenustatyta kitų faktinių aplinkybių, leidžiančių abejoti teisėjos nešališkumu, teisėjų kolegija konstatuoja, kad kasatorių teisė į nešališką teismą nebuvo pažeista, Konvencijos 6 straipsnio 1 dalis).”

3.2. The Fake Dialogue: Decorating the Reasoning Instead of Reading the Case Law and Cases of Abusive Interpretation

It is a regular practice of Polish courts to pretend dialoguing with the ECtHR instead of really doing so. The manifestation of such practice appears when a court – instead of finding a proper case law and drawing conclusions from it – decorates the reasoning by random references to some accidentally chosen decisions of the ECtHR. The Supreme Administrative Court in the case¹⁵³ concerning the decision of one of regional administrative courts imposing an obligation to pay the court fee (of 1000 PLN) quoted the ECtHR decision in *Airey*¹⁵⁴ of 1979, without even noting the available recent case law, e.g. the *McKee* case.¹⁵⁵ The Supreme Administrative Court did not go into details of the issue of court fees, which were discussed by the ECtHR on many occasions¹⁵⁶ and did not assess whether the obligation to pay the court fee for initiating the proceedings did not constitute an ‘excessive burden’ unjustifiably restricting the applicant’s access to a court. Instead, it just somewhat bluntly and superficially noted that the ECtHR jurisprudence (represented by the abovementioned *Airey* judgment) accepted limitation of access to a court resulting from imposition of court fees. As a matter of fact though, the Convention standard is a bit more nuanced. In the circumstances of the case pending before the Supreme Administrative Court the finding that the Convention was not violated seemed to be correct especially since the applicant did not even request for exemption from duty to pay the court fee. However, this does not mean, as the Court’s order suggests, that the ECtHR approves ‘any’ dismissal of the case motivated by failure to pay the court fee. Normally, it takes into account the circumstances of the case, the situation of the party to the proceedings, the nature of the proceedings (the ECtHR does not accept automatic dismissal of applications for exemptions from court fees in case of commercial companies), information presented by the interested party and the quality of reasoning of the domestic court.¹⁵⁷

Some courts decide to abuse the ECtHR case law by a ‘cherry-picking’ tactics i.e. invoking only such judgments that fit the assumption already made by the court. A good example of this approach is the ruling of the Supreme Administrative

¹⁵³ Case I GSK 2071/15 (Supreme Administrative Court, order, 20 November 2015).

¹⁵⁴ *Airey v Ireland*, App. no. 6289/73 (ECtHR, 9 October 1979).

¹⁵⁵ *McKee v Hungary*, App. no. 22840/07 (ECtHR, 3 June 2014).

¹⁵⁶ *Scordino v Italy*, App. no. 36813/97 (ECtHR, 29 March 2006), para. 201 and a whole series of other similar Italian cases, or *Apostol v Greece*, App. no. 40765/02 (ECtHR, 28 November 2006) which was devoted entirely to the question of court fees imposed on parties initiating judicial proceedings.

¹⁵⁷ See: P. Hofmański, A. Wróbel, ‘Komentarz do art. 6 EKPC’, [in:] Wróbel A. (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz. Tom I* (Wydawnictwo CH Beck 2010), p. 298 and the case law of the ECtHR referred to therein.

Court¹⁵⁸ rejecting the transcription of a foreign civil status act following the request of a homosexual couple desiring to register a British birth certificate of their daughter in the Polish birth register. The case was brought as a cassation complaint of the applicants from the judgment of the Łódź Administrative Court.¹⁵⁹ The applicants pleaded that the disputed judgment of the Court violated Art. 14 and 8 ECHR. The Łódź Administrative Court invoked the ECtHR judgment in *Gas and Dubois*¹⁶⁰ in which the Court found no violation of Art. 14 in conjunction with Art. 8 ECHR in a case concerning the ban of second-parent adoption for same-sex couples. However, the Strasbourg ruling was delivered by 6 votes to one. Three of the prominent judges (Costa, Spielmann and Berro-Lefèvre) presented concurring opinions in which they stressed that they hoped that “the French legislature will not merely be satisfied with the finding of no violation and will decide [...] to review this issue.”¹⁶¹ In these circumstances a national court should be careful before deciding to follow the stance taken in such judgment, especially when it was delivered in the area where fast developments of interpretation and evolution of interpretative consensus take place. The Supreme Administrative Court decided the case in December 2014, i.e. almost two years after the *X v Austria*.¹⁶² In the latter ruling the Strasbourg Court found violation of Art. 14 taken in conjunction with Art. 8 ECHR in a case concerning Austrian ban of second-parent adoption for same-sex couples. The Supreme Administrative Court disregarded these developments and instead abused the ECtHR ruling in *Schalk and Kopf* by limiting its reference to this case (in which the ECtHR for the first time decided that State Parties are obliged to introduce some type of formalisation for same-sex couples cohabitation¹⁶³) to the finding that “states are free to limit the access to marriage

¹⁵⁸ Case II OSK 1298/13 (Supreme Administrative Court, 17 December 2014).

¹⁵⁹ Case III SA/Łd 1100/12 (Regional Administrative Court in Łódź, 14 February 2013).

¹⁶⁰ *Gas and Dubois v France*, App. no. 25951/07 (ECtHR, 15 June 2012).

¹⁶¹ Concurring opinion of judge Costa joined by judge Spielmann in *Gas and Dubois*. The second concurring opinion was concluded with the following statement: “I echo Judge Costa’s call for the legislature to revisit the issue by bringing the wording of Art. 365 of the Civil Code into line with contemporary social reality.”

¹⁶² *X and Others v Austria*, App. no. 19010/07 (ECtHR, 19 February 2013).

¹⁶³ *Schalk and Kopf v Austria*, App. no. 30141/04 (ECtHR, 22 November 2010). In this case the Court ruled (para. 105) that “the area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes” and (para. 106) “the Austrian Registered Partnership Act, which came into force on 1 January 2010, reflects the evolution described above and is thus part of the emerging European consensus. Though not in the vanguard, the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act any earlier.” Clearly, the reasons why the Court found ‘no violation’ was that the legislative changes actually were introduced and whilst the State Parties enjoy margin of appreciation as regards the timing this is not the case for the decision to introduce recognition. This understanding of the Court’s stance was later confirmed in *Vallianatos and others v Greece*, App. nos 29381/09 and 32684/09 (ECtHR, 7 November 2013) and *Oliari and Others v Italy*, App. nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).

to same-sex couples.”¹⁶⁴ Transparently, the Supreme Administrative Court picked the ECtHR decisions to legitimize its own assessment, while at the same time abusing the actual standing accepted in the ECtHR case law. The Supreme Administrative Court even went on to disregard the well-settled case law of Polish courts concerning the duty to interpret domestic laws in accordance with the case law of the ECtHR and the Convention. The Court reproached the applicant for expecting it to construe Art. 47 of the Constitution (guaranteeing the respect for privacy and self-determination) in accordance with Art. 14 in conjunction with Art. 8 ECHR.¹⁶⁵ This case provided the opportunity to enter into dialogue with the ECtHR, which was not taken by the SAC. The domestic court actually failed to explore the standard developed by the Strasbourg Court and thus, instead of delivering a judgment encompassing a concurring or dissenting dialogue, it abused the ECtHR interpretation to enhance the persuasive power of its own judgment.

Finally, another well-settled practice of courts is to refer to ECtHR rulings through quotations from descriptive material (legal writings) instead of quotations made directly from the ECtHR decisions. A series of rulings of Supreme Administrative Court delivered in May 2015 provide a good example.¹⁶⁶ The Supreme Administrative Court cited a work published in one of on-line sources,¹⁶⁷ which referred to some ECtHR decisions,¹⁶⁸ however, no references were made in the Court’s reasoning to the decisions of the ECtHR themselves. The court did not actually read the relevant decisions of the ECtHR but limited itself to quoting the work evoking them.

In Lithuania one may trace the symptoms of a regular dialogue between domestic courts and the ECtHR. Certain (positive or negative) examples can be found in this contribution. As in the Czech Republic or Hungary, in Lithuania the Constitutional Court makes extensive references to the case law of the ECtHR.

¹⁶⁴ In Polish: “w orzecznictwie ETPCz przyjmuje się, że państwowi wciąż wolno ograniczać dostęp do związków małżeńskich parom osób tej samej płci (wyrok ETPCz z 24 czerwca 2010 r. w sprawie *Schalk i Kopf przeciwko Austrii*). Odnosi się to również do związków partnerskich.”

¹⁶⁵ In Polish: “tego warunku nie spełnia powołanie się w uzasadnieniu skargi kasacyjnej [...] na enigmatyczną konieczność wykładni art. 47 Konstytucji w szczególności rozpatrywanym łącznie z art. 8 oraz art. 14 Konwencji [...]”

¹⁶⁶ Cases: I OZ 419/15, I OZ 420/15 and I OZ 421/15 (Supreme Administrative Court, decisions, 6 May 2015).

¹⁶⁷ M. Stępień, ‘Nadużycie prawa do sądu – czy sądy są bezsilne względem piniaczy sądowych?’, [in:] M. Balcerzak, T. Jasudowicz, J. Kapelańska-Pręgowska (eds), *Europejska Konwencja Praw Człowieka i jej system kontrolny – perspektywa systemowa i orzecznicza* (Katedra Praw Człowieka, Wydział Prawa i Administracji, Uniwersytet Mikołaja Kopernika 2011), see in particular, p. 441.

¹⁶⁸ ECtHR cases: *Winer v United Kingdom*, App. no. 10871/84 (10 July 1986); *W. v Germany*, App. no. 11564/85 (4 December 1985); *Steward-Brady v United Kingdom*, App. no. 27436/95 (2 July 1997).

In the judgment of 28 September 2011¹⁶⁹ the Court analysed whether the Resolution of the *Seimas* of the Republic of Lithuania No. X-1569:

“On the Approval of the State Family Policy Concept” of 3 June 2008, is not in conflict with Paragraph 1 of Art. 6, Paragraph 1 of Art. 7, Paragraph 1 of Art. 38 of the Constitution of the Republic of Lithuania and the constitutional principle of a state under the rule of law.¹⁷⁰ The disputed Resolution consolidated the definitions of the notions of family (Item 1.6.9), harmonious family (Item 1.6.2), extended family (Item 1.6.4) and incomplete family (Item 1.6.6). In part III of the judgment the CC found that: “The constitutional concept of family must also be construed by taking account of the international commitments of the State of Lithuania that were undertaken after it had ratified the Convention for the Protection of Human Rights and Fundamental Freedoms [...]. Art. 8 of the Convention guarantees the right to respect for family life. The European Court of Human Rights [...] in its jurisprudence, which is important for the construction of Lithuanian law as a source of construction of law, has more than once analysed the concept of family. In the case *Marckx v Belgium* the ECHR held that the concept of family life is not confined to families formed on the basis of marriage and that it may cover other *de facto* relationships. The support and encouragement of the traditional family is in itself legitimate

¹⁶⁹ Case 21/2008 (Lithuanian Constitutional Court, 28 September 2011).

¹⁷⁰ See also another example of extensive reference to the ECtHR practice by the Lithuanian Constitutional Court in Judgment of the Lithuanian Constitutional Court of 12 April 2013 on the duty to provide the information about a person to whom a vehicle was entrusted, case no. 8/2010–132/2010, § 11, where it held that the right to remain silent and the privilege against self-incrimination are not absolute (the judgment of 8 July 2004 in *Weh v Austria* (App. no. 38544/98); it does not follow that any direct compulsion will automatically result in a violation; although the right to a fair trial under Art. 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. In order to determine whether the essence of the right to remain silent and privilege against self-incrimination was infringed, a court must take into account the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put (the judgment of 29 June 2007 in the case of *O’Halloran and Francis v the United Kingdom* (App. nos 15809/02 and 25624/02). The ECtHR has also noted that the obligation to inform the authorities is a common feature of the Contracting States’ legal orders and that it may concern a wide range of issues (e.g., the obligation to reveal one’s identity to the police in certain situations) (the judgment of 8 July 2004 in the case of *Weh v Austria* (App. no. 38544/98)). The ECtHR, when considering the cases concerning the liability of owners (holders) of vehicles for non-compliance or improper compliance with the obligation to indicate the identity of the driver, held that an impending sanction for refusal to disclose the identity of the driver or an inaccurate disclosure of the information does not violate the right to remain silent (Art. 6 of the Convention) (the judgment of 8 July 2004 in the case of *Weh v Austria* (App. no. 38544/98); the judgment of 29 June 2007 in the case of *O’Halloran and Francis v the United Kingdom* (App. nos 15809/02 and 25624/02)). It is merely the obligation of a person who is the registered car owner to give information as to who was driving the car; a simple fact – namely who was the driver of the car – is not in itself incriminating (the judgment of 8 July 2004 in the case of *Weh v Austria* (App. no. 38544/98)).

or even praiseworthy, however, in the achievement of this end recourse must not be had to measures whose object or result is to prejudice the natural family, since the members of such a family enjoy the guarantees of Art. 8 of the Convention (which regulates *inter alia* the right to respect for family life) on an equal footing with the members of the traditional family [...]. The right to family life not merely implies a duty for the states to abstain from unlawful interference with a person's family life, but there may be also positive obligations necessary to ensure effective protection of this right of the person [...]. When establishing what relationships are encompassed by the notion 'family life', a great number of factors might be taken into consideration, e.g., the living together, permanence of the relationship, character of the demonstrated mutual obligations, etc. In the opinion of the ECHR, the notion 'respect for family life' means that biological and social reality prevail over a legal presumption, which flies in the face of established facts (judgment of 27 October 1994 in the case *Kroon and others v The Netherlands*, Application no. 18535/91). Family life may be established even if the relationship between persons has ended. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down (judgment of 26 May 1994 in the case *Keegan v Ireland*, Application no. 16969/90). Construing the concept of family life, the ECHR has been gradually broadening it and has held that the concept of family life encompasses the relationships of not only parents (married or unmarried) with their children, but also interrelationships between other persons, *inter alia* ties between near relatives. In the aforementioned case *Marckx v Belgium* it was held that family life includes at least the ties between near relatives (for instance those between grandparents and grandchildren), since such relatives may play a considerable part in family life (judgment of 13 June 1979 in the case *Marckx v Belgium*, Application no. 6833/74). In other case, into the concept of family life, the ECHR also included the 'family life' of brothers and sisters (judgment of 26 September 1997 in the case *El Boujaïdi v France*, Application no. 25613/94) [...].¹⁷¹

Although the deliberations on the 'concept of family life' in the ECtHR case law are quite elaborate, one may be struck by the lack of reference to the more recent practice of the ECtHR concerning the topical issue, such as *S.H.*¹⁷² (family life-related problems of artificial fertilization), *Schalk and Kopf* (right of same-sex couples to respect of family life¹⁷³) or *Elsholz*¹⁷⁴ (family life of 'parties living together out of wedlock'). Therefore, it seems appropriate to qualify this judgment to the category of a 'fake dialogue' simply because a proper dialogue assumes some regularity and reflecting of the current scene of interpretation of the Convention. When the judgment lacks these features, it can hardly be deemed as belonging to a 'proper dialogue' with the ECtHR.

¹⁷¹ Case 21/2008 (Lithuanian Constitutional Court, 28 September 2011) 22, paras III.1–III.1.3.

¹⁷² *S.H. and others v Austria*, App. no. 57813/00 (ECtHR, 1 April 2010) subsequently referred to the Grand Chamber (judgment of 3 November 2011).

¹⁷³ Referred to above.

¹⁷⁴ *Elsholz v Germany*, App. no. 25735/94 (ECtHR, 13 July 2000).

3.3. The Failed (Non-attempted) Dialogue: Cases of Non-implementation of the ECHR Standard

3.3.1. Poland

The practice of Polish courts provides for examples of non-implementation of the standard resulting from ECtHR decisions. It appears where courts simply ignore the duty of ‘taking into account’ the case law of Strasbourg.

The European Court of Human Rights on several occasions dealt with the status of ‘assessors’ (junior judges) in the Polish criminal proceedings. In the leading case *Henryk Urban and Ryszard Urban v Poland*¹⁷⁵ and subsequently in the case *Mirośław Garlicki v Poland*¹⁷⁶ the ECtHR formulated the twofold test applicable in cases concerning the alleged violation of Art. 6 or Art. 5(3) ECHR where assessors decided on the application of a temporary arrest warrant. The first element of this test concerns the institutional deficiency of an assessor who can be removed from his or her judicial office at any time by the Minister of Justice (a political officer and member of the government). The assessors do not enjoy, therefore, a sufficient independence *vis-à-vis* the executive. The second element of the ECtHR test is whether the circumstances of a particular case could give rise to a legitimate suspicion that the Minister of Justice took an interest in the proceedings. However, even in the absence of the second element, the standards stemming from the aforementioned provisions of the Convention fail to be met. One has to note that the deficient status of assessors in criminal proceedings had been – prior to the date of each of the ECtHR’s rulings – subject to constitutionality review held by the Polish Constitutional Court. It found¹⁷⁷ that Polish law making it possible for the assessors to perform judicial functions and – *inter alia* – decide on the application of temporary arrest warrants (Art. 135(1) of the Act on the Organisation of Courts) is incompatible with Art. 45(1)(1) of the Constitution – a provision which is essentially a corollary of the guarantee afforded by Art. 6 ECHR. The Constitutional Court invoked Art. 6 ECHR¹⁷⁸ and held that “the principal argument indicative of the unconstitutionality of the vesting of judicial powers in an assessor is the admissibility of his or her dismissal, including even during the period in which an assessor exercises judicial powers.” Acting under Art. 190(3) of the Constitution the Constitutional Court decided that “the provision mentioned in the first part of the operative part of the judgment (section 135(1) of the 2001 Act) will lose

¹⁷⁵ *Henryk Urban and Ryszard Urban v Poland*, App. no. 23614/08 (ECtHR, 30 November 2010), see in particular paras 45–56.

¹⁷⁶ *Mirośław Garlicki v Poland*, App. no. 36921/07 (ECtHR, 14 June 2011), see in particular paras 106–116.

¹⁷⁷ Case SK 7/06 (Polish Constitutional Court, 24 October 2007).

¹⁷⁸ Even though the case was decided as a direct constitutional complaint where the exclusive grounds of constitutionality review is the Constitution itself and not any international treaty including ECHR.

its binding force eighteen months after the promulgation of the judgment in the Journal of Laws of the Republic of Poland¹⁷⁹ and “the acts of the assessors referred to in section 135(1) of the 2001 Act shall not be subject to a challenge on the basis of Art. 190(4) of the Constitution.”¹⁸⁰ However, even though the decisions of assessors could thus not be challenged as incompatible with the Constitution, the ECHR constitutes an independent source of law and nothing prevented the courts from challenging the decisions of assessors as incompatible with the Convention. In these circumstances the Provincial Court in Opole¹⁸¹ and the Wrocław Appellate Court¹⁸² dealt with the lawsuit of J. W. who claimed compensation for unlawful custody, which was applied by the District Court where the assessor sat on the bench. The claimant invoked the ECtHR judgment in the *Garlicki* case. The courts dismissed his claims stating among others that “the decision of the ECtHR of 14 June 2011 in case [*Garlicki*] refers to particular and individually defined factual circumstances and subjects/individuals related thereto whereas it has no direct application to the situation of Mr. J. W.”; “decisions of ECtHR finding violation of the Convention do not eliminate from the domestic legal system of the provisions whose application led to the infringement of norms of the Convention.”¹⁸³ They added that “ordinary courts are bound by Art. 190(1) of the Constitution and they apply the decisions of the Constitutional Court having general applicability and thus the acts of the assessor taken when the provision granting him or her judicial function remained in force were taken within statutory competence.”¹⁸⁴ In other words, the courts found the decision of the assessor depriving the applicant of his liberty ‘compatible with law’ even though it was clear according to the ECHR standard that it was not the case. The courts disqualified both the normative effect of the Convention and the binding force of the ECtHR decisions and disregarded their duty resulting from Art. 1 ECHR.

The *Garlicki* case had yet another interesting consequence in the Polish judicial practice concerning the presumption of innocence. One of the reasons why *Garlicki* claimed violation of certain provisions of ECHR was the fact that on the day

¹⁷⁹ Case SK 7/06 (Polish Constitutional Court, 24 October 2007), para. II.1 of the operative part of the judgment.

¹⁸⁰ Ibidem, para. II.2 of the operative part of the judgment.

¹⁸¹ Case III Ko 337/11 (Provincial Court in Opole, 16 September 2011).

¹⁸² Case II Aka 17/12 (Court of Appeal in Wrocław, 16 February 2012).

¹⁸³ Case II Aka 17/12 (Court of Appeal in Wrocław, 16 February 2012), para. 2 of the conclusions (in Polish: “orzeczenia ETPCz stwierdzające naruszenie przepisów Konwencji o ochronie wolności i podstawowych praw nie eliminuje z wewnętrznego porządku prawnego przepisu, którego zastosowanie doprowadziło do naruszenia norm konwencyjnych”).

¹⁸⁴ Ibidem, para. 3 of the conclusions (in Polish: “sądy powszechne zobowiązane treścią art. 190 ust. 1 Konstytucji stosują orzeczenia Trybunału Konstytucyjnego, które mają moc powszechnie obowiązującą, tym samym czynności asesora sądowego podjęte w czasie obowiązywania przepisu nadającego mu uprawnienia sądenia podjęte zostały w ramach ustawowych kompetencji”).

following the applicant's arrest, the Minister of Justice, at that time acting also as the Prosecutor General, organised a press conference during which he stated when referring to Garlicki that "the information gathered and the evidence obtained mean that today we can tell you clearly: Doctor G., acting the part of a virtuoso of Polish cardiac surgery, is a ruthless and cynical bribe-taker. We have knowledge of several dozen bribes accepted by this doctor" and added that "no-one else will ever again be deprived of life by this man."¹⁸⁵ The Minister's media show was fiercely criticised by human rights' bodies and organisations. The ECtHR assessed in this context that

it is the duty of the highest-ranking State officials, in particular those with responsibility for the prosecution authorities and administration of justice, to respect the presumption of innocence, one of the fundamental principles of the legal order, and to exercise particular caution when formulating any statements in relation to on-going criminal proceedings. The Court considers that any statement of a high-ranking State official disregarding the principle of presumption of innocence is even more objectionable as it may be seen as a direction addressed to subordinate officials.¹⁸⁶

After the delivery of the ECtHR judgment in *Garlicki* case, the Provincial Court in Gliwice¹⁸⁷ and the Court of Appeal in Katowice¹⁸⁸ dismissed the lawsuit of some Mr. M. C. against the State Treasury – the President of the District Court in X. Mr. M. C. claimed compensation from the State Treasury for the defamation allegedly caused by the President of the Criminal Division of the District Court in X who requested the Prosecution to commence criminal proceedings against M. C. in the letter whose title was "notification of the crime committed" (Pol. *zawiadomienie o popełnieniu przestępstwa*) instead of "notification of the suspected crime" (Pol. *zawiadomienie o podejrzeniu popełnienia przestępstwa*). Polish courts found that the somewhat ultimate formulation of the title of the letter sent by the judge was 'oversight or inaccuracy' and the real intention of that letter was to notify about the suspicion that the crime had been committed. One may argue though that especially a highly qualified lawyer and an impactful member of the administration of criminal justice such as the President of the Criminal Division of the Court must be expected to observe the principle of presumption of innocence with particular caution, as held by the ECtHR in the *Garlicki* case. The Appellate Court, while referring to the *Garlicki* case, held that "it does not constitute a precedent for the present case" since the *Garlicki* case "concerned the statement of the state official" (apparently judges do not seem to be 'state officials' in the perception of the Katowice Appellate Court) and in the *Garlicki* case the impugned statement was "the opinion that the [applicant]

¹⁸⁵ Both citations are taken verbatim from the ECtHR judgment.

¹⁸⁶ *Miroslaw Garlicki v Poland*, *op. cit.* (n. 176) para. 133.

¹⁸⁷ Case XII C 242/11 (Provincial Court in Gliwice, 29 March 2012).

¹⁸⁸ Case V ACa 535/12 (Court of Appeal in Katowice, 13 February 2014).

was guilty” whereas in the present case the opinion concerned the ‘state of suspicion’ only.¹⁸⁹ Nevertheless it appears that the *Garlicki* standard was clearly disregarded in the present case.

It is a well-settled jurisprudence of the ECtHR that

the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.¹⁹⁰

This is why one is allowed in a democratic society to refer to a politician as a “dictator”,¹⁹¹ a “neo-Nazi organisations’ cover provider”,¹⁹² a “typical cerebral bankrupt who is lucky to be living in a country with such a limited pool of human resources that a person of his characteristics can even end up in Parliament”,¹⁹³ “[the King of Spain] who is in charge of the torturers, who defends torture and imposes his monarchical regime on our people through torture and violence”¹⁹⁴ or simply “an idiot”.¹⁹⁵ The intensity of criticism and the choice of means of expressing this criticism is subject to a greater level of tolerance in particular when a politician “clearly intended to be provocative and consequently to arouse strong reactions.”¹⁹⁶

Against this background certain Polish courts dealt with the case of football fans accused of “ostentatiously and publicly expressing defiance of the constitutional bodies of the Republic of Poland”¹⁹⁷ by shouting during a clearly political manifestation “Donald, you chump, your government will be overthrown

¹⁸⁹ *In extenso*: “W żadnym przeto wypadku wyrok Europejskiego Trybunału Praw Człowieka z 14 czerwca 2011 roku – sprawa M. G. przeciwko Polsce, skarga nr [...] nie mógł mieć precedensowego charakteru w niniejszej sprawie, gdy zarzut naruszenia art. 6 ust. 2 podniesiony został z powodu wypowiedzi wygłoszonej przez urzędnika państwowego. Trybunał uznał za celowe przypomnienie że zasada domniemania niewinności zostaje naruszona w sytuacji, jeżeli postanowienie sądowe lub wypowiedź urzędnika państwowego dotyczące osoby oskarżonej o popełnienie czynu zagrożonego karą zawiera opinię, że osoba ta jest winna zanim jeszcze wina została jej udowodniona zgodnie z prawem. Należy jednakowoż odróżnić stwierdzenia wyrażające opinię, że dana osoba jest winna od stwierdzeń opiniujących jedynie ‘stan podejrzenia’. Te pierwsze naruszają bowiem zasadę domniemania niewinności, podczas gdy te drugie uznane zostały za niekwestionowalne w różnych sytuacjach badanych przez Trybunał.”

¹⁹⁰ See e.g. instead of many other similar: *Cojocar v Romania*, App. no. 32104/06 (ECtHR, 10 February 2015), para. 25.

¹⁹¹ *Cojocar v Romania*, App. no. 32104/06 (ECtHR, 10 February 2015), para. 7.

¹⁹² *Brosa v Germany*, App. no. 5709/09 (ECtHR, 17 April 2014), para. 7.

¹⁹³ *Mladina D.D. Ljubljana v Slovenia*, App. no. 20981/10 (ECtHR, 17 April 2014), para. 7.

¹⁹⁴ *Otegi Mondragon v Spain*, App. no. 2034/07 (ECtHR, 15 March 2011), para. 10.

¹⁹⁵ *Oberschlick v Austria*, App. no. 20834/92 (ECtHR, 1 July 1997), para. 9.

¹⁹⁶ *Ibidem*, para. 31.

¹⁹⁷ Art. 49 of the Code of Petty Crimes.

by hooligans!”¹⁹⁸ which was a rather explicit expression of discontent regarding the policy of the Donald Tusk cabinet. The Courts of both instances,¹⁹⁹ even though only the first instance court found the accused guilty and the second instance court discontinued the proceedings (due to expiration), did not doubt that “although the case law, including in particular the ECtHR jurisprudence, accepts that the limits of criticism (assessment) towards public figures are by all means more flexible than in case of ‘regular citizens’ [...], nevertheless these assessments must be expressed in such a way as not to infringe the dignity and reputation of the criticised figure, including a politician.”²⁰⁰ The Strasbourg nod as good as a wink to a blind Polish horse. This case deserves further comment. One would accept the stance taken by domestic courts had they explained why they departed from the ECtHR standard of interpretation of Art. 10 ECHR in cases concerning criticism towards prominent politicians. In fact, there could be a reason to do so. Poland is facing an unprecedented deluge of hatred towards politicians, including regular verbal lynching. This hatred is spread by politicians (and their paid ‘Internet trolls’²⁰¹) but also by regular citizens, especially on-line. Perhaps it would be wise and desirable to reconsider the limits of criticism towards politicians since one may fear that this flood of hatred threatens the foundations of democratic debate which in contemporary Poland does not even pretend to concern the exchange of rational arguments in order to protect the common good but rather turns into a sort of verbal wrestling. However, in the case at stake the Białystok Provincial Court did not attempt to discuss the case law of the ECtHR critically, but chose to disregard it and make a disappointedly obscure statement that criticism towards politicians must not compromise their reputation. What a lost opportunity.

In the *Potomska and Potomski* case²⁰² the ECtHR dealt with the problem of immovables constituting historic monuments. Their owners cannot trigger the expropriation by the State. Pursuant to Art. 50 of the 2003 Protection and Conservation of Monuments Act²⁰³ it is only the public authorities who can initiate the expropriation proceedings concerning real property amounting to historic monuments (immovable monuments may be expropriated at the re-

¹⁹⁸ In Polish: *Donald, matole, twój rząd obalą kibole!*

¹⁹⁹ Case XIII W 1838/12 (Białystok District Court, 14 March 2013) and Case VIII Ka 499/13 (Białystok Provincial Court, 3 October 2013).

²⁰⁰ Case VIII Ka 499/13 (Provincial Court in Białystok, 3 October 2013): “choć w orzecznictwie, także europejskim, zwłaszcza ETPCz, ugruntował się pogląd, że granice krytyki (oceny) osób publicznych są dalece bardziej elastyczne niż w stosunku do ‘zwykłych obywateli’ [...], tym niemniej jednak oceny owe winny być wyrażane w sposób nienaruszający czci i dobrego imienia krytykowanego (także polityka).”

²⁰¹ I take this term from J. Bishop, ‘The effect of de-individuation of the Internet Troller on Criminal Procedure implementation: An interview with a Hater’ (2013) 7 *International Journal of Cyber Criminology* 28.

²⁰² *Potomska and Potomski v Poland*, App. no. 33949/05 (ECtHR, 29 March 2011).

²⁰³ Act of 23 July 2003 on the protection and conservation of monuments (O.J. 2014, item 1446).

quest of a regional inspector only where there is a risk of irreversible damage to the monument). The owner himself is not legally entitled to institute such proceedings. The Potomskis were interested in being expropriated since they had purchased a plot of land which was subsequently found an immovable monument (Jewish cemetery) and thus became useless for the Potomskis' intended economic purposes as nothing could be constructed on the site. The ECtHR found that "the domestic law did not provide a procedure by which the applicants could assert before a judicial body their claim for expropriation and require the authorities to purchase their property." According to the Committee of Ministers' information on the execution of *Potomski* judgment, the government intended to propose a bill allowing property owners to institute proceedings aimed at expropriation.²⁰⁴ However, no progress was achieved to date. Quite on the contrary, the Ministry of Culture claimed that no legislative intervention is necessary since ECtHR had not pointed out at the indispensability of legislative amendments. The implementation of the judgment could well be assured by a proper interpretation of Art. 50 of the Protection and Conservation of Monuments Act, including some form of indirect effect of Art. 1 of Protocol 1 ECHR. The regional inspector can construe the provision of Polish law by 'taking into account' the Strasbourg case law and decide that a risk of irreversible damage to a monument occurs also where the owner declares his/her *désintéressement* in maintaining the proper condition of a monument. Until appropriate legislative changes are introduced, domestic courts should be invited to consider whether the entry of an immovable to the register of monuments, which imminently leads to the restriction of the right to property is compatible with the Convention where no sufficient scheme of compensation is provided for by the legislation. Instead, Polish courts make the ECtHR judgment shallow by stating simply that it concerned the impossibility of instituting the expropriation by the owner concerned and did not refer to the issue of entering the monument to the register.²⁰⁵ Perhaps a more principled approach of administrative courts would encourage the government to implement the *Potomski* ruling in a prompt manner.

²⁰⁴ Source: Council of Europe, 'Reports', <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Potomski&StateCode=&SectionCode=>> (access: 28 February 2016).

²⁰⁵ See e.g.: Case II OSK 1512/11 (Supreme Administrative Court, 14 December 2012) where the Court held that "zarówno w powołanym wyżej wyroku Europejskiego Trybunału Praw Człowieka, jak i w wystąpieniu Rzecznika Praw Obywatelskich problem dotyczy nie samego wpisu do rejestru zabytków, jak ma to miejsce w niniejszej sprawie, a kwestii związanych ze sposobem rekompensaty Państwa z tytułu ograniczenia prawa własności. Trybunał nie negował konieczności ochrony zabytków. Krytycznie odniósł się natomiast do braku skutecznego działania Państwa w celu zapewnienia skarżącym sprawiedliwego odszkodowania z tytułu wpisu do rejestru zabytków."

The ECtHR ruled in the case *Bugajny v Poland*²⁰⁶ concerning expropriation that in the situation where the plot of land is divided by means of administrative decision into smaller plots and some of them are designated to be public roads, the refusal to grant compensation from public funds for such limitation of use of the plots constitutes the disproportionate interference with the right guaranteed by Art. 1 of Protocol No. 1 ECHR. Some of the administrative courts in Poland took the way paved by the ECtHR.²⁰⁷ However, the Warsaw Administrative Court²⁰⁸ ruled that were the administrative decision on the division of plot was conditional upon the establishment of the land easements or the transfer of co-ownership, the right to peaceful enjoyment of property is not interfered. The *Bugajny* judgment was found to be irrelevant in the circumstances of the case.²⁰⁹ One can hardly accept this stance. In the end of the day the previous owner's rights are limited as he cannot enjoy the object of his right as he had before and this constitutes an obvious interference with the right to a peaceful enjoyment of property.

3.3.2. Other CEE States

Examples of failed (unattempted) dialogue may be found in the practice of ordinary courts in Czech Republic. The references to the case law of the ECtHR are sometimes superficial and not in-depth. For instance, in a case concerning the Police provocation consisting of instigation to a crime (i.e. the type of provocation where the accused did not have the intention of committing a crime and he eventually gained such intent after being instigated to do so by the Police) the High Court in Olomouc²¹⁰ only remarked that “the case law of the ECtHR leads to the conclusion that public authorities must prove that the intention to commit a crime, manifested by fulfilment of its features, existed even without the action of the Police.”²¹¹ No decision of the ECtHR was quoted, in spite

²⁰⁶ *Bugajny v Poland*, App. no. 22531/05 (ECtHR, 6 November 2007), paras 67–75.

²⁰⁷ See e.g.: Case II SA/Sz 241/14 (Szczecin Administrative Court, 3 July 2014) or Case II SA/Wr 311/14 (Wrocław Administrative Court, 23 July 2014).

²⁰⁸ Case I SA/Wa 1745/14 (Warsaw Administrative Court in Warsaw, 1 August 2014).

²⁰⁹ In Polish: “brak jest podstaw do przyznania odszkodowania w sytuacji, gdy wydzielone działki gruntu nie przeszły z mocy prawa na Skarb Państwa, czy gminę, albowiem nie zostały wydzielone pod drogi publiczne, a właściciel ma możliwość w ramach dostępnych mu instrumentów prawnych skutecznie sprzeciwić się korzystaniu z drogi, albo gdy korzystanie z drogi wewnętrznej przez innych właścicieli działek powstałych w wyniku podziału nieruchomości odbywa się w ramach służebności gruntowej [...]. W niniejszej sprawie z taką sytuacją mamy do czynienia. Z decyzji podziałowej wynika, że warunkiem podziału było ustanowienie służebności drogowych lub sprzedaż udziałów w drodze wewnętrznej (art. 99 u.g.n.). Tym samym, w ocenie Sądu, wyrok Europejskiego Trybunału Praw Człowieka z dnia 6 listopada 2007 r. w sprawie [*Bugajny*] nie znajduje odniesienia do niniejszej sprawy.”

²¹⁰ Case 1 To 35/2011 (Vrchní soud v Olomouci, 18 August 2011).

²¹¹ In Czech: “Evropský soud pro lidská práva ve své judikatuře zdůrazňuje, že státní orgány musí prokázat, že by čin – a to určitý, zcela konkrétní čin naplňující znaky skutkové podstaty některého trestného činu – byl spáchán i bez podnětu ze strany Policie.”

of a rather generous record of jurisprudence concerning the topical issue.²¹² Similarly, in another case concerning the delayed proceedings (alleged violation of Art. 6 ECHR) the Provincial Court in Plzeň²¹³ briefly noted the interpretative standard of Art. 6 ECHR without quoting any ECtHR decisions to prove the existence of such standard.²¹⁴

Two important cases in recent years, illustrating the practice of application of ECHR standards and dialogue between the Strasbourg Court and courts of Ukraine, were *Timoshenko* and *Volkov*, both of significant political flavour. Both cases concerned important public figures (a famous politician and a prominent member of the highest judicial authority) and in both cases it took a political turmoil rather than abnormal process of implementation of the judgment to accomplish the task of fulfilling the requirements stemming from the Convention.

The first case concerned the unlawful detention of the former Ukrainian Prime Minister Yuliya Tymoshenko.²¹⁵ The ECtHR described the continuing detention of Tymoshenko as “arbitrary and unlawful” and explained that “it transpires from the detention order, as well as the prosecutor’s application for this measure and its factual context, the main justification for the applicant’s detention was her supposed hindering of the proceedings and contemptuous behaviour. This reason is not among those, which would justify deprivation of liberty under Art. 5(1)(c) ECHR. Moreover, it remains unclear for the Court how the replacement of the applicant’s obligation not to leave town by her detention was a more appropriate preventive measure in the circumstances.”²¹⁶ It further observed “on the whole the domestic law does not provide for the procedure of review of the lawfulness of continued detention after the completion of pre-trial investigations satisfying the requirements of Art. 5(4) of the Convention”,²¹⁷ neither the “procedure in Ukrainian law for bringing proceedings to seek compensation for a deprivation of liberty found to be in breach of one of the other paragraphs of Art. 5 by this Court.”²¹⁸ Despite the gravity of these findings and the binding effect of Art. 1 and 46 of the Convention, it took further 8 months to release Tymoshenko, however, the reason for freeing her was not the obligation to implement the ECtHR’s decision, but the revolution in the streets of Ukrainian cities and the change of the ruling political forces.

²¹² See e.g.: the jurisprudence quoted in *Veselov and Others v Russia*, App. nos 23200/10, 24009/07 and 556/10 (ECtHR, 2 October 2012).

²¹³ Case 8 To 163/2004 (Krajský soud v Plzni, 17 May 2004).

²¹⁴ In Czech: “Nápravu porušení práva na projednání věci v přiměřené lhůtě ve smyslu citovaného článku 6 odst. 1 Úmluvy zajišťuje v podobných případech Evropský soud pro lidská práva přiznáním zadosťučnění obviněné osobě. Akceptuje ovšem i ty případy, kdy přímo státní orgán (soud) poskytne náhradu ve formě zmírnění trestu.”

²¹⁵ *Tymoshenko v Ukraine*, App. no 49872/11 (ECtHR, 30 April 2013).

²¹⁶ *Ibidem*, paras 270 and 271.

²¹⁷ *Ibidem*, para. 281.

²¹⁸ *Ibidem*, para. 286.

The *Volkov* case²¹⁹ concerned the former judge and President of the Military Chamber of the Ukrainian Supreme Court. In 2007 he was elected by the Assembly of Judges of Ukraine to the post of a member of the High Council of Justice (the body responsible i.a. for advising on the appointment or discharging of judges), however, it required from the applicant to take the oath before the Parliament. The Parliamentary Committee objected while suggesting that the issue of the decision concerning the applicant's predecessor whose term of office was terminated by the Assembly of Judges had to be examined first. Also, some members of the Parliament lodged requests with the High Council of Justice, asking that it carries out preliminary inquiries into possible professional misconduct by the applicant. In 2010 the Parliament voted for the dismissal of the applicant from the post of a judge for 'breach of an oath' (what is noteworthy – he has never taken the oath) and adopted a resolution to that effect. The decision of the Parliament was taken after the High Council of Justice took the decision on making the submission to the Parliament. The applicant challenged those decisions before the 'special chamber' of the Higher Administrative Court, to no effect though. As for the Higher Administrative Court the Venice Commission found that "the composition of the [...] highly influential so-called 'fifth chamber' of the [Higher] Administrative Court should be precisely determined by the law in order to comply with the requirements of the fundamental right of access to a court pre-established by the law", whereas in reference to the High Council of Justice it stated that "the composition of the High Council of Justice of Ukraine still does not correspond to European standards."²²⁰ The applicant brought a complaint to the ECtHR which declared that Art. 6(1) ECHR was violated in respect of the applicant in four aspects, namely "as regards the principles of an independent and impartial tribunal", "as regards the principle of legal certainty and the absence of a limitation period for the proceedings against the applicant", "as regards the principle of legal certainty and the dismissal of the applicant at the plenary meeting of Parliament" and "as regards the principle of a tribunal established by law." The Court also found that "there has been a violation of Art. 8 of the Convention." The ECtHR ruled that "Ukraine shall secure the applicant's reinstatement to the post of judge of the Supreme Court at the earliest possible date." The 'earliest possible date' turned out to be 2 February

²¹⁹ *Volkov v Ukraine*, App. no. 21722/11 (ECtHR, 9 January 2013).

²²⁰ *Ibidem*, para. 79. See also: Buquicchio G., Dürr S.R., '*Volkov v Ukraine* and the Venice Commission's Approach to Structural Independence of the Judiciary', <http://www.venice.coe.int/CoCentre/Buquicchio_Durr_Volkov.pdf> (access: 28 February 2016), where the Venice Commission concluded i.a. that "The judgment of *Volkov v Ukraine* by the European Court of Human Rights confirms that the right to a fair trial under Art. 6 of the Convention not only depends on the circumstances of the individual case, but also on whether there are sufficient guarantees for structural independence of the judiciary. Only when such guarantees are in place, a fair trial can take place in an individual case."

2015,²²¹ in spite of several earlier occasions where vacancies appeared allowing to reinstate Mr. Volkov.²²² It took 2 years, the Euromaidan revolution and the collapse of the Yanukovych government for the judgment to be implemented. This was not exactly the success story of the ECHR effective and not illusory implementation.

One may conclude, taking these examples into account, that the Convention standards failed to be effectively implemented by the Ukrainian judiciary. In none of these two cases the judicial system worked as the effective tool to implement rights and freedoms guaranteed by the Convention. The happy endings in both cases resulted from major political upheavals and not from the dialogue between the Ukrainian judiciary and the ECtHR.

In spite of the legislative framework and the promising directives coming from the Supreme Court, the analysis shows that Russian judges are generally unwilling to follow the standard resulting from the Convention.²²³

Burkov²²⁴ reminds that Russian accession to the Convention was – if viewed from a legal perspective – premature and guided by political motivations. He notes that the implementation of the Convention in a day-to-day practice of Russian courts is unsatisfactory and a substantial imbalance appears between normative provisions and a judicial practice. In his opinion, the optimistic perspective that one may take on the basis of the documents mentioned above is spoiled by the fact that even the Supreme Court and the Supreme Arbitrazh Court of Russia do not follow their own ‘guidelines’ regarding the implementation of the ECHR. The research of Burkov shows that e.g. between 5 May 1998 and 1 August 2004 only 8 out of 3911 scrutinized decisions of the Supreme Court attempted to assess the compliance with the Convention. None of these decisions contained reference to the case law of the ECtHR. In case of Arbitrazh courts²²⁵ only 23 decisions mentioned the Convention at all (out of 38,068 decisions), out of which 8 referred to

²²¹ See: Supreme Court of Ukraine, ‘Mr Oleksandr Volkov Was Reinstated to his Post of a Judge of the Supreme Court of Ukraine’, <[http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/\(documents\)/40758947BA3FE9EAC2257DE00054D6B5?OpenDocument&year=2015&month=02&](http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/(documents)/40758947BA3FE9EAC2257DE00054D6B5?OpenDocument&year=2015&month=02&)> (access: 1 January 2016).

²²² See e.g.: The Foundation Judges for Judges, Letter of 29 August 2013 pointing out that the vacancies were available in order to implement the ECtHR judgment already in July 2013, <http://www.mdx.ac.uk/__data/assets/pdf_file/0019/58240/brief-case-Volkov.COM-290813def.doc.pdf> (access: 1 January 2016).

²²³ See broadly e.g., [in:] A. Trochev, ‘All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia’ (2009) 2 *Demokratizatsiya*, p. 145; A.L. Burkov, *The Impact of the European Convention on Human Rights on Russian Law. Legislation and Application in 1996–2006* (ibidem-Verlag 2007).

²²⁴ Extensive reference to: A.L. Burkov, ‘Implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts’ (2006) 1 *Russian Law: Theory and Practice*, p. 68. See also: idem, ‘Применение Европейской конвенции о защите прав человека в судах России’ (2006) 6 *Международная защита прав человека*.

²²⁵ Arbitrazh courts are part of regular Russian judiciary adjudicating in commercial disputes and those involving business entities – see: *Handbook on commercial dispute resolution in the*

a specific provision of the Convention. Not a single reference to the case law was traced. Burkov proves that invoking the Convention without referring to the case law leads to confusions and misinterpretations: in one of the cases²²⁶ the Supreme Court found that reassignment of police officers to a different place of service violates Art. 4 ECHR (prohibition of forced labour), which has never been construed from this provision by the ECtHR, whereas in another case²²⁷ the Supreme Court applied Art. 14 ECHR as a free-standing standard. The experience of human rights watchdogs, presented by Burkov, is that not in a single case judges of Russian courts invoke the Convention (let alone the case law) of their own initiative. Positive examples are extremely rare and these are the solicitors that inalienably provoke them.²²⁸

In Lithuania, like in Hungary, Czech Republic or Poland, the practice of ordinary courts is divergent and sometimes it is far from the proper dialogue with the ECtHR described above. References are sometimes superficial and not in-depth, whereas sometimes the dialogue consists of proper analysis of the Strasbourg *acquis*. For instance, in one of the cases the Supreme Court of Lithuania, confronted with a plea alleging the breach of Art. 6(2) ECHR by violating the principle of presumption of innocence,²²⁹ only briefly noted that the said principle is guaranteed by Art. 31 of the Constitution of the Republic and it had not been violated.²³⁰ No references to ECtHR case law were made in spite of the existence of the variety of relevant ECtHR jurisprudence.²³¹ It is striking that the Convention background was not discussed taking into consideration that the applicant invoked Art. 6 ECHR.

Russian Federation, <<http://www.ita.doc.gov/goodgovernance/adobe/Chapter%201/1-A%20Arbitrazh%20Courts.pdf>> (access: 5 February 2016).

²²⁶ *Appeal of the Trade Union of Personnel of the Militia of the City of Moscow v Ministry of Internal Affairs* (Supreme Court of the Russian Federation, 16 November 2000).

²²⁷ *Kolotkov v Government of the Russian Federation* (Supreme Court of the Russian Federation, 13 March 2003).

²²⁸ Burkov invokes in this respect the decision of the Presidium of the Sverdlovsk Region Court of 13 July 2005 which applied Art. 6 ECHR and extensively quoted *Posokhov v Russia*, App. no. 63486/00 (ECtHR, 4 March 2003). A.L. Burkov, 'Implementation of the Convention...' (n. 224), p. 75.

²²⁹ Case 2 K-123/2010 (Supreme Court of Lithuania, 30 March 2010).

²³⁰ In Lithuanian: "Kasatorių argumentai dėl BPK 44 straipsnio 6 dalies ir EŽTK 6 straipsnio 2 dalies nuostatų pažeidimų yra nepagrįsti ir teisės taikymo aspektu nepriimtini. BPK 44 straipsnio 6 dalyje ir EŽTK 6 straipsnio 2 dalyje yra įtvirtintas nekaltumo prezumpcijos principas. Toks principas įtvirtintas Lietuvos Respublikos Konstitucijos 31 straipsnio 1 dalyje. Nekaltumo prezumpcijos principo esmė – kaltu asmuo gali būti pripažintas tik įstatymo nustatyta tvarka vykusiame procese ir to proceso metu buvo laikomasi visų baudžiamojo proceso reikalavimų."

²³¹ See e.g.: ECtHR rulings, [in:] *O'Halloran and Francis v United Kingdom*, App. nos 15809/02 and 25624/02 (29 June 2007); *Kyprianou v Cyprus*, App. no. 73797/01 (15 December 2005) or *Ringvold v Norway*, App. no. 34964/97 (11 February 2003).

3.4. Non-classifiable Decisions: Problems with Identification of the Convention's Status or the Role of National Organs in the Convention System

Sometimes, the courts do not even attempt to construe the Convention standard and ignore the Convention as a directly applicable source of law and disregard its consequences. For example, the Supreme Administrative Court in Poland did not manage to avoid error concerning the very legal status of the Convention. In judgment of 1 June 2015²³² it held that:

the applicant invoked Art. 6.1 ECHR in conjunction with Art. 6.3 of the Treaty (on the EU) and thus exclusively as the provision of the Union law. The European Union acceded to the ECHR, however it did so under the condition that the accession would not infringe the Union's competence as defined in the Treaties. Fundamental rights guaranteed by the Convention constitute part of the Union law being the general principles of law. Therefore, just like in case of principles enshrined in the Charter (of Fundamental Rights), being the Union law they can be violated by national court only when it adjudicates in the 'Union law-related case'. In its ruling C-571/10 *Servet Kamberaj* [...] the Court of Justice also held that in case of incompatibility of national norm with the ECHR, the reference to the ECHR included in Art. 6 of the Treaty [on the EU] does not oblige the national court to apply the Convention directly and to abstain from application of national norm incompatible with the Convention. The provision of the Treaty reflects general principle that fundamental rights are integral part of general principles of law the observance of which is supervised by the Court [of Justice]. Nonetheless the aforementioned provision does not regulate relations between the Convention and national legal systems of the [EU] Member States and does not specify the consequences which should be drawn by national court in case of lack of conformity of national provisions with the rights guaranteed by the Convention.²³³

²³² Case II FNP 1/14 (Polish Supreme Administrative Court, 1 June 2015), para. 5.4.

²³³ In Polish: "Art. 6 ust. 1 Konwencji strona skarżąca powołała w powiązaniu z art. 6 ust. 3 Traktatu, a więc wyłącznie jako przepis prawa unijnego. Unia Europejska przystąpiła do europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności, jednakże z zastrzeżeniem, że przystąpienie to nie narusza kompetencji Unii określonych w Traktatach. Prawa podstawowe, zagwarantowane w tej Konwencji, stanowią część praw Unii jako zasady ogólne prawa. Z tego względu, tak jak zasady określone w Kartce, mogą zostać naruszone jako prawo unijne przez sąd krajowy wyłącznie wówczas, gdy będzie on rozpoznawał sprawę unijną. W wyroku z dnia 24 kwietnia 2012 r., w sprawie C-571/10 *Servet Kamberaj przeciwko Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano* (IPES) i inni (niepubl. w Zbiorze) Trybunał Sprawiedliwości stwierdził ponadto, że w przypadku sprzeczności pomiędzy normą prawa krajowego a europejską konwencją praw człowieka, dokonane w art. 6 Traktatu odesłanie do konwencji nie wymaga od sądu krajowego zastosowania bezpośrednio postanowień tej konwencji i odstąpienia od stosowania niezgodnej z nią normy prawa krajowego. Postanowienie Traktatu stanowi odbicie zasady, zgodnie z którą prawa podstawowe stanowią integralną część ogólnych zasad prawa, których przestrzeganie zapewnia Trybunał. Jednakże wspomniany artykuł nie reguluje stosunków między europejską konwencją praw człowieka a porządkami prawnymi państw członkowskich i nie określa konsekwencji, jakie powinny

Obviously, it was the applicant who caused this misunderstanding as he pleaded the violation of Art. 6(1) of the Convention “in conjunction with Art. 6(1) and (2) TEU.” But it was exactly the role of the Supreme Administrative Court to remediate this misunderstanding and hold that Art. 6 ECHR is applicable regardless of whether EU law does apply or not. The Court should have distinguished between the application of EU law (which did not apply in this case since the facts of the case occurred before the date of accession of Poland to the European Union²³⁴) and application of the Convention (which did apply). Instead the Supreme Administrative Court went on to use the CJEU’s *Kamberaj* decision in order to prove that the Convention does not apply.

In this ruling the Supreme Administrative Court managed to confuse and misinterpret the legal character of the Convention and its status in the EU law. The Convention is obviously not ‘the Union law’ regardless of how the applicant qualified ECHR in its pleas. The Union is not a party to the Convention and the Court had apparently missed the CJEU opinion 2/13.²³⁵ For unknown reasons the Supreme Administrative Court applied the *Wachauf*²³⁶ doctrine to the ECHR, which must be evaluated as a flagrant violation of Art. 1 of the Convention. The ECHR is applicable internally regardless of whether EU law is applied or not. By referring to *Servet Kamberaj* the Supreme Administrative Court tried to prove that ECHR is not directly applicable in Poland whereas the CJEU only ruled that the reference in Art. 6 TEU must not be interpreted as meaning that the ECHR is directly applicable in the Member States by operation of EU law.²³⁷ At the same time the Court ignored the status of the Convention. Despite possible substantive violation of the Convention, it is highly disturbing that the Supreme Administrative Court paid no attention to the domestic provisions regulating the status of the Convention²³⁸ neither to the ECtHR case law

wyciągnąć sąd krajowy w razie sprzeczności między prawami gwarantowanymi w tej konwencji a normą prawa krajowego.”

²³⁴ Case C-168/06 *Ceramika Paradyż* (CJEU, 6 March 2007).

²³⁵ Opinion 2/13 on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (CJEU, 18 December 2014).

²³⁶ Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* (CJEU, 13 July 1989), para. 19.

²³⁷ Case C-571/10 *Servet Kamberaj v Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano* (CJEU, 24 April 2012), paras 59–63 where the Court ruled that “Art. 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law.”

²³⁸ E.g.: Art. 91(1) and (2) of the 1997 Constitution of the Republic of Poland declaring the duty of all Polish authorities to apply self-executing norms of treaties.

concerning the domestic effect of the Convention²³⁹ nor to the extensive legal literature concerning that issue.²⁴⁰

The case law of Hungarian ordinary courts – just like e.g. in Czech Republic or Poland – seems to be encountering similar problems concerning the identification of the position of the Convention in the legal system applicable in the State or the role of national courts *vis-à-vis* the Convention. Let us take the example of the Hungarian ‘Vajnai saga’. Mr. Attila Vajnai, the Vice President of the Hungarian Workers’ Party, held a speech while wearing a five-pointed red star symbol. He was later prosecuted for doing so under the Hungarian Criminal Code, which penalised the exhibition of the red star symbol, and was subsequently convicted. The ECtHR in response to the Vajnai’s application claiming the violation of Art. 10 ECHR, stressed that “when freedom of expression is exercised as political speech – as in the present case – limitations are justified only in so far as there exists a clear, pressing and specific social need” and “the ban in question is too broad in view of the multiple meanings of the red star. The ban can encompass activities and ideas, which clearly belong to those protected by Art. 10, and there is no satisfactory way to sever the different meanings of the incriminated symbol. Indeed, the relevant Hungarian law does not attempt to do so. Moreover, even if such distinctions had existed, uncertainties might have arisen entailing a chilling effect on freedom of expression and self-censorship” and consequently found Hungary to be in breach of its obligations arising under Art. 10 ECHR.²⁴¹ However, six months after the ECtHR judgment was delivered Vajnai again participated in the demonstration wearing the same symbol and again he was prosecuted by the Police for doing so. It is important to note that the ECtHR decision assessed in fact the provision of the Criminal Code itself as being incompatible with the ECHR and not just the practice of law-applying organs. Mr. Vajnai complained to the Independent Police Complaints Board, however the latter found the Police action consistent with the fundamental right of the complainant. Mr. Vajnai appealed to the court, which in the first instance held that the policemen were not entitled to

²³⁹ E.g.: *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland*, App. no. 32772/02 (ECtHR, 30 June 2009) where the ECtHR held in § 84 that “one of the most significant features of the Convention system is that it includes a mechanism for reviewing compliance with the provisions of the Convention. Thus, the Convention does not only require the States Parties to observe the rights and obligations deriving from it, but also establishes a judicial body, the Court, which is empowered to find violations of the Convention in final judgments by which the States Parties have undertaken to abide (Art. 19, in conjunction with Art. 46(1)). In addition, it sets up a mechanism for supervising the execution of judgments, under the Committee of Ministers’ responsibility (Art. 46(2) of the Convention). Such a mechanism demonstrates the importance of effective implementation of judgments.”

²⁴⁰ See e.g.: G. Martinico, ‘Is the European Convention Going to Be “Supreme”? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts’ (2012) 2 *European Journal of International Law*, p. 401 or D. Shelton, *Remedies in International Human Rights Law* (OUP 2015).

²⁴¹ *Vajnai v Hungary*, App. no. 33629/06 (ECtHR, 8 July 2008).

take the inconsistency of the legislation in force and the ECHR into account, and in the revision proceedings before the Supreme Court it was held that the policemen should not be held responsible for not knowing the ECtHR's *Vajnai v Hungary* judgment.²⁴² The Hungarian courts made it clear that despite the duty of the State – therefore, all its organs, not just the legislative or the central government – to assure effective protection and observance of rights and freedoms guaranteed by the Convention (Art. 1 ECHR) – some state organs are quite surprisingly exempted from this obligation.²⁴³

Although the *Vajnai* decision can be found already quite disappointing, in the *Horváth* case²⁴⁴ national courts went on further to decide to almost decline their jurisdiction in favour of the ECtHR. The case concerned two Hungarian nationals of Roma origin who

alleged under Art. 2 of Protocol No. 1 read in conjunction with Art. 14 of the Convention that their education in a remedial school amounted to direct and/or indirect discrimination in the enjoyment of their right to education, on the basis of their Roma origin, in that their schooling assessments had been paper-based and culturally biased, their parents could not exercise their participatory rights, they had been placed in schools designed for the mentally disabled whose curriculum had been limited, and they had been stigmatised in consequence.²⁴⁵

The applicant claimed damages before national courts and the Supreme Court of Hungary held that

the systemic errors of the diagnostic system leading to misdiagnosis – regardless of its impact on the applicants – could not establish the respondents' liability [...]. The creation of an appropriate professional protocol which considers the special disadvantaged situation of Roma children and alleviates the systemic errors of the diagnostic system is the duty of the State

whereas

the failure of the State to create such a professional protocol and [an eventual] violation of the applicants' human rights as a result of these systemic errors exceed the competence

²⁴² See for more details and comments in E. Csatlós, 'The Red Star Story and the ECtHR in the Hungarian Legal Practice', <http://jesz.ajk.elte.hu/2014_4.pdf> (access: 15 December 2016) 2.

²⁴³ See also the follow-up of the *Vajnai* case in *Fratanoló v Hungary*, App. no. 29459/10 (ECtHR, 3 November 2011) and the resolution of the Hungarian Parliament of 2012 in which it expressed its 'disagreement' with the Strasbourg decision (see also: The Steering Committee for Human Rights, *National implementation of the Interlaken Declaration*, 23 October 2012, DH-GDR(2012)009, 9).

²⁴⁴ *Horváth and Kiss v Hungary*, App. no. 11146/11 (ECtHR, 29 January 2013). See further comments in K.S. Akoglu, 'Removing Arbitrary Handicaps: Protecting the Right to Education in *Horváth and Kiss v Hungary*' (2014) 37 *Boston College International and Comparative Law Review*, Art. 2 1–15.

²⁴⁵ *Horváth and Kiss v Hungary*, App. no. 11146/11 (ECtHR, 29 January 2013), para. 3.

of the Supreme Court [...] the applicants may seek to have a violation of their human rights established before the European Court of Human Rights. Therefore the Supreme Court has not decided on the merit of this issue.²⁴⁶

The Hungarian judicial system failed as a guarantor of rights stemming from the Convention. It is unimaginable that national courts who were requested to order compensation for the undisputed violation of human rights confirm that such infringement did exist but they cease their jurisdiction and guide the party to apply to the ECtHR. However, the *Potomski* follow-up in Polish administrative courts proves that Hungarian courts are not isolated in such practice.

4. Concluding Remarks

Courts of all CEE States engage in dialogue with the ECtHR, aware of the duty to ‘take into account’ the case law of the Court. In Ukraine it is statutorily guaranteed that courts are obliged to treat “the case law of the [ECtHR] as a source of law.” In Russian Federation the Supreme Court went on to declare in the general guidelines addressed to Russian courts that the adverse decisions of the ECtHR delivered in cases against Russia are to be ‘obligatorily’ followed by Russian courts. In case of legal positions taken in cases against other State Parties they are to be ‘taken into consideration’ by courts if the circumstances of the case under examination are similar to those which have been the subject of analysis and findings made by the ECtHR. However, the recent developments in Russia spoiled this idyllic picture. In Poland the Supreme Court developed the doctrine of the duty to ‘take into account’ case law of the ECtHR. Similar approach, i.e. the absence of explicitly provided statutory ‘duty of obedience’ and, at the same time, a well-established practice of the highest judicial authorities confirming such a duty, seems to be adopted in Czech Republic, Hungary and Lithuania.

The references of domestic courts to the case law of the Strasbourg Court are of different conceptual value. Generally in Czech Republic, Hungary, Lithuania and Poland the constitutional courts set the hurdles high when it comes to referring to and making use of the ECtHR case law. The situation is not so optimistic though in ordinary or administrative courts. One may conclude that the practice of Czech ordinary courts is divergent and encompasses both the instances of proper judicial dialogue with ECtHR and those where courts only superficially declare that certain interpretative standard of the Convention exists, without a thorough analysis of the ECtHR’s case law. The same is true about Hungarian, Lithuanian

²⁴⁶ Ibidem, paras 52 and 53. Verbatim quotations.

or Polish ordinary and administrative courts. In spite of some very positive examples, sometimes these courts briefly note the jurisprudence of the ECtHR without drawing any conclusions therefrom. In-depth analyses are scarcer, although still traceable. Instances of conscious departing from the standard of interpretation of the Convention through elaborate analysis of differences of circumstances are unique. Very rarely national courts simply confuse and misunderstand the status of the Convention (see the Polish example referred to above)²⁴⁷ and their own role and role of other State's bodies resulting from Art. 1 ECHR (let us mention the Hungarian *Vajnai* and *Horváth* examples).

An interesting feature of these six jurisdictions (Czech Republic, Hungary, Lithuania, Poland, Russian Federation and Ukraine) is that in the four former States, members of the EU with a relatively long record of participation in the Convention system, there are no normative provisions or guidelines adopted by the supreme judicial authorities imposing a duty to observe or take into account the case law of the ECtHR. In the two latter jurisdictions there are either explicit statutory norms providing for such duty (Ukraine) or at least general guidelines adopted by the Supreme Court putting it in bold terms that there exists such obligation. Therefore it appears that the stronger the regulation obligating to reflect the case law of the ECtHR by domestic courts is, the more is the practical outcome disappointing. It does not seem convincing that there is such an inverse proportion. Perhaps the reasons lay in other factors such as:

- a) the political environment, which is generally favourable to the impact of the ECHR and the Strasbourg case law in the already quite well-settled democracies in the Czech Republic, Hungary, Lithuania and Poland and somewhat discouraging in Russian Federation and Ukraine,
- b) the membership in the EU resulting, through the practice of regular dialogue with the CJEU under the Art. 267 TFEU preliminary reference procedure, in the accustoming to 'take into account' the positions taken by international courts,
- c) the duration of membership in the Convention system: the longer it is, the more it allows the national courts to learn that violating the Convention does not pay.

In order to strengthen the openness of national courts to dialoguing with the ECtHR it would be desirable to consider certain amendments in the Convention system. Definitely national judges may have linguistic problems and it would probably trigger more interest in the ECtHR case law if all decisions of the Strasbourg Court were officially translated into the languages of all State Parties to the Convention. It works with Luxembourg, why shouldn't it work with Strasbourg? From the legal practitioner's point of view one may add that judges

²⁴⁷ See: Case II FNP 1/14 (Polish Supreme Administrative Court, 1 June 2015) (n. 232), paras 51–52.

are tempted by the possibilities of transferring the responsibility for decisions to other courts – they are likely to use the procedures allowing them to present legal questions to national supreme or constitutional courts in order to receive decision providing grounds for some more daring and courageous interpretations of law. The new Protocol No. 16 to the ECHR providing for the advisory opinions procedure seems to be the tool instigating national courts to cooperate interpretatively with the ECtHR. Especially if national procedures allow domestic courts to present questions ‘via’ supreme courts it would probably lead to a more regular dialogue with the ECtHR.

The dialogue in its full form, including references of the ECtHR to the case law of domestic courts, could and ought to be strengthened. It would inalienably contribute towards the greater legitimacy of the ECtHR *acquis* and its better acceptance and internalisation by domestic authorities. Also, national courts would thus contribute to the development of international law and international rule of law. However, two basic requirements need to be met if this was to happen.

First of all national courts’ decisions must be more elaborate in terms of references to international and foreign jurisprudence. Unfortunately the quality of reasoning supporting the decisions of domestic courts seems to be rather disappointing. Domestic courts must become aware that their influence on international law and its development occurs only through the door called ‘judicial dialogue’. National courts do not have political power and their impact on international law requires and results from the high quality of reasoning.

Secondly, national courts’ decisions must be translated into internationally spoken languages – above all: English. Even the wisest judgments of national courts will have no influence on the development of e.g. human rights law if nobody knows them except for some domestic lawyers. If national authorities have ambitions of exporting the domestic views on international law or human rights law on international scale, they should spend relatively small amounts on establishing institution responsible for bidirectional judicial dialogue. Its first task would be to select, translate, comment on and distribute decisions of foreign and international courts among Polish authorities (not only the judiciary), its second aim would be to select, translate (into English and preferably some other languages), comment on and distribute Polish judgments concerning international law, European Union law and human rights law. One can be sure that very soon foreign and international courts would refer to the case law of Polish domestic courts, if it were easily accessible and clearly explained.

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V. The Preliminary Reference Procedure as an Instrument of Judicial Dialogue in the EU – the CEE Perspective

Anna Czaplińska*

1. Introduction

The general aim of the research project “International law through the national prism: the impact of judicial dialogue” was to deepen the understanding of how courts engage in the interpretation, application and development of international law through transnational judicial dialogue. The dialogue is thus regarded as a tool that may serve well the development of the international legal order and the strengthening of the rule of law within it by domestic and international courts.

For purposes of the research project, judicial dialogue was defined extensively, as any reference, whether affirmative or critical, by one court to the jurisprudence of another concerning, of course, questions of international law. Such ‘indirect dialogue’ is the prevailing form of interaction available to most national and international courts. This is the case because within the framework of international legal order or its particular regimes there exist usually no formal

* Dr iur., Assistant Professor, Department of European Constitutional Law, Faculty of Law and Administration, University of Lodz, Poland.

mechanisms enabling a ‘direct dialogue’, understood as a dialogue involving contact and exchange of views, between domestic and foreign or international courts on a given legal problem.¹ The European Union makes the most significant exception in that respect.²

One issue needs to be clarified at the very beginning of this analysis. For the purposes of the present paper, but also generally in the author’s view, EU law is regarded as a part of international law, created by Member States of an international organization and the organization itself. Despite some particular characteristics (which themselves also originate from concepts of international law, as e.g. direct effect and primacy are derived from monist theories) and a certain extent of autonomy, the EU legal order can only be described as an autonomous regime, a subsystem of international law. As such, it comes within the substantial scope of the present research project.

Moreover, among these particular features of the EU legal order there are factors determining the phenomenon of judicial dialogue in the European Union. One of them is the establishment of a judicial organ of the organization, which, nowadays, has become a whole system of judicial bodies functioning under the name of “the Court of Justice of the European Union” (CJEU). It holds compulsory jurisdiction over the EU, its Member States and institutions with a competence to “ensure that in the interpretation and application of the Treaties the law is observed” (Art. 19 TEU). The other feature is the inclusion in this judicial system of Member States’ domestic courts as guardians of effectiveness of EU law on the national level, substantially as a consequence of direct effect and other principles of EU law and formally through the establishment of a procedural mechanism generating the direct judicial dialogue on EU law between the national courts and the CJEU: the preliminary reference procedure (Art. 267 TFEU).³

Thus, there is no controversy in stating that by founding the European Communities, which then evolved into the present European Union, the Member States had created a legal system where judicial dialogue was, from the outset, an inherent instrument for development of law.⁴ However, the literature, which examines, explicitly or implicitly, the topics of preliminary reference and of EU legal order development in the context of judicial dialogue is rather sparse.⁵ Therefore, it was

¹ For some instances other than the EU see: R. Virzo, ‘The Preliminary Ruling Procedures at International Regional Courts and Tribunals’ (2011) 10 *The Law and Practice of International Courts and Tribunals*, p. 285.

² See: A. Arnall, ‘Judicial Dialogue in the European Union’, [in:] J. Dickinson, P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012), p. 118.

³ Farrell A. Miller, ‘The Preliminary Reference Procedure of the Court of Justice of the European Communities: A Model for the ICJ’ (2009) 32 *Hastings International and Comparative Law Review*, p. 677.

⁴ See: F. Jacobs, ‘Judicial dialogue and the Cross-Fertilization of Legal Systems: the European Court of Justice’ (2003) 38 *Texas International Law Journal*, p. 548.

⁵ Alongside the works already cited we may mention: J. Cohen, ‘The European Preliminary Reference and the US Supreme Court Review of State Court Judgments: A Study in Comparative

considered worthy to include this issue into the research project. As the result, the present paper examines the CJEU jurisprudence, which results from preliminary reference practice of four of the Central and East European EU Member States, which are examined in this research project, namely the Czech Republic, Hungary, Lithuania and Poland. The examination includes rulings issued in a period from their EU accession (1 May 2004) until 14 February 2016.

It needs to be stated that the task of identification of preliminary reference cases coming from the four Member States was not a very hard one, thanks to the CJEU jurisprudence database and the research tools provided there. The multilingual character of the EU, reflected *inter alia* in the obligation to publish the documents of general application in all official languages of the Union,⁶ is retained also in respect to the CJEU.⁷ The publication of the CJEU judgments in all EU languages and of the orders at least in French and the language of proceedings, made it possible for such research to be conducted by a single person in a comparative way. This also confirms the crucial role that linguistic availability plays in any study involving empirical examination of case law of international and – especially – national courts. In the effect, over two hundred twenty cases of preliminary rulings on references stemming from the four States were identified.⁸ Only cases closed within the research period were taken into consideration.

If the matter of judicial dialogue is to be regarded purely technically, each of the over two hundred identified cases constitutes an instance of a dialogue: there is a question on a legal issue and then there is a reply. However, the present study focuses on the substance of such dialogue and its relevance for the evolution

Judicial Federalism' (1996) 44 AJIL, p. 421; G. Martinico, O. Pollicino, *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar Publishing 2012); M. Cartabia, 'Taking Dialogue Seriously The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union' (2007) 12 Jean Monnet Working Papers; M. Claes, M. de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review, p. 100; R.D. Kelemen, 'The Court of Justice of The European Union in The Twenty-First Century' (2016) 79 Law and Contemporary Problems, p. 117; C. Carruba, L. Murrah 'Legal Integration and Use of the Preliminary Ruling Process in the European Union' (2005) 59 International Organization, p. 399. For critical assessment of the 'dialogue' concept see: K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001), p. 38; A. Dyeve, 'Domestic Judicial Non-Compliance in the European Union: A Political Economic Approach' (2013) 2 LSE Law, Society, Economy Working Papers.

⁶ Art. 4 of Regulation No. 1 determining the languages to be used by the European Economic Community, O.J. 17 1958 385, last amended by Council Regulation (EU) 517/2013 of 13 May 2013, O.J. L 158 2013 1.

⁷ Arts. 36–40, Rules of Procedure of the Court of Justice of 25 September 2012 (O.J. L 265, 29.9.2012), as amended on 18 June 2013, O.J. L 173 2013 65.

⁸ The aim of the research was not to provide statistical information and no statistical methods are used. However, we refer to the numbers, usually in approximate way just to show the total amount and particular share of each State, the diversification of subject matter of references and the interplay between amount and significance of references.

of EU legal order. Thus preliminary rulings are subject to a thorough analysis as to whether and how they contribute to the development of EU law, whether and how they strengthen the rule of law and influence the protection of individual rights within the European Union, whether they concern legal problems of universal character, of interest to more Member States (and not just to the referring State) and are likely to be generally followed and finally – whether they involve a more extensive argumentation of the courts that would enhance the quality of the dialogue. The result of this analysis is the selection of the most significant preliminary rulings, which are further discussed in the present paper.

It was not possible to examine the follow-up to the CJEU preliminary rulings at the national courts within the framework of the present study. Due to limitations of languages and accessibility, such task would have gone beyond the capacity of a sole researcher and would require engagement of a team of scholars. Moreover, the issue of judicial dialogue in respect of EU law may be regarded as a separate subject of research, and, as such, it definitively deserves a comprehensive study (as mentioned earlier, it is rather underexploited in the doctrine). Here, only some aspects have been considered in a limited way and with a focus on the selected CEE States just as one of complementary topics within a more complex research project.

2. The Dialogue-generating Features of the Preliminary Reference Procedure

For the purposes of the present study it is neither necessary to describe in detail the preliminary reference procedure, nor useful to discuss all legal problems linked with it. In fact, there are numerous handbooks, monographs and articles dealing with the procedure in general as well as with specific issues.⁹ Therefore, we shall refer to the contents of Art. 267 TFEU only in general terms and focus on these features of the procedure, which determine its discursive nature.

According to Art. 267, any court (or tribunal) of a Member State may refer to the CJEU any question raised in a case before it concerning interpretation of the Treaties, or interpretation or validity of acts of the EU institutions or other EU bodies, if such a court considers a ruling on this question necessary for a judgment in a specific case. Where a court against whose decisions there is no judicial remedy under national law decides a case, that court is under obligation to refer the matter to the CJEU. However, this obligation arises only when the referring

⁹ For recent comprehensive presentation see: M. Broberg, N. Fergen, *Preliminary References to the European Court of Justice* (Oxford University Press 2014).

court first regards the reply to be indispensable for deciding a case. The CJEU preliminary ruling, given in reply to the national court's reference, is binding upon that court, since "the aim of judicial cooperation between national courts and the Court of Justice under Article 177 [present Art. 267] is to ensure that community law is applied in a unified manner throughout the Member States."¹⁰ Moreover, in accordance with the settled case law of the CJEU, the preliminary rulings have also *erga omnes* effect, binding on courts other than the referring court in a sense that those courts cannot ignore the CJEU ruling, but they may either follow it or decide to make on their own another preliminary reference concerning the same problem.¹¹

The occasionally compulsory character of references and the (individually and generally) binding force of preliminary rulings provide the basic arguments for denying the discursive nature of the preliminary reference procedure.¹² According to this position, one might speak about 'judicial dialogue' only when the interaction between courts is voluntary and there is no relation of subordination, dependency or even reliance between them. However, acceptance of such argumentation would lead to denial of the 'dialogue' quality in many cases of institutionalized judicial interaction. Yet, this is actually the matter of defining judicial dialogue and, of course, each researcher is free to determine the subject of his/hers research. As stated earlier, within the present project the broadest possible approach to judicial dialogue is adopted.¹³ Our interests are focused on the fact that one court having faced a legal problem, which it needs to solve, is seeking the opinion of another court, of an international or foreign court, concerning the same or similar problem, and on the outcome of such interaction between the courts. From this perspective it does not matter whether such reference to other jurisdiction is direct, induced by a procedural requirement, consists in posing a question to have it answered by the other court or indirect, made of free choice (if not on an impulse) and often reduced to a random quotation of the other court's judgment.

M. Claes and M. de Visser present another argument for the denial of the discursive character of the preliminary reference procedure. They refuse to qualify it as a 'real' judicial dialogue and stress the lack of a 'discussion' between

¹⁰ Case 69/85 *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany* (order, 5 March 1986), paras 12–13.

¹¹ A. Farrell Miller, 'The Preliminary Reference Procedure of the Court of Justice of the European Communities: A Model for the ICJ', pp. 676–677. For detailed analysis of preliminary ruling effects see: M. Broberg, N. Fergen (n. 10), p. 441 and the case law quoted there.

¹² This line of argumentation was invoked e.g. in a presentation of Ch. Fardet during the international colloquy *La concurrence des juges en Europe – le dialogue en question(s)* (Tours, 25–27 November 2015), and in the discussions hereinafter. The author participated in the colloquy. The video records of the colloquy are available at: <<https://juges-en-europe.sciencesconf.org/resource/page/id/10>> (access: 10 June 2016).

¹³ See in that respect the text of A. Wyrozumska in the present volume.

the CJEU and the referring court in the course of proceedings.¹⁴ Claes and de Visser claim that, on one hand, the role of referring court is restricted to posing the question and to the application of the CJEU's answer and, on the other, that the CJEU rulings are variable and unpredictable and thus sometimes not very useful for the national courts.¹⁵ There are, however, some contradictions in their argumentation. It seems that the authors would recognize as judicial dialogue only a situation where a direct multiple exchange of views between the courts or judges takes place. It is, however, impossible to introduce such discussions between the courts in any judicial proceedings, especially if foreign or international courts were to be involved. The narrowing of the understanding of judicial dialogue would also result in leaving the indirect dialogue outside of the scope of definition of judicial dialogue. These would be situations where one court merely refers to case law of another court, usually without the latter's knowledge of the fact and the possibility to react. Furthermore, there are procedural means provided for in the CJEU's Rules of procedure serving the increase, if necessary, of the involvement of the referring court in the CJEU deliberations. These are a request for clarification from the CJEU to the referring court (Art. 101) and the possibility of making subsequent references to the CJEU, if the national court decides that further guidance is required (Art. 104). The fact that national courts do not avail themselves of these subsequent references very often indicates rather that CJEU's preliminary rulings usually are sufficiently clear and useful for the national courts. Interestingly, Claes and de Visser take notice of these regulations (in a footnote) but consider them not significant enough to affect their allegations and understanding of the notion of a dialogue.¹⁶ It is also hard to understand why the variability and unpredictability of CJEU's decisions would question the discursive character of preliminary reference procedure. In other words, why refer a question, if one may predict the result? The capacity to anticipate the answer does not seem to be a feature that induces the dialogue; it seems more like the one preventing it.

Last but not least, there is a point where the two positions contesting the dialogic nature of preliminary reference procedure clash. According to the former view, there can be no dialogue if the national court is obliged to make a reference. According to the latter, one cannot speak about dialogue in the context of preliminary reference procedure, if it is so easy to avoid such dialogue by simply not making a reference.¹⁷ Actually, if all these arguments were to be taken seriously, we would have to assume an opinion that no such thing as judicial dialogue exists

¹⁴ M. Claes, M. de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', p. 104. They refer to the dialogue typology by L. Tremblay in 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 *International Journal of Constitutional Law*, p. 617.

¹⁵ *Ibidem*.

¹⁶ *Ibidem*.

¹⁷ *Ibidem*, p. 104.

in practice, not only in respect of preliminary reference procedure, but at all. And this is the main danger that may result from narrowing down the definitions of judicial dialogue.

In our view, many of the features argued above as disqualifying the discursive nature of the preliminary reference procedure are in fact confirming it. But maybe the last word on this issue should be given to the actor concerned, the CJEU alone. In 2008 the Court gave preliminary ruling in the German case *Kempter*.¹⁸ The case concerned interpretation of the CJEU judgment *Kühne & Heitz*¹⁹ as to whether in order to contest a final administrative decision on the basis of the *Kühne & Heitz* rules, the party concerned must have had first raised the issue of EU law in the earlier proceedings before national court, which disregarded such issue at that time and, having issued a judgement without a reference to the CJEU, made the contested administrative decision final.²⁰ The CJEU ruled, quite predictably, that no such requirement could be derived from the *Kühne & Heitz* judgment. In its reasoning the Court expressly stated that “the system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court’s assessment as to whether a reference is appropriate and necessary”. The Court agreed in that respect with the opinion of Advocate General Y. Bot.²¹ The Advocate General recalled the existing CJEU case law, originating from the *Cilfit* judgement,²² concerning the scope of obligation of national courts of last instance to make a preliminary reference including the situations where national courts might be exempted from the obligation. He concluded, and this position was subsequently adopted by the CJEU (as quoted above), that the decision to make or not to make a reference for a preliminary ruling depended entirely on a national court’s assessment and in no way depended on the pleas of the parties to the main proceedings. Both the Advocate General and the CJEU consider this freedom of assessment as to the necessity of a reference as a dialogue-generating feature of the preliminary ruling procedure.²³ Of equal relevance is the discretionary power of a national court to decide whether it obtained sufficient guidance from the preliminary ruling delivered in response to its reference or whether it would be necessary to refer to the CJEU on the matter again.²⁴

¹⁸ Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* (CJEU, 12 February 2008), para. 42.

¹⁹ Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* (CJEU, 13 January 2004).

²⁰ Case C-2/06 *Kempter* judgement, para. 21.

²¹ Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* (Advocate General Y. Bot opinion, 24 April 2007), paras 99–104.

²² Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (CJEU, 6 October 1982).

²³ See also: N. Fennely, ‘Preliminary Reference Procedure: A Factual and Legal Review’ (2006) 13 *Irish Journal of European Law*, p. 72.

²⁴ Case C-2/06 *Kempter* opinion, para. 101.

Just a couple of months later the CJEU confirmed the dialogic character of preliminary reference procedure in the Hungarian case *Cartesio*, which is actually one of the most significant examples of contribution of the CEE Member States preliminary reference practice to the development of EU law.²⁵ The case concerned several legal issues, which are considered below in a more detailed way. Thus, at this point it is sufficient to mention that the discursive nature of preliminary reference system is indicated here on the occasion of examination, whether a measure of domestic law providing the possibility to appeal against a national court's decision on making a preliminary reference to the CJEU (existing under Hungarian law) could limit the national court's power to make such reference stemming directly from Art. 267 TFEU if, in appeal proceedings, the superior court might amend the decision, declare the request for a preliminary ruling inoperative and order the referring court to resume the suspended proceedings before it. The CJEU stated that, although EU law did not generally preclude a decision on preliminary reference from remaining subject to the remedies normally available under national law (including appeal), nevertheless, the outcome of such a remedy could not limit the jurisdiction conferred by Art. 267 TFEU to national court to make a reference to the CJEU, because the assessment of the relevance and necessity of the question was the responsibility of the referring court alone (subject only to the limited verification by the CJEU).²⁶ Therefore, only the referring court may decide, taking into account the appeal outcome, whether to maintain the preliminary reference, amend it or withdraw.²⁷ Thus, the discretion of the national court was reaffirmed as a factor relevant for the dialogue character of preliminary reference procedure.

The scope of discretion on the part of the CJEU is equally relevant for elaborating the court-to-court dialogue within the preliminary reference procedure. As T. Tridimas rightly points out, the Court, while exercising its functions under Art. 267 TFEU, enjoys a significant range of discretion, that manifests itself in a number of respects.²⁸ First, the CJEU is free to assess whether the referring court provided information sufficient to give the preliminary ruling and, if necessary, request clarification or dismiss the request. It may well decide to refuse to give the answer when it finds the question does not in fact concern issues of EU law or is hypothetical.²⁹ However, the Court has wide discretionary powers when it comes to evaluation of factual and legal background presented

²⁵ Case C-210/06 *Cartesio Oktató és Szolgáltató bt* (CJEU, judgement, 16 December 2008), para. 91.

²⁶ *Ibidem*, paras 93–94.

²⁷ *Ibidem*, para. 96.

²⁸ T. Tridimas, 'The CJEU and the Specificity of Preliminary Reference Rulings: Some Reflections', [in:] S. Besson, P. Pichonnaz (eds), *Les principes de droit européen – Principes in European Law* (L.G.D.J. 2011), p. 332.

²⁹ See: *ibidem*, 332–333 and the CJEU case law quoted there: N. Fennely (n. 24), p. 72.

by a national court, which may even result in reformulation of the questions referred or in taking into consideration other EU rules and provisions than those, to which the national court refers. All that is put in place in order to provide the national court with the best possible knowledge that would be helpful for deciding the case pending before it.³⁰ The reformulation technique is particularly useful where a referring court phrased its question expressly in terms of compatibility of national provisions with EU law. This is a question, in line with the standing jurisprudence of the CJEU, on which only the national court is competent to decide, even though this is done on the basis of EU law interpretation given by the CJEU.³¹

Another factor determining the dialogic character of the preliminary reference procedure is the lack of any hierarchical relationship between the CJEU and national courts.³² The CJEU is neither appellate instance for domestic courts, nor has jurisdiction to examine and repeal national regulations. The binding effects of preliminary rulings are limited to the explanation of issues of EU law (concerning its interpretation or validity) referred to the CJEU.³³ They do not settle the case pending before the national court, but as stated above, provide answers necessary for deciding the case by this court. It is only a referring national court alone that is competent to assess whether, and how, the obtained preliminary ruling may be applied to the factual and legal circumstances of the given case.

The quality of the judicial dialogue within the preliminary reference procedure depends, on the one hand, on the extent and accuracy of information given by a national court on facts and legal background of the proceedings in respect to which the reference is made. On the other hand, it is determined by the specificity of the preliminary ruling delivered by the CJEU. A proposal by Tridimas is to distinguish a three-degree scale of specificity of preliminary rulings:³⁴ the 'outcome cases' where the CJEU suggests a ready solution to the dispute before national court;³⁵ 'guidance cases' where the CJEU provides guidelines to a national court on how to resolve the case;³⁶ and 'deference cases' where the CJEU answers in such general terms that it leaves it to a national court to decide on the issue.³⁷ Although this classification aims to demonstrate how much the degree of specificity and the margin of discretion left to national courts may vary in respect to different preliminary rulings, it appears not very useful in practice. Its author himself states that the thresholds of the categories are somewhat

³⁰ *Ibidem*. See also: M. Broberg, N. Fergen (n. 10), p. 362.

³¹ *Ibidem*, p. 412. See also: A. Arnulf (n. 3), p. 118.

³² See: F. Jacobs (n. 5), p. 548; A. Dyeve (n. 6), p. 9.

³³ M. Broberg, N. Fergen (n. 10), p. 441.

³⁴ T. Tridimas (n. 29), p. 333.

³⁵ *Ibidem*, p. 334.

³⁶ *Ibidem*, p. 336.

³⁷ *Ibidem*, p. 340.

floating and they may coexist in the same ruling.³⁸ Probably the biggest weakness of Tridimas' approach lies in the fact that his typology is elaborated on the basis of criteria applied *in abstracto* to the CJEU preliminary rulings without any connection to the follow up and final outcome of their application by the national courts. Therefore, instead of multiplying categories it may be more reasonable to state that the degree of specificity of preliminary rulings may vary from case to case, but it is related above all to the subject of the questions and the specificity of information referred to the CJEU by a national court. It is the interplay of the different aspects of discretion, interdependence and reliance on the part of both, the CJEU and the national courts that make the preliminary reference system the best example of a direct judicial dialogue. These factors surface also in the cases examined within the present study.

3. The Preliminary Reference Practice of the Courts in the Selected CEE Member States and Its Impact on the Development of EU Law

3.1. The Czech Republic

Within the research period the CJEU responded to thirty-four preliminary references submitted by the Czech courts (and further four were withdrawn by the national referring court). Just one reference within the set was declared inadmissible, although it has to be stressed that such outcome of the case does not automatically exclude its potential contribution to the development of EU law. It is not so uncommon that a reference, which finally turns out to be inadmissible, gives rise to legal problems, which are explained by the CJEU in an order dismissing the reference.

The Supreme Administrative Court (*Nejvyšší správní soud*) submitted about the half of the cases. In addition, some of the remaining references came from the administrative divisions of provincial courts (*Krajský soud*). Thus the question of application of EU law in relations between an individual and Member State authorities clearly prevails in the Czech preliminary reference practice.

Interestingly, one of the first cases referred to by a Czech court to the CJEU turned out to become a landmark case in the jurisprudence on the principle of legal certainty. It is the famous *Skoma-Lux* (I) case.³⁹ *Skoma-Lux* was a Czech com-

³⁸ *Ibidem*, p. 334.

³⁹ Case C-161/06 *Skoma-Lux sro v Celní ředitelství Olomouc* (CJEU, 11 December 2007).

pany (specializing in international wine and liquor trading), which brought to the Provincial Court (*Krajský soud*) in Ostrava an action for annulment of several decisions of Czech customs authorities imposing fines for alleged infringements of certain customs provisions of Czech law, as well as EC Regulation 2454/93. The alleged offences were supposed to occur several times between 11 March and 20 May 2004 (so before and after the accession of the Czech Republic to the EU). The company based its action (in the part concerning the EU law) on the plea of inapplicability of the Union regulation to the alleged offences, including those which occurred after the accession of the Czech Republic to the EU, as on the dates when the acts in dispute were committed that regulation had not yet been published in the Czech language in the Official Journal of the European Union.⁴⁰ So the national court referred to the CJEU questions concerning the case, of which the essential one read:

May Article 58 of the Act concerning the conditions of accession, on the basis of which the Czech Republic became a Member State of the European Union as from 1 May 2004, be interpreted as meaning that a Member State may apply against an individual a regulation which at the time of its application has not been properly published in the *Official Journal of the European Union* in the official language of that Member State?

The first noticeable symptoms of the importance of the case were, firstly, the fact that it was decided by the Grand Chamber and, secondly, that there was quite a broad interest among other Member States, which eventually intervened in the proceedings.⁴¹ Such factors at first sight, though they do not grant that the outcome, will meet the expectations, indicate that one may suspect a given case of having potential for significant influence on the development of EU law. However, what we shall focus on in the present paper is the discursive aspect of the preliminary ruling. It is remarkable how carefully the referring court considered the problem in the light of the CJEU previous case law concerning the publication of EU legal acts.⁴² It pointed out to the *Oryzomyli* judgment where the Court stated that the absence of proper publication of a Community act in the Official Journal could constitute a ground for its unenforceability against individuals.⁴³ Regarding circumstances of the case in the main proceedings, the referring court stressed that the provisional translations of the regulation were available on the internet (on EU and Czech Ministry of Finance websites), and noticed that interested parties usually acquaint themselves with legal rules in an electronic form. The absence of publication in the Official Journal then would not always

⁴⁰ *Ibidem*, para. 14.

⁴¹ These were – besides of course the Czech government and the Commission – the Estonian, Latvian, Polish, Slovak and Swedish governments.

⁴² Case C-161/06 *Skoma-Lux*, paras 18–21.

⁴³ Case 160/84 *Oryzomyli Kavallas and Others* (CJEU, 15 May 1986), paras 11–21.

result in factual unavailability of the content of a legal act.⁴⁴ Therefore, a possible solution to the problem might involve the acceptance that the applicability of EU legislation not published in the relevant language should be determined on a case-by-case basis, examining whether an individual concerned had a possibility of getting to know the content of the act. In case of *Skoma-Lux* such finding would lead to an assumption that as a company operating internationally it had to be aware of the customs rules known in all Member States. However, the referring court further observed that the formal requirement of a proper publication of legislation in an official language of a person to whom it applies is one of the basic safeguards for observance of the principles of legal certainty and equality of citizens, confirmed by the CJEU case law, and that the parallel existence of a number of non-official divergent translations would increase legal uncertainty.⁴⁵ Precisely the principles of legal certainty and equal treatment of individuals within the scope of EU law were the two major grounds that the CJEU relied on in its ruling. The Court emphasized that although Community legislation was indeed available on Internet in that form and used by individuals more and more frequently, it was not equivalent to a valid publication in the Official Journal in the absence of any rules in that regard in EU law.⁴⁶ Thus, the CJEU could not accept such form of making EU legislation available to be a sufficient basis for the enforceability of provisions. The Court confirmed that the only authentic version of an EU regulation was that in the Official Journal of the European Union.⁴⁷ Consequently, the CJEU ruled that Art. 58 of the Act concerning the conditions of accession “precluded the obligations contained in Community legislation which has not been published in the Official Journal of the European Union in the language of a new Member State, where that language is an official language of the Union, from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means.”⁴⁸ The reply given to the provincial court’s reference was thus unequivocal, leaving no space for doubt on the part of the referring court as to how to apply this interpretation to the pending case. As a late development that partly might have originated in the *Skoma-Lux* case one may regard the adoption of Council Regulation (EU) No. 216/2013 of 7 March 2013 on the electronic publication of the Official Journal of the European Union,⁴⁹ which granted equal status to the printed and the electronic version of Official Journal as means for official publication of EU legislation. Its enactment, however, would not change the situation in *Skoma-Lux*, as the Regulation considers as authentic only the electronic version of Official Journal and no other sources available on the Internet.

⁴⁴ *Ibidem*, para. 19.

⁴⁵ *Ibidem*, para. 21 and the case law cited there.

⁴⁶ *Ibidem*, para. 48.

⁴⁷ *Ibidem*, paras 49–50.

⁴⁸ *Ibidem*, para. 51.

⁴⁹ O.J. L 69 2013 1.

Just by a pure chance, the two probably most famous Czech preliminary ruling cases (*Skoma-Lux* being the first one) are also significant in respect of judicial dialogue. Although in the case of the second one – the *Landtová* ruling⁵⁰ – what started as an attempt of dialogue ended up as a multilevel, multidimensional inter-court dispute.⁵¹ The essential legal issue of the case before the Czech courts originated in the dissolution of Czechoslovakia (which effected on 1 January 1993) and the measures agreed and adopted by the two new States to deal with various problems resulting from the dissolution. One of them was the Agreement on Social Security of 29 October 1992 between the Czech Republic and the Slovak Republic, which in its Art. 20(1) settled the rule for recognition of social insurance periods.⁵² As a result the benefits were to be calculated according to the rules of social security system of that contracting State (so either Czech Republic or Slovakia) in which the relevant insurance periods were completed and subject to the responsibility of this States social security authorities. Thus a person of Czech nationality, who acquired the pension entitlement in Czech Republic, but a part of his/hers insurance periods were completed in the Slovak territory before the dissolution date, had the respective part of the benefit calculated under the Slovak system rules and paid by Slovak institution. That was the case of Ms. M. Landtová. However, in 2005 the Czech Constitutional Court (*Ústavní soud*) issued a judgment on interpretation of Art. 20(1) of the abovementioned Agreement. Accordingly, where a Czech national (residing also in Czech Republic) satisfies the conditions for entitlement to a pension and the amount of it as set by Czech law is greater than that laid down by the social security Agreement, the Czech Social Security Authority (CSSA) must ensure that the retirement pension is of an amount equivalent to the higher entitlement (set by Czech legislation). Therefore, the CSSA supplements the retirement pension paid by the other contracting State, which must be taken into account in order to avoid double payment of two retirement pensions of the same kind, granted on the same grounds by two separate social security institutions.⁵³

Ms. Landtová in 2006 was awarded a partial retirement pension by the CSSA, however her benefit was calculated solely on the basis of the Slovak scheme. She challenged the decision before the Metropolitan Court in Prague (*Městský soud v Praze*). The Court annulled the CSSA's decision in accordance with the 2005 Constitutional Court judgment and concluded that the benefit paid

⁵⁰ Case C-399/09 *Marie Landtová v Česká správa socialního zabezpečení* (CJEU, 22 June 2011).

⁵¹ The case before Czech courts known as *Slovak Pension Rights*, see to that respect A. Dyevre (n. 10) and the texts by Wyzozumska and Skomerska-Muchowska in the present volume.

⁵² “[P]eriods of insurance completed before the date of dissolution of the Czech and Slovak Federal Republic shall be considered to be periods of insurance completed in the contracting State on whose territory the employer of the person concerned had its headquarters either on the day of the dissolution, or on the last day before that date”; Case C-399/09 *Landtová*, paras 8–9.

⁵³ Case III. ÚS 252/04 (Czech Constitutional Court, 25 January 2005).

to Ms. Landtová by the CSSA should be adjusted up to the amount that would be due under the Czech social security scheme. The CSSA brought an appeal on a point of law before the Supreme Administrative Court (*Nejvyšší správní soud*). The latter set aside the judgment of the Metropolitan Court and referred the case back for reconsideration, questioning i.a. whether the 2005 Constitutional Court judgment and the preferential treatment granted thereby to nationals of the Czech Republic were compatible with the principle of equal treatment laid down in Article 3(1) of Regulation 1408/71.⁵⁴ Nevertheless, the Metropolitan Court upheld its position and ruled that the CSSA was required to supplement the benefit. Subsequently the CSSA brought another appeal to the Supreme Administrative Court, claiming that the obligation to adjust the benefits solely for individuals of Czech nationality residing in the territory of the Czech Republic under the conditions set out in the 2005 judgment, was contrary to Art. 3 of the Regulation 1408/71 (principle of equal treatment) and since, such an obligation also involved taking into account Slovak periods of insurance, it was also contrary to Art. 12 (stating that the same period of insurance cannot be taken into account twice). The Supreme Administrative Court shared the CSSA doubts and submitted a reference for a preliminary ruling to the CJEU.⁵⁵

The Court of Justice admitted that the provisions of Regulation 1408/71 did not preclude a national rule, which provided for payment of a supplement to pension benefit in the circumstances established under the 2005 Constitutional Court judgment.⁵⁶ Nevertheless, with regard to the principle of equal treatment, the CJEU was not convinced by the arguments of uniqueness and speciality of the national regulation, which had been adopted to deal with the effects of an exceptional situation of dissolution of a State and creation of two new States. It ruled that provisions of Regulation 1408/71 did preclude a national rule, which allowed payment of a supplement to old age benefit solely to Czech nationals residing in the territory of the Czech Republic. At least, the CJEU stressed that it did not necessarily follow from such statement that, under EU law, a person who satisfied the two requirements of nationality and residence should be deprived of such a payment. The idea behind the CJEU ruling was, therefore, not to restrict the supplement system but to enable also individuals other than Czech nationals resident in Czech Republic, and fulfilling other criteria, to benefit from it. One may wonder whether this was the judgment the CSSA and the referring court might have hoped for. Despite that, the CJEU was heavily criticized for this ruling and the critique cannot be called as wholly

⁵⁴ Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, O.J. L 149 1971 2, with subsequent amendments.

⁵⁵ Case C-399/09 *Landtová*, paras 23–25.

⁵⁶ *Ibidem*, paras 31–40.

undeserved.⁵⁷ In our view, *Landtová* makes a perfect example of a case where both courts lost a great opportunity to remain silent. The right way to act was shown twice by the court of first instance in the domestic proceedings – the Metropolitan Court, which though induced by the first appeal judgment of the Supreme Administrative Court, used its freedom and did not regard the explanation of EU law issues necessary to enable it to decide the case. It is hard to resist the impression that the driving force that led the Supreme Administrative Court to file the request for a preliminary ruling was the rivalry with the Constitutional Court and the desire to have the latter's judgment reversed by using the preliminary ruling of the CJEU. The CJEU could have avoided the dialogue as well, by declaring the questions irrelevant for the domestic proceedings. The national regulation in question was a recognized exception to the EU social security coordination system, it was justified by unique situation of dissolution of a State long before the EU accession of its successors and, last but not least, it concerned a really limited group of individuals, which would diminish year by year until they would simply die out. One must really ask what reason, other than vanity, made the CJEU entertain this case, bearing in mind that before and afterwards it gave rise to such a controversy among the judiciary and scholars, crowned by the unprecedented declaration of the CJEU judgment as *ultra vires* by the Czech Constitutional Court in 2012.⁵⁸ This case constitutes a remarkable (and a surprising) example that judicial dialogue may be driven by emotions. Then the dialogue does not bring any good. One may only hope that the CJEU and the national courts would draw right conclusions from this example to avoid similar situations in the future.

3.2. Hungary

Of the four EU Member States studied in our research Hungary is the one with by far the largest number of preliminary references submitted, both in terms of absolute numbers and in relation to the country's size and population.⁵⁹ Within the research period there were ninety-four cases submitted and closed. Eight of them were removed from the register due to withdrawal. In eleven instances, the CJEU declared its lack of jurisdiction. Among these eleven, in one particularly important *Ynos* case the declaration was made by means of a judgment instead of an order.⁶⁰ As to the referring courts, there is no leading category of courts that comes to a forefront. We may point to around fourteen references that came from the Hungarian Supreme Court (present *Kúria*, previously *Legfelsőbb Bíróság*).

⁵⁷ See in that respect the texts by Wyrozumska and Skomerska-Muchowska in the present volume.

⁵⁸ Case ÚS 5/12 *Slovak Pensions XVII* (Czech Constitutional Court, 31 January 2012).

⁵⁹ M. Broberg, N. Fergen (n. 10) 34.

⁶⁰ Case C-302/04 *Ynos kft v János Varga* (CJEU, 10 January 2006) – see further reference to this case in the present paper.

The rest was sent by courts of all levels, of general and specialized jurisdictions, adjudicating in all instances.

Accordingly, the subject matter of Hungarian references is much diversified and it is hard to indicate one or two prevailing domains. Taking a very generalizing approach one may state that the majority of references regarded various aspects of the four internal market freedoms. There was also a considerable number of taxation cases (seventeen) as well as questions within the field of competition and consumer protection (seventeen too). Some references regarded common agricultural policy (seven). What is though especially noteworthy, there were five cases concerning the area of freedom security and justice. The remaining instances concerned e.g. jurisdiction of national courts and judicial cooperation, environment or protection of personal data.

The *Ynos* case was the first preliminary reference submitted by a Hungarian court. As already suggested, it regarded such an interesting and significant problem – from the perspective of application of EU law in the Member States, which joined in 2004 – that the CJEU despite finding the lack of jurisdiction decided over it by means of a judgement and not by an order which would be typical in such situation. The details of the proceedings before the referring court are not relevant for the outcome of preliminary ruling. It is sufficient to state that it concerned the effects of unfair terms used in consumer contracts, which had been concluded and in respect of which a dispute had arisen before Hungary's accession to the EU. However, the provisions of Hungarian law regarding unfair contract terms had already been adapted to the EU Directive 93/13 when this situation occurred.⁶¹ The national court for that reason assumed that the interpretation and application of these domestic rules had to be in conformity with the Directive.⁶² Though the national court seemed quite convinced about this assumption, it included within the reference, as last, a question on this particular issue.⁶³ The CJEU, however, took an entirely opposite view and stated that it had jurisdiction to interpret the Directive only as regards its application in a new Member State with effect from the date of that State's accession to the EU and since the facts of the case before the referring court occurred prior to the Hungary's accession to the EU, the Court did not have jurisdiction to interpret the Directive.⁶⁴ Consequently, before the accession to the EU of a new Member State, no obligation could be established for the national court to interpret the domestic law in conformity with the wording and purpose of the Directive. Therefore, the judicial dialogue in this case contributed to the clarification of the scope of the obligation of EU conform interpretation (the indirect effect of directives/EU law).

⁶¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts O.J. L 95 1993 29.

⁶² Case C-302/04 *Ynos*, para. 28.

⁶³ It was preceded by two questions on the interpretation of the directive's provisions; *ibidem*, para. 29.

⁶⁴ *Ibidem*, 37.

The *Cartesio* preliminary ruling was already referred to in the context of dialogue-generating features.⁶⁵ Now we shall deal with the substantial problems of the case, which regard freedom of establishment. *Cartesio*, the applicant in the main proceedings, was a company established under Hungarian law with a seat in Baja (Hungary). In November 2005 the company applied to the competent national court for registration of the transfer of its seat to Gallarate in Italy and for subsequent amendment of the information on its seat in the commercial register. The company, however, was to remain governed by Hungarian law. The application was rejected on the ground that the Hungarian law in force did not allow a company established in Hungary to transfer just its seat abroad while continuing to be subject to Hungarian law.⁶⁶ According to the registry court a transfer like that would require that the company ceases to exist under Hungarian law and, then, it re-establishes itself in compliance with the law of the country of its new seat. *Cartesio* appealed against that decision to the Provincial Court of Appeal in Szeged (*Szegedi Ítéltábla*). The appellate court examined the up-to-date CJEU jurisprudence on freedom of establishment. It concluded that, so far, Arts. 49 and 54 TFEU⁶⁷ did not include the right for a company established under the legislation of one Member State to transfer its central administration (and thus its principal place of business) to another Member State whilst retaining its legal personality and nationality of origin. Yet, if the competent authorities were to object to such rule, the content of Arts. 49 and 54 TFEU may be further refined in the future case law of the CJEU.⁶⁸ The appellate court subsequently referred to some judgements, which could serve as a starting point for such potential development.⁶⁹ Therefore the court decided to refer the questions concerning this problem and also some aspects of interpretation of Art. 267 TFEU to the CJEU.

The Court of Justice stated that, in the absence of EU legislation, the Member States are competent to determine the requirements under which a company was to be regarded as established under their respective legislations and, accordingly, capable of enjoying the right of establishment, and the requirements, under which it was able subsequently to maintain that status. Thus the CJEU held that the freedom of establishment did not preclude one Member State from preventing a company established under its national law from transferring its seat to another Member State whilst retaining its status as a company governed by the law of the first Member State.⁷⁰ On the other hand, where a company established under the law of one Member State moves to another Member State it not only changes the seat, but also is converted into a form

⁶⁵ See above, para. II.

⁶⁶ Case C-210/06 *Cartesio*, paras 23–24.

⁶⁷ Former Arts. 43 and 48 TEC.

⁶⁸ Case C-210/06 *Cartesio*, paras 34–35.

⁶⁹ *Ibidem*, paras 36–39.

⁷⁰ *Ibidem*, paras 109–110.

of company governed by the law of the latter. In a situation like that the freedom of establishment permits a company to convert without having to be wound up or to enter into liquidation in the Member State of original establishment, to the extent the law of the host Member State allows for such a conversion, unless a restriction of the freedom of establishment serves overriding requirements of the public interest.⁷¹

These principles were complemented by developments delivered in the *VALE Építési* preliminary ruling.⁷² An Italian company VALE COSTRUZIONI was established and registered in Rome in 2000. In February 2006, the company applied to be deleted from that register as it wished to discontinue business in Italy in order to transfer its seat and business to Hungary. Subsequently it was removed from the Italian commercial register with a notice “the company had moved to Hungary.” Instantly afterwards a company VALE Építési Kft. was incorporated and its representative requested a competent Hungarian court to register the company in Hungary with an entry stating that VALE COSTRUZIONI was the predecessor in law of VALE Építési Kft. However, that application was rejected by the Hungarian registry court (*Fővárosi Bíróság*) on the ground that a company incorporated and registered in another State could not transfer its seat to Hungary and could not be registered there as the predecessor in law of a Hungarian company. Hungarian law allowed only for Hungarian companies to convert, but did not permit a company governed by the law of another Member State to convert to a Hungarian company.⁷³ VALE Építési appealed against the decision but the appeal was rejected by the Provincial Court of Appeal in Budapest (*Fővárosi Ítéltábla*). The company then lodged another appeal to the Supreme Court (*Legfelsőbb Bíróság*). The Supreme Court shared the applicant’s serious doubts as to the compatibility of Hungarian provisions in respect of company conversion with the EU law, in particular freedom of establishment, and submitted the preliminary reference to the CJEU on that matter.

The CJEU started its reasoning with an assertion that in the absence of a uniform regulation of companies in EU law, it was for the national legislation to determine the conditions of their incorporation and functioning. Therefore, the host Member State may determine the national law applicable to cross-border company conversions and apply its domestic provisions on the conversion of its national companies.⁷⁴ However, the Court argued that under the Hungarian law companies were treated in general manner differently according to whether the conversion was domestic or of a cross-border nature, since only the former was provided for in Hungarian legislation. Such discriminatory treatment is very likely to deter companies, which have their seat in other Member States from exercising the freedom of establishment and amounts to an unjustified restriction

⁷¹ *Ibidem*, para. 111.

⁷² Case C-378/10 – *VALE Építési Kft.* (CJEU, 12 July 2012).

⁷³ *Ibidem*, 9–11.

⁷⁴ *Ibidem*, paras 28–29.

on the exercise of that freedom.⁷⁵ Thus the CJEU concluded that Arts. 49 and 54 TFEU had to be interpreted as precluding legislation of a Member State which enabled companies established under its national law to convert, but did not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by law of the former Member State.⁷⁶ In respect of the application of existing national provision to the cross-border conversions, the CJEU pointed that they needed to be applied in compliance with the principles of equivalence and effectiveness, to ensure the protection of the rights which individuals acquire under EU law. Therefore, the application of Hungarian provisions on domestic conversions governing the establishment and functioning of companies, such as the requirements to draw up lists of assets and liabilities and property inventories, cannot not be questioned.⁷⁷ Analogically, where a Member State requires, in the context of a domestic conversion, a strict legal and economic continuity between the predecessor company and the converted successor company, such a requirement may also be imposed in the context of a cross-border conversion.⁷⁸ The CJEU stressed, however, that EU law precluded the Member State from refusing to record in its register, in the case of cross-border conversions, the original company (of another Member State) as the predecessor in law of the converted company, if such a record was made in respect of domestic conversions.⁷⁹

The examples of *Cartesio* and *VALE Építési* demonstrate that the dialogue within the preliminary reference procedure may lead to elaboration of quite detailed rules regulating in a comprehensive way of a legal issue in the absence of common EU legislation thereon – in this case regarding the cross-border company conversions in the context of the freedom of establishment.

Among the preliminary references submitted by Hungarian courts there is a relatively small but topically important share of cases concerning the area of freedom, security and justice, with particular regard to rights of third country nationals.⁸⁰ The one concerning probably the most unusual problem is *Shomodi*. In this case, the Hungarian Supreme Court (*Legfelsőbb Bíróság*) sought the CJEU's interpretation of provisions of EU Regulation 1931/2006 on local border traffic in relation to the Convention implementing Schengen

⁷⁵ *Ibidem*, para. 34.

⁷⁶ *Ibidem*, para. 41.

⁷⁷ *Ibidem*, para. 52.

⁷⁸ *Ibidem*, para. 55.

⁷⁹ *Ibidem*, para. 56.

⁸⁰ See CJEU cases: C-404/07 *György Katz v István Roland Sós* (9 October 2008); C-31/09 *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* (17 June 2010); C-254/11 *Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v Oskar Shomodi* (21 March 2013); C-364/11 *Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal* (19 December 2012).

Agreement.⁸¹ Under that Convention, foreign nationals not subject to a visa requirement may move freely within the Schengen area for a maximum period of three months during the six months following the date of first entry.⁸² The Regulation 1931/2006 contains specific provisions that apply to third country nationals who are residents in a border area of a non-Member State, which borders a Member State of the EU (an area that extends no more than 30 kilometres from the border). The 'border residents' may obtain a local border traffic permit, which enables them to enter the neighbouring Member State and remain there for an uninterrupted period. The duration of this period is determined by agreements concluded between the neighbouring States (on the basis of the Regulation 1931/2006) but may not exceed three months and such permits do not authorise their holders to move beyond the border area of the Member State visited.⁸³ The agreement on the local border traffic between Hungary and Ukraine determines the maximum duration of a stay in Hungary for Ukrainian border residents as three months of uninterrupted stay.⁸⁴ Mr. O. Shomodi, a Ukrainian national is a holder of a local border traffic permit and accordingly is authorised to enter the border area of Hungary. On 2 February 2010 he requested entry into Hungary at the Záhony border crossing, however the Hungarian border police found that he had stayed in Hungarian territory for 105 days during the period from 3 September 2009 to 2 February 2010, having entered that territory almost daily for several hours. Since he had thus exceeded, in the view of the Hungarian border police, the time limit of three months, the police denied him entry onto Hungarian territory.⁸⁵

Mr. Shomodi brought an action against the decision of the border police to the Provincial Court (*Szabolcs-Szatmár-Bereg megyei bíróság*), which ruled that general regulations of EU and Hungarian law on cross-border traffic were not applicable. The court applied the special rules on local border traffic and found there was no limit on the number of entries to which the holder of a local border traffic permit was entitled and that the three-month limit applied only to uninterrupted stays. Therefore, the court concluded that the grounds relied on by the border police did not justify the refusal to Mr. Shomodi to enter Hungarian territory and reversed the decision.⁸⁶ The border police appealed against this judgement to

⁸¹ Regulation (EC) 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, O.J. L 405 2006 1, corrigendum O.J. L 29 2007 3; Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990, O.J. L 239 2000 19.

⁸² Art. 20(1) of the Convention.

⁸³ Case C-254/11 *Shomodi*, para. 7.

⁸⁴ *Ibidem*, para. 15.

⁸⁵ *Ibidem*, para. 16.

⁸⁶ *Ibidem*, para. 17.

the Supreme Court (*Legfelsőbb Bírósága*), which referred to the CJEU questions on the interpretation of specific border traffic rules, in particular the character and way of counting of the time limits.⁸⁷

In its preliminary ruling the CJEU stated that the general rules of the Schengen *acquis* did not apply to local border traffic and pointed out that the three month limit laid down by the local border traffic regulation related only to ‘uninterrupted stays’, whereas the limitation resulting from the general rules of Schengen *acquis* did not contain that reservation.⁸⁸ Moreover, by adopting the regulation on local border traffic, the EU legislature intended to put rules in place for local border traffic, which are distinct from the general rules of Schengen *acquis* and are subject to autonomous interpretation. The purpose of those rules, namely, is to enable the residents of the border areas to cross the external land borders of the EU for legitimate economic, social, cultural or family reasons, and to do so easily (understood as without excessive administrative constraints) and frequently, even regularly.⁸⁹ However, as the CJEU noted that facilitation of border crossing was intended for *bona fide* (‘good will’) border residents with legitimate reasons for frequently crossing the border, so the Member States remained free to impose penalties on those who abuse or fraudulently used their local border traffic permits.⁹⁰ Accordingly, the CJEU concluded that the holder of a local border traffic permit needed to be able to move freely within the border area for a period of three months if his stay was uninterrupted and to have a new right to a three-month stay each time that his stay was interrupted. Consequently, in the view of the CJEU, the stay must be regarded as interrupted as soon as the person concerned crosses the border back into his State of residence in accordance with the conditions laid down in the local border traffic permit, irrespective of the frequency of such crossings, even if they occur several times daily.⁹¹

Shomodi constitutes thus an example of affirmative judicial dialogue, where the CJEU entirely confirmed the argumentation and the propriety of the judgment of the court of first instance. It also strengthens the effectiveness of individual rights – and does so in relation to a particular group of third country nationals, who turn out to be beneficiaries of judicial dialogue as well.

3.3. Lithuania

Within the period covered by our research the Lithuanian courts submitted twenty-seven references, of which none had been withdrawn and, remarkably none had been declared inadmissible. The total number is relatively not that small

⁸⁷ *Ibidem*, para. 18.

⁸⁸ *Ibidem*, para. 23.

⁸⁹ *Ibidem*, para. 24.

⁹⁰ *Ibidem*, para. 25.

⁹¹ *Ibidem*, paras 26, 28–29.

(although still below Union average), taking into account the size and population of the country.⁹² Remarkably, the Lithuanian references concern such a variety of EU law issues that it is harder than in case of the three remaining States under scrutiny, to organise them on the basis of their subject matter. It seems that there are no prevailing themes in the preliminary reference practice of Lithuanian courts. In fact, very often one case addressed a number of issues, including also systemic problems of EU legal order. It is also worth noticing, in comparison with the three remaining Member States that the vast majority of references comes from the highest judicial authorities of Lithuania, the *Lietuvos Aukščiausiasis Teismas* (the Supreme Court) and the *Lietuvos vyriausiasis administracinis teismas* (the Higher Administrative Court). Moreover, importantly, the Constitutional Court (*Lietuvos Respublikos Konstitucinis Teismas*) was one of the first Lithuanian courts to submit a preliminary reference to the CJEU.⁹³

One of the most interesting Lithuanian cases in terms of the use of judicial dialogue for strengthening of the protection of individual rights is the case *Peftiev*.⁹⁴ The case constituted a smart challenge to EU smart sanctions adopted against Belarus.⁹⁵ Mr. Peftiev and other respondents in the main proceedings were included in the list of persons subject to EU measures against Belarus. In order to challenge those measures, they hired a Lithuanian law firm, which brought actions for annulment before the EU General Court. Subsequently, the law firm issued four invoices for its legal services to the respondents and the clients transferred the corresponding sum to the law firm's bank account. However, due to the effect of EU sanctions in force, the transferred funds were frozen in the law firm's bank account. In turn, the respondents in the main proceedings, according to the provisions of the sanctions regulation made a request to the Lithuanian authorities for lifting the measures freezing the financial funds in so far, as it was necessary to pay for the legal services. The request was refused, as the funds were allegedly acquired unlawfully. Mr. Peftiev and others brought then actions for annulment of those decisions before the Regional Administrative Court in Vilnius asking it to annul the decisions and to order their reconsideration by the administrative organs, which issued them. The court actually decided in favour of the respondents in the main proceedings, but on this occasion the administrative authorities appealed against the judgment to the Lithuanian Supreme Administrative Court (*Lietuvos vyriausiasis administracinis teismas*), rising the argument that they enjoyed on the basis of the Sanctions Regulation absolute discretion in deciding whether or not to apply the derogation, because decisions in that respect were linked to political issues

⁹² M. Broberg, N. Fergen (n. 10), p. 34.

⁹³ Case C-239/07 *Julius Sabatauskas and Others* (CJEU, 9 October 2008).

⁹⁴ C-314/13 *Užsienio reikalų ministerija and Finansinių nusikaltimų tyrimo tarnyba v Vladimir Peftiev and Others* (CJEU, 12 June 2014).

⁹⁵ Council Regulation (EC) 765/2006 of 18 May 2006 concerning restrictive measures in respect of Belarus O.J. L 134 2006 1, with subsequent amendments.

and external relations of Member States have with other States, which is an area in which they should have a broader freedom of action. However, the Supreme Administrative Court considered the problem in connection with the Council document “EU Best Practices for the effective implementation of restrictive measures”⁹⁶ and the CJEU case law and came to the conclusion that interpretation of that kind of provision must take into account the need to ensure protection of fundamental rights, including the right to a judicial remedy. The only way for a person affected by a restrictive measure to have this measure annulled is to bring an action before the EU Court. But in order to do that, the applicant is required to have legal representation (under the Rules of Procedure of the General Court); the GC itself, as the Supreme Administrative Court observed, in cases of this character exhaustively examined the requests to grant the legal aid and, where necessary, granted it.⁹⁷ On the basis of this analysis, the court referred to the CJEU questions concerning, on one hand, the alleged absolute discretion of administrative organs while deciding on granting of derogation. On the other hand, the referring court, in case the scope of discretion turned out to be not that absolute, asked about the criteria and circumstances which must be regarded when the grant of derogation is decided upon (including the effectiveness of protection of individual’s fundamental rights as well as safeguards against misuses of derogation) and whether the (allegedly unlawful) source of the funds had any relevance for the decision on derogation.⁹⁸ The CJEU entirely supported the observations of the referring court. It started by reminding national authorities that when deciding on a request for release of frozen funds pursuant to Regulation 765/2006, they implemented EU law, and accordingly, they were required to observe the Charter of Fundamental Rights of the European Union (‘the Charter’).⁹⁹ In consequence, the provisions of the Regulation must be interpreted as meaning that, when taking a decision on granting a derogation requested with an aim to enable an individual to challenge the lawfulness of restrictive measures imposed by the EU, the competent national authority does not enjoy absolute discretion, but must exercise its powers in a manner which upholds the rights provided for in Art. 47 (right to effective legal remedy and access to court) of the Charter and observes the indispensable nature of legal representation in bringing such an action before the General Court.¹⁰⁰ As to provision of safeguards against the misuse of the derogation granted, the CJEU emphasized, that national authorities may verify whether the requested release of funds was intended exclusively for payment of reasonable professional fees

⁹⁶ Council document 11679/07 EU of 9 July 2007 “Best Practices for the effective implementation of restrictive measures”, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011679%202007%20INIT> (access: 5 April 2017).

⁹⁷ Case C-314/13 *Pefatiev*, paras 20–21.

⁹⁸ *Ibidem*, para. 22.

⁹⁹ *Ibidem*, para. 24.

¹⁰⁰ *Ibidem*, para. 34.

and reimbursement of incurred expenses associated with the provision of legal services and they may also set the appropriate conditions in order to guarantee, inter alia, that the objective of the sanction is not frustrated and the derogation granted is not distorted.¹⁰¹ Finally, as the applicable provisions of Regulation 765/2006 make no reference to the origin of the funds in question or possible unlawful acquisition thereof, such circumstances are not relevant for granting a derogation from freezing those funds in order to pay for legal services.¹⁰² The *Peftiev* ruling constitutes then a great example of judicial dialogue strengthening the protection of fundamental rights and the position of individual by application of the Charter of Fundamental Rights even in respect of measures taken the field of external policy of the EU.

Another very interesting instance of development of EU law by means of preliminary ruling procedure is the *Gazprom* judgment.¹⁰³ The case concerned a competence dispute between a Lithuanian court and an arbitral tribunal in respect of proceedings, which involved a company *Lietuvos dujos* in which the Lithuanian State had share. The remaining shareholders were Gazprom and the German Company E.ON Ruhrgas. In 2004 the shareholders concluded an agreement, which contained in Section 7.14, an arbitration clause according to which “[a]ny claim, dispute or contravention in connection with this Agreement or its breach, validity, effect or termination, shall be finally settled by arbitration.” In 2011 Lithuania (represented by the Ministry of Energy) requested that the Provincial Court in Vilnius investigates activities of the company (in connection with actions of the management board which the ministry found improper) on the basis of the Lithuanian civil code. In return, Gazprom instituted arbitral proceedings claiming that bringing the action to Lithuanian court infringed the arbitral clause of the shareholders agreement. In July 2012, the arbitral tribunal declared that the arbitration clause had been partially breached and ordered Lithuania, in particular, to withdraw or limit some of its claims brought before the Provincial Court. Meanwhile, in September 2012, the Provincial Court ordered the investigation of the activities of *Lietuvos dujos* company and declared also held that an application for investigation of the activities of a legal person fell within its jurisdiction and was not subject to arbitration under Lithuanian law. The company and the members of its management board appealed against that decision to the Court of Appeal of Lithuania. In separate proceedings, Gazprom applied to that court for recognition and enforcement in Lithuania of the arbitral award of July 2012. The Court of Appeal dismissed Gazprom’s application, recalling the provisions of Lithuanian law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958.¹⁰⁴ The court observed that, by the arbitral award

¹⁰¹ Ibidem.

¹⁰² Ibidem, para. 40.

¹⁰³ Case C-536/13 *Gazprom OAO v Lietuvos Respublika* (CJEU, 13 May 2015).

¹⁰⁴ *United Nations Treaty Series*, Vol. 330, p. 3.

of July 2012 recognition and enforcement of which were sought, the arbitral tribunal limited the ministry's capacity to bring proceedings before a Lithuanian court for initiation of an investigation in respect of the activities of a legal person, but also denied that national court the power to determine whether it has jurisdiction at all. By doing so the arbitral tribunal infringed the sovereignty of the Republic of Lithuania, which as contrary to Lithuanian and international public policy, justified the refusal to recognize the arbitral award.¹⁰⁵ By a separate order the court also dismissed the company's appeal and confirmed the jurisdiction of the Lithuanian courts to hear that case.¹⁰⁶ Both orders were subject of an appeal to the Lithuanian Supreme Court. That Court decided to deal with the appeal concerning recognition and enforcement of the arbitral award and to suspend the second appeal until the first had been decided. Since the Supreme Court was uncertain, upon taking into account the relevant case law of the CJEU and provisions of Regulation 44/2001,¹⁰⁷ whether the recognition and enforcement of the arbitral award could be refused on the grounds given by the Court of Appeal.¹⁰⁸ Therefore, the Supreme Court referred to the CJEU some questions on the interpretation of the regulation. In its reply, the CJEU observed that actually the problem of recognition of arbitral awards was expressly excluded from the scope of Regulation 44/2001.¹⁰⁹ However, instead of declaring the lack of jurisdiction in the referred case, the CJEU went on and gave the referring court exhaustive guidance on how the courts should interpret their own competence-competence and the breadth of the margin of discretion they enjoy while determining whether they have jurisdiction over a given case or not. It is striking, how the Court of Justice formulated the conclusion of the judgment, thus linking it with interpretation of provisions, which are not applicable to the case at all:

Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement of an arbitral award issued by an arbitral tribunal in another Member State.

However, if we take into account the role of courts as guardians of the rule of law and the growing controversies concerning arbitration as means of resolution of commercial disputes involving also States (e.g. within the recently agreed

¹⁰⁵ Case C-536/13 *Gazprom*, para. 22.

¹⁰⁶ *Ibidem*, para. 23.

¹⁰⁷ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters O.J. L 12 2001 1.

¹⁰⁸ Case C-536/13 *Gazprom*, para. 25.

¹⁰⁹ *Ibidem*, paras 28, 40–41.

upon CETA), we do not tend to be too critical about the CJEU's position in the present case. In addition, the *Gazprom* ruling demonstrates one more function of judicial dialogue: that of education of judges and of the general public.

3.4. Poland

Although Poland with sixty-five cases takes a second place (after Hungary) in terms of absolute numbers, the statistics are less impressive when it comes to classification related to size and population of the country.¹¹⁰ In two cases the references were withdrawn. In six of the remaining cases the CJEU declared itself incompetent to adjudicate on the matters, however, as noticed earlier, the inadmissible references are not always irrelevant for development of EU law. Nearly two thirds of the Polish references came from the administrative courts (the provincial administrative courts and the Supreme Administrative Court *Naczelny Sąd Administracyjny*). On the other end lies the Polish Supreme Court (*Sąd Najwyższy*), which had only submitted six references. The remainder of cases originated from district and provincial courts. In respect of subject matter of the rulings, there is an overwhelming domination of tax law cases. Apart from them there are few concerning competition, consumer protection, problems of jurisdiction, pensions and a number of single other issues. Many of the cases, especially tax cases, concern very particular, sometimes technical issues relevant only for the case referred. However, there are still numerous ones addressing fundamental, systemic problems of EU law.

One of such issues was considered in the *Filipiak* case,¹¹¹ which revealed problems that might occur within the 'border zone' between the domestic constitutionality review procedure and the application of EU law. The main proceedings before the national court (the Provincial Administrative Court in Poznań, *Wojewódzki Sąd Administracyjny w Poznaniu*) concerned the Polish income tax legislation which allowed for deductions of contributions paid for social security and health insurance in the calculation of the amount of income tax obligation under the condition that these contributions belonged to categories specified in Polish legislation. In the effect, the only contributions to be deducted were those paid to the institutions of Polish social security and health insurance systems. Mr. Filipiak, as a partner of a Dutch partnership, paid in the Netherlands the social security and health insurance contributions required of him by Dutch legislation, however paid his income tax in Poland. He claimed that such regulation of Polish income tax law was incompatible with EU law, in particular the internal market freedoms. Accordingly, the contested provisions could not be applied by virtue of the principles of direct effect and primacy of EU law.

¹¹⁰ M. Broberg, N. Fergen, *Preliminary References...*, p. 34.

¹¹¹ Case C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* (CJEU, judgment, 19 November 2009).

Unfortunately, the Polish tax authorities did not agree with him and in consequence, Mr. Filipiak brought an action against their decisions to the Provincial Administrative Court in Poznań.

The Court shared the applicant's concerns as to the conformity of Polish legislation with EU law and decided to submit a preliminary reference to the CJEU. It observed, however, that it was essential to examine whether the contested Polish provisions were compatible with a Treaty provision, which was not relied on by the applicant,¹¹² namely the current Art. 49 TFEU (former Art. 43 TEC) providing for the freedom of establishment. The Court also argued that the effect of the contested provisions was that a taxpayer, being subject to unlimited tax liability in Poland on the entirety of his income and pursuing an economic activity in another Member State was not allowed to deduct in the calculation of his tax obligation the contributions for social security and health insurance paid in the Netherlands also paid in the Netherlands, even though those contributions were not deducted in that Member State.¹¹³ Furthermore, the referring court drew attention to the fact that the Polish Constitutional Court (*Trybunał Konstytucyjny*) had already ruled on the compatibility of the contested provisions of the law on income tax with the Polish Constitution, holding that

to the extent to which the tax provisions at issue do not allow taxpayers specified in Article 27(9) of the Law on income tax to deduct social security and health insurance contributions from income deriving from an activity pursued outside the Republic of Poland and from the tax payable thereon where those contributions were not deducted in the Member State in which that activity was pursued, those provisions are not compatible with the principle of equality before the law laid down in Article 32 of the Polish Constitution, in conjunction with the principle of social justice, set out in Article 2 of that Constitution.¹¹⁴

The Constitutional Court, though, decided (pursuant to Art. 190(3) of the Polish Constitution) to defer the date when the provisions declared unconstitutional would lose all binding force to 30 November 2008.¹¹⁵ Therefore, the questions referred to the CJEU by the Provincial Administrative Court regarded on one hand, whether Art. 49 TFEU should be interpreted as precluding the provisions such as the ones in the contested Income tax law. On the other hand, the referring court wondered whether the principle of the primacy of EU law should be interpreted as taking precedence over the provisions of national law in so far as the entry into force of the judgment of the Polish Constitutional Court had been deferred on the basis of those provisions.¹¹⁶

¹¹² Mr. Filipiak indicated Art. 45 TFEU (former Art. 39 TEC, free movement of workers).

¹¹³ Case C-314/08 *Filiplik*, para. 22.

¹¹⁴ *Ibidem*, paras 23–24. See: Case K 18/06 (Polish Constitutional Court, 7 November 2007).

¹¹⁵ Case C-314/08 *Filiplik*, para. 25. The maximum deference period provided for in that provision is 18 months.

¹¹⁶ *Ibidem*, para. 26.

While responding to the first question of the Polish court, the CJEU observed that the refusal to grant to a taxpayer the right to deduction of compulsory contributions paid in another Member State in circumstances like those in the main proceedings might deter individuals from taking advantage of the freedom of establishment and freedom to provide services and amounted to a restriction on those freedoms. Such restriction could only be justified by overriding reasons in the public interest.¹¹⁷ Thus, the CJEU concluded that EU law precluded the national legislation like that contested in the proceedings before the referring court.¹¹⁸ With regard to the second question the CJEU argued that according to the principle of the primacy of EU law, a conflict between a provision of national law and a directly applicable provision of the Treaty needed to be resolved by application of EU law by a national court, and if necessary by refusing the application of a conflicting national provision, and not by its annulment. Subsequently, the Constitutional Court's deferral of the date on which the provisions, which it declared unconstitutional, would lose their binding force did not preclude the national courts from respecting the principle of the primacy of EU law and from declining to apply those provisions as contrary to EU law. In the effect, the primacy of EU law obliges the national court to apply EU law and to refuse to apply the conflicting provisions of national law, irrespective of the judgment of the national constitutional court deferring the date on which those provisions, would stop to be in force in a national legal order.¹¹⁹ In this way, the dialogue between the CJEU and the Polish administrative Court clarified the relationship between the primacy of EU law and the effect of rulings of Member States' constitutional courts.

Another preliminary ruling originating from a Polish court, which contributed to the development of EU law was *Polska Telefonia Cyfrowa*.¹²⁰ *Polska Telefonia Cyfrowa sp. z o.o.* (PTC) was one of the main telecommunications operators in Poland. In 2006, the President of the Office for Electronic Communications (*Prezes Urzędu Komunikacji Elektronicznej*, President of UKE) identified PTC as having significant market power in the market for the provision of voice call termination services. By means of an administrative decision the President of UKE imposed on PTC certain regulatory requirements. It is necessary to mention that under the Directive 2002/21¹²¹ the Commission is empowered to publish

¹¹⁷ *Ibidem*, paras 71–72.

¹¹⁸ *Ibidem*, para. 73.

¹¹⁹ *Ibidem*, paras 82–84.

¹²⁰ Case C-410/09 *Polska Telefonia Cyfrowa sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej* (CJEU, 12 May 2011).

¹²¹ Directive (EC) 2002/21 of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive'), O.J. L 108 2002 33.

guidelines¹²² concerning market analysis and the assessment of significant market power. The national regulatory authorities (NRAs – in Poland the President of the UKE) are obliged by the provisions of the Directive to take the said guidelines into account for the definition of relevant markets appropriate to national circumstances and, in particular, of relevant geographic markets within their territory, in accordance with the principles of competition law.¹²³ The PTC contested the decision before Polish courts, claiming that the decision was based on the Commission Guidelines issued in 2002 and since they had not been published in Polish in the Official Journal of the European Union, they could not be relied on against PTC (as a private company). The PTC's action failed in two instances and subsequently the company lodged a cassation to the Polish Supreme Court (*Sąd Najwyższy*). The Supreme Court carefully examined the case law of the CJEU concerning the publication of legal acts and the binding effects on individuals (including the *Skoma-Lux* case, analysed earlier) and questioned the effects of the Commission Guidelines. The Supreme Court wondered whether the term 'obligations contained in Community legislation', used in para. 51 of *Skoma-Lux*, covered (apart from regulations and decisions) also other acts of EU institutions affecting individuals' rights or obligations and noted that the CJEU's jurisprudence justified a conclusion that this term is interpreted rather broadly.¹²⁴ The Court observed that the Guidelines gave rise to legitimate legal expectations on the part of persons whose situation falls within their scope.¹²⁵ Moreover, the Supreme Court concluded that in these circumstances Polish telecommunications undertakings were in a less favourable situation than undertakings established in other Member States, which were able to acquaint themselves with the guidelines in the official languages of those States.¹²⁶ For these reasons the Supreme Court decided to refer to the CJEU a question concerning the legal effects of the unpublished Guidelines. The Court of Justice in its reply first reiterated that a fundamental principle of the EU's legal order (principle of legal certainty – A.Cz.) required that measures adopted by the public authorities could not be enforceable against the persons concerned before they have had an opportunity to acquaint themselves with such rules. In addition, as it had been stated in *Skoma-Lux*, the Act of Accession to the EU of i.a. Poland precluded the obligations provided for in EU legislation, which had not been published in the Official Journal in the language of a new Member State (and that language being an official language of the EU), from being imposed on individuals in that State, even though those persons could have accessed the content of that legislation by other

¹²² Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, O.J. C 165 2002 6.

¹²³ Art. 16 of the Directive 2002/21.

¹²⁴ Case C-410/09 *Polska Telefonia Cyfrowa*, paras 17, 19.

¹²⁵ *Ibidem*, para. 20.

¹²⁶ *Ibidem*, para. 18.

means.¹²⁷ Addressing the considerations raised by the Supreme Court, the CJEU pointed out that the character of the Guidelines is to be evaluated on the basis of their content, which justified the conclusion that they could impose obligations on individuals. In that respect the CJEU, after a thorough examination, observed that the guidelines merely set out the principles that the NRAs should use in the analysis of markets and effective competition under the regulatory framework for electronic communications.¹²⁸ Consequently, the Court of Justice concluded that the Guidelines did not contain any obligation capable of being imposed, directly or indirectly, on individuals and thus the fact that they had not been published in the Official Journal in Polish did not prevent the Polish NRA from referring to them in a decision addressed to an individual.

The *Polska Telefonía Cyfrowa* ruling constitutes one of the best examples of a dialogue approach on the part of both involved courts. The referring Supreme Court presented a well-elaborated set of arguments for consideration of the CJEU with a thorough reference to the latter's jurisprudence on the issue. The Court of Justice comprehensively addressed all the doubts and points presented by the referring court. As the result, a ruling was issued, which truly develops the doctrine of EU sources of law and legal effects of *sui generis* acts.

The case *Rubach* demonstrates that, sometimes, unusual motivations stand behind a national court's decision to make a preliminary reference and to enter the judicial dialogue.¹²⁹ The case before the national District Court in Kościan (*Sąd Rejonowy*) concerned the criminal proceedings against Mr. T. Rubach. He acquired at a terrarium fair the exotic spiders of the genus *Brachypelma Albopilosum*, which is a protected specimen listed in Annex B to Regulation 338/97.¹³⁰ The inclusion in the Annex prohibits effectively commercial activities with regard to such specimen, except where it can be proved that such specimens were acquired and introduced into the EU, in accordance with the legislation in force for the conservation of wild fauna and flora.¹³¹ Mr. Rubach began breeding those spiders in captivity and auctioning them on the internet between February and October 2006. On the basis of those facts, he was charged with 46 infringements of Art. 128 the Polish Law on nature protection, which penalized i.a. infringements "of the provisions of EU law concerning the protection of species of wild animals and plants through the regulation of trade therein by: [...] (d) offering for sale or purchase, purchasing or acquiring, using or displaying publicly for commercial purposes, selling, holding or transporting for the purpose of sale, specimens of specific species of plants or animals." In October 2007, the District Court in Kościan acquitted the accused of all the charges because,

¹²⁷ *Ibidem*, paras 23–24.

¹²⁸ *Ibidem*, para. 30.

¹²⁹ Case C-344/08 *Criminal proceedings against Tomasz Rubach* (CJEU, 16 July 2009).

¹³⁰ Council Regulation (EC) 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, O.J. L 61 1997 1.

¹³¹ Art. 8 of the Regulation 338/97.

in the Court's view, his actions did not constitute the prohibited act. However the district prosecutor appealed against the first instance judgement and the appellate court, the Provincial Court (*Sąd Okręgowy*) in Poznań, overturned that judgment in its entirety and referred the case for reconsideration back to the District Court.¹³²

While reconsidering the case, the District Court observed that appellate court's interpretation of national law, which was binding on the District Court, actually meant that the accused could avoid criminal liability, only if he were in a position to establish the source of the animals, either by producing a certificate of registration (as required under Article 64(1) of the Law on nature protection) relating to the animals sold or by supplying evidence which would make it possible to retrace the source of those animals and to identify with certainty the previous owner or breeder. However, according to the court's investigations, the accused was unable to register the spiders because, as arachnids, they were not subject to registration under Polish law. As the court pointed out, Mr. Rubach was not required under Polish law to have any specific knowledge of the origin of the animals that he had bought, since he had bought them at a legal fair. In the District Court's view, Mr. Rubach, as unable to produce any of the evidence required by the appellate court, could not avoid criminal liability. Therefore, the District Court decided to refer a question to the Court for a preliminary ruling:

[H]ow, under [Article 8(5) of Regulation No. 338/97] and in the light of the presumption of innocence, may a keeper of animals listed in Annex B [to that regulation] (which are not amphibians, reptiles, birds or mammals) prove satisfactorily that his specimens were acquired [...] in accordance with the legislation in force with regard to wild fauna and flora [...]?

The CJEU considered the question very thoroughly. It observed, first, that Regulation 338/97 did not limit the evidence that might be used in order to establish that specimens of species listed in Annex B to that regulation have been acquired lawfully and the apportionment of the burden of proof should be assessed in the light of the principle of the presumption of innocence which is one of the fundamental rights protected in the EU legal order (the Court referred to its case law but also to Art. 6 ECHR).¹³³ Accordingly the CJEU reminded that introduction of the system of protection for specimens of species listed in Annexes A and B to Regulation No. 338/97 did not in any way affect the general obligation of the prosecution to prove that the criminal act had occurred.¹³⁴ Consequently, the CJEU ruled that Art. 8(5) of Regulation 338/97 had to be interpreted as

¹³² Case C-344/08 Rubach, para. 12.

¹³³ Ibidem, paras 29–30.

¹³⁴ Ibidem, para. 32.

meaning that, in the context of criminal proceedings brought against a person accused of having infringed that provision, any type of evidence accepted under the procedural law of the Member State concerned in similar proceedings is in principle admissible for the purpose of establishing whether specimens of animal species listed in Annex B to that regulation were lawfully acquired. In the light also of the principle of the presumption of innocence, such a person may adduce any such evidence to prove that those specimens came lawfully into his possession in accordance with the conditions laid down in that provision.¹³⁵

It is not hard to agree with the opinion that the *Rubach* case is quite unique in that it demonstrates that the preliminary ruling procedure can be used as remedy against mistakes of other courts. Also in that, it shows exceptional engagement of the referring court, which did all that was possible, or even more, to ensure that the rights of an individual – including such fundamental principle as presumption of innocence – are observed despite the curious findings of the court of higher instance. This is the ‘human face’ of judicial dialogue.

4. Conclusion

The presented selection of preliminary rulings on the questions referred by the courts of Czech Republic, Hungary, Lithuania and Poland contains the ones that are most significant for the development of EU law. Although the number of preliminary references originating from the CEE States subject to research is – with the exception of Hungary – lower than the EU average, there are no differences as to the quality of the references. The problems of interpretation of EU law (the questions on validity are scarce) raised by the national courts in their preliminary references concern matters fundamental from the constitutional perspective of the EU legal order as well as issues essential from the point of view of development of the particular domains of EU law. Quite often national courts show courage to present, beside the factual and legal circumstances of the cases pending before them, their own considerations on the problems that are subject of preliminary references. This way they open the field to discussion and contribute to the enrichment of judicial dialogue. This practice seems to be welcome by the CJEU, as the examined case law leaves the impression that the Court is interested and inspired to develop the judicial dialogue where it has the opportunity to engage in a ‘correspondence’ discussion of sorts with arguments of the national courts. In its replies the CJEU tries to be as unequivocal as possible as to the interpretation of norms of EU law, but, as a rule, it leaves to national courts a wide

¹³⁵ *Ibidem*, para. 34.

margin of discretion in the assessment whether and in what way the interpretation given may be applied in national proceedings. As the result, we may conclude that also in the context of the CEE States the institutionalised judicial dialogue, organised with a use of the preliminary reference, constitutes an excellent means of creation and sustainable development of international, supra-State legal order where, at the same time, the common Union interest, the rights of individuals and the national identities of the Member States are protected.

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VI. The Polish Ordinary Courts in Dialogue on International Law

Magdalena Matusiak-Frącczak*

1. Introductory Remarks

Polish ordinary courts¹ adjudicate in areas of criminal law and civil law, including labour and social security law. The right to a fair trial requires that the case is verified by at least two court instances² and this rule is preserved both by civil and criminal procedure.³ In strictly defined matters a case can be resolved by the Polish Supreme Court, which acts as a court of cassation. It must be noted that Polish law does not classify the Supreme Court as a part of the ordinary courts system.⁴ However, due to the value of its judgments for the ordinary courts we shall consider it as such.

Polish courts issue judgments on the basis of Polish law, which encompasses also public international law. Pursuant to Art. 9 of the Polish Constitution, the Republic of Poland shall respect international law binding upon it. Ratified international agreements are one of the sources of a universally binding law of the Republic of Poland (Art. 87(1) of the Constitution). They constitute part of the domestic

* Dr iur., Assistant Professor, Department of European Constitutional Law, Faculty of Law and Administration, University of Lodz, Poland.

1 In Poland there are at present 321 district courts, 45 provincial courts and 11 appellate courts, Biuletyn Informacji Publicznej, 'Lista sądów powszechnych', <<https://bip.ms.gov.pl/rejestry-i-ewidencje/lista-sadow-powszechnych/>> (access: 21 November 2015).

2 Arts. 45(1) and 175(1) of the Polish Constitution.

3 Art. 367(1) of the Code of Civil Procedure and Art. 425(1) of the Code of Criminal Procedure.

4 Art. 175(1) of the Polish Constitution, Art. 2(1) of the Code of Civil Procedure, Arts. 24–27 of the Code of Criminal Procedure.

legal order and shall be applied directly after their promulgation in the *Journal of Laws of the Republic of Poland (Dziennik Ustaw)*, unless their application depends on the enactment of a statute (Art. 91(1) of the Constitution). An international agreement ratified upon prior consent granted by a statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of these statutes (Art. 91(2) of the Constitution). Since the entry into force of the Polish Constitution international law, at least in theory, is quite broadly applied by Polish courts. The aim of this paper is to show whether when this happens courts use the expertise of international and foreign courts or even enter into the conversation with the judges from other jurisdictions.

A wide understanding of the notion of judicial dialogue has been adopted for the purposes of this study. The notion will denote here any referral made by Polish ordinary courts to decisions of other jurisdictions. In order to answer the posed research question, the following screening method was applied. Courts' rulings are in Poland published in Internet databases. These databases were searched with the use of selected keywords, for example: 'international', 'custom', 'convention', 'tribunal', to find the relevant case law. They were then analysed with the view of identifying instances of dialogue and classified accordingly.

Having collected the research material, it was noticeable that the decisions from other jurisdictions that are the most frequently mentioned by Polish courts are these of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Both the European Convention on Human Rights (ECHR) and EU law form a part of the Polish law and they are often directly applicable by the courts. The judgments of these two jurisdictions are widespread, many of them are available in Polish and are broadly commented by Polish scholars. Due to a great quantity of the judgments referring to the decisions of the ECtHR and the CJEU, the scope of the research was limited only to those delivered in years 2010–2015. The referrals to the decisions of the other international bodies, e.g. the United Nations Human Rights Committee (HRC) or the International Court of Justice (ICJ) or courts of other States were occasional. Therefore, they were examined in a more detailed manner and no time limits applied. The study does not deal with the procedural references to the decisions of foreign courts where the application of foreign law ensues from the obligation based, e.g. on the Regulation 593/2008⁵ or international private law.⁶

⁵ Regulation (EC) of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (2008) O.J. L 177/6.

⁶ As an example of this type of judgments we may present the judgment in Case IV CSK 309/12 (Supreme Court, 8 February 2013), in which the Court referred to the judgments of the German courts on the interpretation of the rules of the *Bürgerliches Gesetzbuch* on the compensation for traffic accidents, which the Court had to apply on the basis of the Hague Convention on the law applicable to traffic accidents of 4 May 1971. The courts, on the basis of Art. 1143(3) of the Code of Civil Procedure, asked the Ministry of Justice for the explanation of the foreign legal practice.

As it has been pointed out already in this volume by M. Górski, the judicial dialogue may be classified *vis-à-vis* the criterion of appropriateness. The dialogue can be proper, fake or decorative and, eventually, failed.⁷ We will explore the examples from all these categories, yet the main focus will be to identify the examples of proper dialogue. By doing so we would like to show the participation of Polish ordinary courts in the development of international law, in the strengthening the rule of law or searching for common judicial standards.

2. Examples of a Proper Dialogue

The aim of this part of the paper is to present decisions of Polish courts, in which they enter into proper dialogue with international and foreign bodies. A proper dialogue means courts' rulings "referring to accurately collected case law of other courts and analysing it properly from methodological point of view."⁸

The research revealed four main substantive law categories where such dialogue appears. Polish courts refer to the decisions of international and foreign courts mainly in cases concerning human rights, EU law and customary international law. The fourth group covers every other area of law in which the courts enter into dialogue on international law.

2.1. Human Rights Protection

The first area, in which Polish ordinary courts enter into a dialogue with international bodies, is the field of human rights protection. Poland is a party to numerous human rights treaties and these rights form an essential element of the Polish legal system.

The substantial part of the dialogue is made up of references of the courts to the decisions of the ECtHR. This range of cases will be addressed only very briefly, as it is a topic of a more detailed analysis made in this volume by M. Górski.⁹ It seems sufficient to indicate that ordinary courts are acquainted with the judgments of the ECtHR. Many decisions of the Court, especially those rendered

⁷ See the contribution to this volume: M. Górski, *Dialogue between national courts of selected Central and Eastern European States and the ECtHR concerning the ECHR*.

⁸ See: *ibidem*.

⁹ See: *ibidem*.

against Poland, are translated into Polish and they are published on the websites of the Ministry of Justice¹⁰ and the Ministry of Foreign Affairs.¹¹

The decisions of the ECtHR are mentioned by ordinary courts mostly in the following areas: the right to a fair trial,¹² the obligation of a State to protect the personal goods of the arrested and the imprisoned persons whilst ensuring appropriate conditions of their imprisonment,¹³ the use of the provocation in the criminal procedure,¹⁴ the freedom of speech,¹⁵ the compensation for the arbitrary arrest.¹⁶ In all cases ECtHR judgments are generally invoked to support the courts' own reasoning.

As an example of a proper judicial dialogue we shall discuss a judgment delivered by the Wrocław District Court in X P 384/13.¹⁷ The case concerned disciplinary sanction imposed on a school teacher (the plaintiff) who during the staff meeting criticised the behaviour of the school director. The plaintiff opposed to the fact that the director announced the results of the teachers' evaluation by the students in public during the meeting, but instead should have done so in private with every teacher. The plaintiff, in the view of the director, questioned his competences and depreciated his authority. As a result, the director punished the plaintiff giving her a caution.¹⁸

The plaintiff argued before the court that the penalty violated her freedom of speech, as enshrined in Art. 54 of the Polish Constitution and in Art. 10 ECHR. To solve the case, the Wrocław District Court referred to numerous judgments of the ECtHR on Art. 10 ECHR, especially in relations between employee and employer, in order to establish a standard of protection of this right, which is common for the European States.

At the beginning it was necessary to establish the attribution of protection under Art. 10 ECHR. The first judgment mentioned by the Wrocław District

¹⁰ Biuletyn Informacji Publicznej, 'Orzecznictwo Europejskiego Trybunału Praw Człowieka', <<https://bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/orzecznictwo-europejskiego-trybunalu-praw-czlowieka/>> (access: 2 October 2015).

¹¹ Biuletyn Informacji Publicznej, 'Nowe tłumaczenia wyroków Europejskiego Trybunału Praw Człowieka na język polski', <https://www.msz.gov.pl/pl/polityka_zagraniczna/europejski_tribunal_praw_czlowieka/aktualnosci/nowe_tlumaczenia_wyrokow_europejskiego_tribunalu_praw_czlowieka_na_jezyk_polski> (access: 2 October 2015).

¹² Supreme Court cases: III CZP 16/10 (30 November 2010); III KK 327/12 (5 April 2013); I KZP 14/14 (26 June 2014); I PZ 19/14 (28 October 2014); case II AKz 340/10 (Wrocław Appellate Court, 17 June 2010).

¹³ Case III CZP 25/11 (Supreme Court, 18 October 2011); case I ACa 758/12 (Szczecin Appellate Court, 20 December 2012); case I ACa 966/12 (Warsaw Appellate Court, 31 January 2013).

¹⁴ Supreme Court cases: III KK 152/10 (30 November 2010); II KK 265/13 (19 March 2014).

¹⁵ Case I ACa 662/12 (Łódź Appellate Court, 1 October 2012); case II AKa 91/11 (Lublin Appellate Court, 6 June 2011); case I ACa 201/12 (Warsaw Appellate Court, 20 September 2012).

¹⁶ Case II KK 296/11 (Supreme Court, 13 June 2012).

¹⁷ Case X P 384/13 (Wrocław District Court, 7 June 2013).

¹⁸ In Polish: *upomnienie*.

Court was a 2009 *Wojtas-Kaleta v Poland*¹⁹ where the application was filed by a journalist of the Polish Public Television (TVP S.A.). The applicant as well as many other journalists and artists signed an open protest letter directed to the Board of TVP S.A. criticizing the reduction in the number of cultural programs to the favour of purely commercial ones. The ECtHR found that the reprimand penalty²⁰ imposed on the applicant was in conflict with Art. 10 ECHR, especially taking into consideration the fact that the applicant's critique was done in good faith and it was not directed against any specific person but only against the employer's policy. In 2013 decision the Wroclaw District Court found the situation in *Wojtas-Kaleta v Poland* analogous to the one before it. It emphasized that the plaintiff was not acting *mala fides* against the director or any other teacher, but presented a general opinion that the results should be discussed with everyone in private.

Further the Wroclaw District Court referred to the decision in *Sosinowska v Poland*,²¹ in which the applicant, a medical doctor, criticized the work of her colleague and his improper treatment of patients. The ECtHR found that the absolute prohibition of critique of one doctor directed at the work of another is contrary to Art. 10 ECHR, especially if the critique is induced by the care for patients' health. In the case at stake, the Wroclaw District Court found that the plaintiff's action was only a defence of her colleague, who was criticized in public and, therefore, at risk of ostracism by other teachers.

Another case mentioned by the Wroclaw District Court was *Fuentes Bobo v Spain*,²² concerning offensive opinions of the applicant against his employer (public television). As a result of pronouncement of his opinions, the applicant was dismissed, which was found by the ECtHR to be an excessive and disproportionate sanction. Before the incident, the applicant had been for many years an appreciated employee.

Having established, that the case at stake falls under the realm of Art. 10 ECHR, it was indispensable to analyse the principle of proportionality of intervention. The Wroclaw District Court found that not every expression of opinion is protected by Art. 10 ECHR and it may happen that a sanction imposed on an employee is proportionate. As example it pointed out the ruling of the ECtHR in *Palomo Sanchez and others v Spain*.²³ The applicants published a magazine, in which they used vulgar language and pictures criticizing their colleagues for giving in court a testimony favourable to their employer. All applicants were dismissed from their work and the ECtHR did not find this sanction excessive. Moreover, the Wroclaw District Court notices, that the ECtHR cited the advisory opinion

¹⁹ *Wojtas-Kaleta v Poland*, App. no. 20436/02 (ECtHR, 16 July 2009).

²⁰ In Polish: *nagana*.

²¹ *Sosinowska v Poland*, App. no. 10247/09 (ECtHR, 18 October 2011).

²² *Fuentes Bobo v Spain*, App. no. 39293/98 (ECtHR, 29 February 2000).

²³ *Palomo Sanchez and others v Spain*, App. no. 28955/06 (ECtHR, 12 September 2011).

of the Inter-American Court of Human Rights (IACtHR) in OC-5/85²⁴ declaring that freedom of speech is a necessary condition of development of trade unions. It resulted thereof that the freedom of expression is also guaranteed to employees, who thus have the right to criticize their employers, despite subordination that exists in their relations.

On the basis of these opinions the Wrocław District Court concluded, that the plaintiff's behaviour could not be regarded as exceeding the freedom of expression. Furthermore, referring to *Jersild v Denmark*²⁵ and *Nilsen and Johnsen v Norway*²⁶ the Court emphasized that

freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Within the limitations of paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.²⁷

On that ground the Wrocław District Court found that there was no reason to impose a penalty on the plaintiff.

The decision of the Wrocław District Court should be considered as an exemplary proper judicial dialogue. The Court not only cited the opinions of the ECtHR but also showed their relation to the subject matter of the case before the District Court. The Court compared the factual background of the cases before the ECtHR and the outcome of the ECtHR's deliberations with the facts of the case before the District Court and on this basis drew conclusions as to the required level of protection of freedom of speech and the appropriateness of the sanction imposed on the plaintiff by her employer. An additional value of this judgment presents itself in an indirect dialogue of the Wrocław District Court with the IACtHR, where the ECtHR played a role of an intermediary.

²⁴ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-American Court of Human Rights Series A No. 5 (13 November 1985): "70. Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free."

²⁵ *Jersild v Denmark*, App. no. 15890/89 (ECtHR, 23 September 1994).

²⁶ *Nilsen and Johnsen v Norway*, App. no. 23118/93 (ECtHR, 25 November 1999).

²⁷ *Ibidem*, 43.

Another international body, whose opinions on human rights had some, albeit limited, influence on decisions of ordinary courts is the Human Rights Committee. The HRC's case-law is mentioned very rarely, it seems that not many judges are familiar with the Committee's activity.

In I CSK 439/13²⁸ the Supreme Court examined in opinion an opinion of the HRC. The case before the Court concerned a Sikh, Mr. S.P., who was forced by the Border Guards to remove his turban during the customs control. He claimed damages for a breach of his personal interests under the Polish Civil Code²⁹ and the freedom of religion.

Firstly, the Supreme Court invoked and analysed several of its own judgments and the case-law of the ECtHR. The Court referred to *X v United Kingdom*,³⁰ in which the applicant was also a Sikh who was fined by the British Police due to his riding a motorcycle without a crash helmet, which was required by British law. His application to the ECtHR was rejected by the European Commission for Human Rights as it noticed that the compulsory wearing of crash helmets is a necessary safety measure for motorcyclists. Therefore, the interference with the applicant's freedom of religion was justified by the protection of health. Then the Supreme Court cited the ruling in *Phull v France*,³¹ in which the factual background was similar to the one in the case at stake. The applicant, who was a practising Sikh, was compelled by the security staff at the airport to remove his turban for inspection as he made his way through the security checkpoint prior to entering the departure lounge. The ECtHR found no violation of the ECHR and emphasized that security checks at the airports are undoubtedly necessary in the interests of public safety, particularly as the measure was only resorted to occasionally.

Moreover, the Court made a comparison of the judgment of the ECtHR in *Mann Singh v France*³² and the opinion of the HRC in *Mann Singh v France*.³³ The Supreme Court studied in detail the decisions of these two instances on the prohibition of wearing a turban while taking a photo for a passport and a driving licence, as in the case of the same person the ECtHR and the HRC have issued contrary decisions. The ECtHR has not found any violation of the ECHR, emphasizing that a requirement of removing a turban for the purpose of taking a photo for a driving licence and an identity card is necessary in a democratic society on the grounds of public safety as it reduces the risk of fraud from tampering permits lead, and therefore it falls into the margin of appreciation granted to State. The HRC, on the contrary, found that there was a breach of the applicant's right to freedom of religion. According to the HRC,

²⁸ Case I CSK 439/13 (Supreme Court, 17 September 2014).

²⁹ Arts. 23 and 24 of the Civil Code.

³⁰ *X v United Kingdom*, App. no. 7992/77 (European Commission for Human Rights, 12 July 1978).

³¹ *Phull v France*, App. no. 35753/03 (ECtHR, 11 January 2005).

³² *Mann Singh v France*, App. no. 24479/07 (ECtHR, 27 November 2008).

³³ *Mann Singh v France*, App. no. 1928/2010 (HRC, 19 July 2013).

France has not proven how taking off a turban for purposes of taking a photo would make the identification of the claimant more possible, as in everyday life he wears a turban in a way, which makes his face perfectly visible. The HRC claimed that the sustained character of the violation caused by the State's refusal to issue requested documents was contrary to the principle of proportionality. The Supreme Court emphasized that the situation of the plaintiff in the case at stake, Mr. S.P., was different from the one of Mr. Mann Singh. It concerned the safety of the passengers and the flight and it was a singular and an exceptional interference in Mr. S.P.'s freedom of religion, whereas the intrusion in the rights of Mr. Mann Singh was of a permanent and a long lasting character, as he could not obtain important documents for several years due to the lack of a photo.³⁴

The analysis of the opinions of the ECtHR and the HRC permitted the Supreme Court to make a conclusion that there was no violation of human rights of Mr. S.P. There was an intrusion with the plaintiff's personal rights and freedom of religion, but it was necessary in a democratic society and neither was it disproportionate, as the obligation to remove the turban was imposed only occasionally.

As it may be noticed, in the area of human rights protection ordinary courts refer to opinions of different international bodies. In that sphere, the most developed dialogue exists with the ECtHR, as the research revealed only one example of a dialogue with the HRC. As we may see from the examples presented above, Polish courts resort to a detailed analysis of decision of other courts to find a common standard of protection of human rights and apply it in cases before them.

2.2. Customary International Law

One of the most natural areas of dialogue with international and foreign courts is the area of customary international law. The major subject in this area is State immunity. In the 2010 *Natoniewski*³⁵ case the Polish Supreme Court was to decide whether the Federal Republic of Germany is protected by State immunity in cases concerning the damages caused during the World War II. The plaintiff, Mr. Natoniewski, claimed damages (a sum of 1 000 000 PLN) as a compensation for the injuries³⁶ suffered during the pacification of Szczecin carried out by the German

³⁴ "W motywach opinii wskazano, że co prawda państwo może powoływać się na ochronę porządku i bezpieczeństwa publicznego, w tym na przeciwdziałanie fałszerstwu dokumentów i tożsamości, jednak skarżone państwo nie wykazało, że dopuszczenie fotografii w turbanie naruszałoby interes ogólny, skoro posiadacz zawsze występuje publicznie ubrany w ten sposób. [...] Wreszcie zastosowanie środka było jedynie okazjonalne (inaczej niż w powołanej wyżej sprawie Mann Singh) i obiektywnie nie przyniosło powodowi uszczerbku, ponieważ badanie zawsze odbywało się w osobnym pomieszczeniu, tylko w obecności funkcjonariusza prowadzącego kontrolę. Zastosowany środek był zatem proporcjonalny."

³⁵ Case IV CSK 465/09 (Supreme Court, 29 October 2010).

³⁶ The plaintiff was a 6-year-old child. His head, chest, hands were burned.

army on 2 February 1944. Mr. Natoniewski claimed that there was no possibility to apply State immunity when the State breached *jus cogens* norm. There is a noticeable trend in public international law to indicate that in case of conflict between *jus cogens* norm and State immunity, a peremptory norm is superior and deprives the rule of State immunity of all its legal effects.³⁷ *Natoniewski* gave thus the Supreme Court a possibility to participate in international legal discussion on the relationship between the two norms.

To determine whether Germany could be sued before Polish courts the Court carefully considered many international and national courts decisions. At the beginning the Supreme Court distinguished between two groups of judgments presenting two different views. According to the first approach, the jurisdictional immunity of State has still an absolute character, whereas, according to the second one, certain restrictions may apply. Apart from the referrals to the judgments of the ECtHR³⁸ and the CJEU,³⁹ the Court examined the judgment of the ICJ of 2002 in *Democratic Republic of the Congo v Belgium*.⁴⁰ For the Polish Supreme Court the ICJ judgment was an example of a decision adopting the first of the above mentioned views. In this case the ICJ held that even the breach of *jus cogens* would not enable the abolition of the immunity of the Minister of Foreign Affairs of the Congo while in office. At the time when the ICJ issued its ruling, there was a broad discussion on immunity of State officials in case of serious crimes under international law. The House of Lords in *Pinochet*⁴¹ and the French *Cour de Cassation* in *Qaddafi*⁴² decided that in this situation, a State official is not protected by immunity. However, the Polish Supreme Court in its decision in *Natoniewski* did not make any distinction between immunity of State and that of the Minister of Foreign Affairs. Upon a broad inquiry into the decisions from other jurisdictions, the Court also indicated, that even if there is a tendency in international law to exclude the State immunity in case of a serious breach of human rights law, the ICJ would need to make a pronouncement on the *Jurisdictional*

³⁷ *Al-Adsani v the United Kingdom*, App. no. 35763/97 (ECtHR, 21 November 2001), joint dissenting opinion of judges Rozakis and Caflish, joined by judges Wildhaber, Costa, Cabral Barreto and Vajić.

³⁸ *Al-Adsani v the United Kingdom*, App. no. 35763/97 (ECtHR, 21 November 2001); *McElhinney v Ireland*, App. no. 31253/96 (ECtHR, 21 November 2001); *Kalogeropoulou and others v Greece and Germany*, App. no. 59021/00 (ECtHR, 12 December 2002); *Waite and Kennedy v Germany*, App. no. 26083/94 (ECtHR, 18 February 1999).

³⁹ C-292/05 *Erini Lechouritou and others v Dimosio tis Demokratias tis Germanias* (CJEU, 15 February 2007); C-172/91 *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann* (CJEU, 21 April 1993).

⁴⁰ *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (ICJ, 14 February 2002).

⁴¹ *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (House of Lords, 24 March 1999).

⁴² Case 00–87215 *Qaddafi* (French *Cour de Cassation*, 13 March 2001).

Immunities of the State (Germany v Italy: Greece Intervening) case⁴³ that was at the time pending.

The Supreme Court examined there also numerous decisions of the courts of other States, i.a. of: the United Kingdom,⁴⁴ the United States,⁴⁵ Italy⁴⁶ and Greece.⁴⁷ It was part of the Court's research into international custom on jurisdictional immunity of States and definitely it is worth an approval that the Court did not limit the scope of its examination only to international bodies, but it made a detailed scrutiny of various foreign courts' case law. In cases concerning the determination of an existence or a lack of a customary international law, it is indispensable that the courts of different States study opinions of other courts on both, national and international level.

The Supreme Court decided, that the Polish judicial practice acknowledges State jurisdictional immunity as a part of international customary law and is applicable by national courts on the basis of Art. 9 of the Polish Constitution. The immunity has its source in the principle of equality of States (*par in parem non habet imperium*) and it is an expression of State sovereignty. Its aim is to preserve friendly inter-State relationships.⁴⁸ The Court, referring to its own previous decisions,⁴⁹ indicated that till 1950's State immunity was absolute in every aspect, but nowadays this absolute character is connected only with a sovereign activity of a State (*acta iure imperii*), whereas a State is not entitled to it when a dispute arises from a commercial transaction entered into by a State or other non-sovereign activity of State (*acta iure gestionis*).

⁴³ *Jurisdictional immunities of the State (Germany v Italy: Greece intervening)* (ICJ, 3 February 2012).

⁴⁴ *Jones v Saudi Arabia* (House of Lords, 14 June 2006).

⁴⁵ *Liu v Republic of China* (United States Court of Appeals, 9 Circuit, 29 December 1989); *Republic of Austria v Maria Altmann* (United States Supreme Court, 7 June 2004); *Guy von Dardel v the USSR* (United States DC Circuit Court of Appeals, 15 October 1985).

⁴⁶ *Ferrini v Germany* 5044/2004 (Italian Corte di Cassazione, 11 March 2004); *Civitella* 1072/08 (Italian Corte di Cassazione, 21 October 2008).

⁴⁷ *Perfectory Voiotia v Germany (Distomo)* 111/2000 (Greek Special Supreme Court, 4 May 2000); *Margellos v Germany* 6/2002 (Greek Special Supreme Court, 17 September 2002).

⁴⁸ The Supreme Court in *Natoniewski* stated that: "Ostatecznie w polskim orzecznictwie pod wpływem wypowiedzi piśmiennictwa przeważał pogląd uznający na gruncie art. 9 Konstytucji za źródło tego immunitetu powszechnie przyjęty zwyczaj międzynarodowy. [...] U podstaw immunitetu jurysdykcyjnego państw obcych leży zasada równości państw (*par in parem non habet imperium*). Jest on wyrazem poszanowania suwerenności państw. Zmierzają do utrzymania między państwami przyjaznych stosunków."

"Finally, the Polish jurisprudence decided that on the basis of Art. 9 of the Polish Constitution it is the commonly accepted international custom that is the source of this immunity. [...] The basis of the jurisdictional immunity of foreign States is the principle of equality of States (*par in parem non habet imperium*). It is the expression of the respect to the State sovereignty. It aims at keeping friendly inter-State relationships" (transl. by the author).

⁴⁹ Supreme Court cases: III PZP 9/90 (26 September 1990); III CSK 293/07 (13 March 2008).

On the other hand, the Supreme Court noticed on the basis of the detailed information supplied by the Ministry of Justice that whenever States regulated State immunity, State jurisdictional immunity is excluded in cases of injury or damage occurred in the territory of State of the forum. The same rule was adopted in the European Convention on State immunity.⁵⁰ There are also judicial decisions, which accept this rule,⁵¹ but there exist also such that contradict it.⁵² However, even if a new rule of customary international law has been recently created and it permits claiming damages from a State for injuries it caused and which occurred in the territory of State of the forum, it does not mean, in the view of the Supreme Court, that it can be applied to the events that took place decades ago.⁵³

Moreover, jurisdictional State immunity concerns especially the actions that occurred during the time of war or armed conflict and cannot be upheld by such recently created exception. The questions of injuries or damages are then regulated by peace treaties between sovereign States. In relations between individuals and States jurisdictional immunity is granted.

The Supreme Court noticed also that some foreign courts present a view, that jurisdictional State immunity is excluded in case of breach of *jus cogens* norms, as it means that a State impliedly renounces its immunity.⁵⁴ Yet the Court underlined that in its opinion State may expressly relinquish its immunity, but the renouncement cannot be implied and it does not belong to a national court to interpret international law in a way unaccepted by other States, and the *jus cogens* exception is not commonly recognized.⁵⁵ Moreover, the *jus cogens* norms concerned (pro-

⁵⁰ European Convention on State Immunity (adopted on 16 February 1972, Basel). Art. 11: "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

⁵¹ *Liu v Republic of China* (United States Court of Appeals, 9 Circuit, 29 December 1989); *Perfectory Voiotia v Germany (Distomo)* 111/2000 (Greek Special Supreme Court, 4 May 2000); *Ferrini v Germany* 5044/2004 (Italian Corte di Cassazione, 11 March 2004); *Hugo Princz v Federal Republic of Germany* (United States DC Circuit Court of Appeals, 14 April 2003); *Hirsch v State of Israel and State of Germany* (United States District Court (New York), 8 April 1997); *Bruce Smith v Socialist People's Libyan Arab Jamahiriya* (United States Court of Appeals, 2 Circuit, 26 November 1996).

⁵² *Margellos v Germany* 6/2002 (Greek Special Supreme Court, 17 September 2002); *Jones v Saudi Arabia* (House of Lords, 14 June 2006).

⁵³ *Republic of Austria v Maria Altmann* (United States Supreme Court, 7 June 2004).

⁵⁴ *Liu v Republic of China* (United States Court of Appeals, 9 Circuit, 29 December 1989); *Guy von Dardel v the USSR* (DC Circuit Court of Appeals, 15 October 1985); *Perfectory Voiotia v Germany (Distomo)* 111/2000 (Greek Special Supreme Court, 4 May 2000); *Ferrini v Germany* 5044/2004 (Italian Corte di Cassazione, 11 March 2004); *Civitella* 1072/08 (Italian Corte di Cassazione, 21 October 2008).

⁵⁵ *Hugo Princz v Federal Republic of Germany* (DC Circuit Court of Appeals, 14 April 2003); *Hirsch v State of Israel and State of Germany* (United States District Court (New York), 8 April 1997); *Bruce Smith v Socialist People's Libyan Arab Jamahiriya* 95–7930, 95–7931, 95–7942 (United

hibition of torture, prohibition of genocide) have substantive character, whereas jurisdictional State immunity is of procedural nature so they cannot reciprocally influence one another.

It is worth underlining that the Supreme Court's judgment in *Natoniewski* was noticed and had an impact on international level, as it was referred to by the International Court of Justice in its decision in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*⁵⁶ and by the European Court of Human Rights in *Jones and Others v the United Kingdom*.⁵⁷ The ICJ's ruling concerned the responsibility of Germany for damages caused during World War II, so the circumstances were exactly the same as in *Natoniewski*. First, agreeing with the Polish Supreme Court, the ICJ noticed, that the Basel Convention⁵⁸ does not cover the immunity of a State for the acts of its armed forces. Then the ICJ described in detail the reasons, why the Polish Court decided that Germany had jurisdictional immunity in cases on the acts committed during World War II and mentioned, that the Polish Supreme Court was one of the bodies presenting opinion that State immunity does not depend on the gravity of the act of which it is accused or the preemptory nature of the rule which it is alleged to have violated.

The judgment of the ECtHR concerned the right to a fair trial (Art. 6 ECHR). The applicants claimed they had been tortured in the Kingdom of Saudi Arabia by its officials and brought civil claims before the courts of the United Kingdom. The claims were dismissed, as the courts decided in favour of State immunity, which was granted to the Kingdom of Saudi Arabia and its officials even in the case of an alleged breach of the *jus cogens* norm, namely the prohibition of torture. The ECtHR was provided by the applicants and the United Kingdom with a comparative material on the practice of 21 Members of the Council of Europe and many other States worldwide in the area of State immunity. The information presented contained also the decision in *Natoniewski*. For the European Court of Human Rights the decisive factor was however the judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*.

The above-mentioned cases prove, that where important issues of international law are concerned the dialogue between different courts is multilateral and one can observe an interaction, what has positive influence on development of international customary law.

States 2 Circuit Court of Appeals, 26 November 1996); *Jones v Saudi Arabia* (House of Lords, 14 June 2006); *Al-Adsani v the United Kingdom*, App. no. 35763/97 (ECtHR, 21 November 2001); *McElhinney v Ireland*, App. no. 31253/96 (ECtHR, 21 November 2001); *Kalogeropoulou and others v Greece and Germany*, App. no. 59021/00 (ECtHR, 12 December 2002); *Waite and Kennedy v Germany*, App. no. 26083/94 (ECtHR, 18 February 1999).

⁵⁶ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n. 44).

⁵⁷ *Jones and Others v the United Kingdom*, App. nos 34356/06 and 40528/06 (ECtHR, 14 January 2014).

⁵⁸ European Convention on State immunity (adopted on 16 May 1972 in Basel).

The other example of Polish cases on State immunity which had a considerable impact internationally concerns immunity from enforcement. The former employee of the Nigerian Embassy in Poland wanted to institute the enforcement proceedings against her employer and required reinstatement and imposition of fine.⁵⁹ Basing on the ICJ's judgment in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, the Provincial Court emphasized that State immunity in the enforcement proceedings is wider than the jurisdictional immunity. A mere fact that there has been a final judgment delivered by a national court against a State does not mean that the enforcement proceedings can be instituted against that State on such basis. The international custom on immunity from jurisdiction and the immunity from enforcement differs as each of them has its separate prerequisites. For the enforcement proceedings against other State's property it has to be ascertained that the property is used for the purposes other than non-commercial government actions or the State has expressly agreed to the application of the enforcement proceedings to a given property, or the State has indicated a property that can be the object of the enforcement proceedings.⁶⁰

The Warsaw Provincial Court referred as well to the judgments of the courts of other States. One of them was the 1977 landmark decision of the German

⁵⁹ Case XXI Pz 95/14 (Warsaw Provincial Court, 26 June 2014).

⁶⁰ "W tym miejscu na szczególną uwagę zasługuje wyrok Międzynarodowego Trybunału Sprawiedliwości z dnia 3 lutego 2012 r. w sprawie *Germany v. Italy: Greece Intervening – jurisdictional immunities of the State*, w którym Trybunał wskazał, że immunitet chroniący przed środkami przymusu własność państwa znajdującą się na terytorium obcego państwa jest szerszy niż immunitet jurysdykcyjny. Z faktu wydania wyroku przeciwko obcemu państwu nie wynika *ipso facto*, że państwo to może być podmiotem środków przymusu na terytorium państwa forum w celu wykonania wydanego wyroku – normy zwyczajowego prawa międzynarodowego odnoszące się do immunitetu egzekucyjnego i immunitetu jurysdykcyjnego są więc różne i muszą być oddzielnie stosowane. Trybunał sformułował także warunki, które muszą być spełnione, aby środek przymusu mógł być zastosowany przeciwko mieniu należącemu do państwa obcego: mienie to musi być wykorzystywane do działań niestujących celom rządowym o charakterze niekomercyjnym lub państwo to wyraźnie zgodziło się na zastosowanie środka przymusu lub wskazało mienie, o które chodzi dla celów zaspokojenia roszczenia prawnego."

"Here a special attention should be given to the judgment of the International Court of Justice of 3 February 2012 in case *Germany v Italy: Greece Intervening – jurisdictional immunities of State*, in which the Court indicated that the immunity protecting from coercive measures a State property placed on a territory of other State is broader than jurisdictional immunity. It does not result *ipso facto* from a mere fact of giving a judgment against foreign State, that a State can be an object of coercive measures on a territory of a foreign State in the aim of the execution of a given ruling – the rules of international customary law on immunity from enforcement proceedings and jurisdictional immunity are thus different and they should be applied separately. The Court has also elaborated conditions, which should be fulfilled, if the coercive measure against the property of other State is to be applied: the property should not be used for governmental purposes of non-commercial character or the State has expressly agreed for the application of coercive measure or has designated property that can be used for the satisfaction of a legal claim" (transl. by the author).

Constitutional Court in *Philippine Embassy*,⁶¹ in which the German Court stated *inter alia* that the receivables from a current ordinary bank account of an embassy of a foreign State existing in the forum State and intended to cover the embassy's expenses and costs are not subject to execution by the forum State.⁶² The Warsaw Court invoked also the judgments, in which the courts of other States decided that the bank accounts used by a foreign State only for the commercial transactions purposes do not have the privilege of immunity from enforcement proceedings.⁶³

On the basis of these judgments the Warsaw Provincial Court ordered the District Court for the capital city of Warsaw to ascertain, whether the enforcement proceedings on the reinstatement could be instituted against the Nigerian Embassy. A separate analysis should concern the possibility of the imposition of a fine, especially taking into account that it may encroach upon the principle of equal sovereignty of States. As the reinstatement belongs to labor law, and thus forms a part of *acta de iure gestionis*, the fine is a repressive measure, so the defendant in the case at stake might remain protected by the immunity from enforcement.

Deciding on the existence of a norm of customary international law and its scope requires referring to decisions of international and foreign courts. The above mentioned examples of proper judicial dialogue, although scarce, show that ordinary courts can carry on a detailed scrutiny of opinions of other bodies and on that basis draw their own conclusions that are noticed on the international level, as the example of *Natoniewski* shows.

2.3. Application of EU Law

The dialogue on EU law between ordinary courts and the CJEU occurs much more often and it is of a different scope and character, due to the role that EU law plays in the national law of the EU Member State. The dialogue between Polish ordinary courts and the CJEU occurs usually through the procedure of preliminary rulings, what is described in this volume by A. Czaplińska.⁶⁴

Nevertheless, for the purposes of this contribution it is worth to mention other examples of the references to EU law. The Warsaw Appellate Court in I ACa

⁶¹ Case 2 BvM 1/76 (German Constitutional Court, 13 December 1977).

⁶² "Forderungen aus einem laufenden, allgemeinen Bankkonto der Botschaft eines fremden Staates, das im Gerichtsstaat besteht und zur Deckung der Ausgaben und Kosten der Botschaft bestimmt ist, unterliegen nicht der Zwangsvollstreckung durch den Gerichtsstaat."

⁶³ *Alcom Ltd. v Republic of Colombia* (House of Lords, 12 April 1984). Here the House of Lords reaffirmed what the German Constitutional Court said that a bank account used by the State or an embassy to cover the day-to-day expenses of an embassy, clearly serves sovereign purposes and therefore is immune from enforcement measures. See also: *Islamic Republic of Iran v Société Eurodif and others* 82-12462 (French *Cour de Cassation*, 14 March 1984).

⁶⁴ See in this volume: A. Czaplińska, 'The Preliminary Reference Procedure as an Instrument of Judicial Dialogue in the EU – the CEE Perspective'.

1663/13⁶⁵ not only referred to the judgments of the CJEU, but made a critical examination of Luxembourg Court's jurisprudence and entered into a reasoned discussion with the CJEU. The Appellate Court decided not to apply to the CJEU under the procedure of preliminary ruling.

The dispute in the case at stake concerned copyrights and the unlawful use of the plaintiff's song in election spot of one of candidates to the Polish Parliament, which was accessible through clickable Internet link.

The Warsaw Appellate Court differed with the CJEU's opinion expressed in C-466/12 *Svensson*,⁶⁶ in which the Court of Justice held that the provision on a website of clickable links to works freely available on another website does not constitute an "act of communication to the public", because there can be no 'new public' as every person having access to the Internet may view any websites available therein. The Warsaw Appellate Court, pointing to the judgment in C-306/05 *SGAE*,⁶⁷ concerning works communicated by means of television sets installed in hotel rooms, decided that the CJEU in C-466/12 *Svensson* has erroneously departed from its previous jurisprudence. According to the Appellate Court, the websites are addressed to different public in different States, they are published in different languages and it cannot be said *a priori* that a clickable link to a website does not break copyrights, because a given work has already been published on another website, so anyone could access it freely. The Warsaw Appellate Court also emphasized that the determination of an "act of communication to the public" should always be based on a detailed analysis of a case also when it concerns clickable Internet links.⁶⁸

Moreover, the Appellate Court showed an interesting approach to foreign jurisdictions. The Court rejected the arguments of the defendant based in the rulings of the courts of the United States of America,⁶⁹ stressing that the continental copyright system, so the one in Poland and in the EU, is very different from the American one. On this ground, the Court held that the US-courts' decisions could not be taken into consideration when applying the relevant Polish and the EU laws. They

⁶⁵ Case I ACa 1663/13 (Warsaw Appellate Court, 7 May 2014).

⁶⁶ C-466/12 *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB* (CJEU, 13 February 2014).

⁶⁷ C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (CJEU, 7 February 2006).

⁶⁸ "Rozumowanie Trybunału prowadzi bowiem do wniosku, że w przypadku wydania książki przez wydawcę inny wydawca, drukując i wydając za pośrednictwem tych samych kanałów dystrybucji taką samą książkę na takich samych warunkach, nie narusza monopolu autorskiego. Wniosek taki logicznie wypływa z rozumowania Trybunału, jednak nie może być on zaakceptowany jako prawidłowy zarówno na gruncie ustawy polskiej, jak i ustawodawstwa Unii Europejskiej. W konsekwencji, w opinii Sądu Apelacyjnego nie można się w tej części zgodzić z rozumowaniem Trybunału, a co za tym idzie – nie można przyjąć, iż w każdym wypadku umieszczanie odwołań (linków) nie narusza monopolu autorskiego."

⁶⁹ It is not indicated by the Warsaw Appellate Court which American judgments have been mentioned by the defendant.

could only be used as an evidence on the evolution of the copyright law in one of the most technically developed States in the world.⁷⁰

Another example are the decisions of the Polish Supreme Court, [in:] II CSK 406/10,⁷¹ II CSK 541/10⁷² and II CSK 326/10,⁷³ all adopted on the 16 February 2011 by the same judges. The cases concerned the determination of the court's jurisdiction in insolvency proceedings, when a debtor runs business in two or more different States and the interpretation of Art. 3(1) and (2) of the Council Regulation (EC) No. 1346/2000.⁷⁴ The plaintiffs requested the opening of the insolvency proceedings in Poland, whereas there was already an insolvency proceeding in progress against the same entrepreneur, instituted in France. In its reasoning the Supreme Court referred to the two orders of the High Court of Justice in London delivered in *Enron Directo SA*,⁷⁵ in which the High Court of Justice developed the theory of mind of management and rebutted the presumption based on the registered office. The theory applied by the High Court in London was examined in detail and confronted by the Polish Supreme Court with the business activity theory, advanced by the CJEU in *C-341/04 Eurofood*.⁷⁶ The aim of the Supreme Court was to discuss two different approaches to the question at hand and to choose the most proper one.

Ultimately, the Supreme Court decided in favor of the business activity theory, established by the Court of Justice. The Supreme Court concluded, that the understanding of the Council Regulation by virtue of the theory of mind of management would be too subjective and it would lessen the protection of the rights of creditors. Debtors could manipulate the prerequisites of establishing court's jurisdiction by moving its seat to a State in which insolvency law is more favorable to them. At the end, the theory of mind of management could too easily lead to forum shopping. That is why, basing its view on teleological interpretation of the Regulation, the Supreme Court chose an approach that to a higher degree permits creditors for a real verification of circumstances justifying jurisdiction.

⁷⁰ "Chybione są argumenty oparte na orzeczeniach sądów Stanów Zjednoczonych Ameryki Północnej. Zasadniczo różny jest system prawa autorskiego kontynentalny – którego częścią jest tak Polska, jak i Unia Europejska – oraz system amerykański. Wskazane orzeczenia opierają się na instytucji *fair use*, która nie może być porównywana do instytucji dozwolonego użytku. Nie mogą one dlatego stanowić podstawy do rozważań w zakresie stosowania prawa w niniejszym postępowaniu, mogą jedynie dawać wskazówkę co do zmian w rozumieniu prawa zachodzącym na terenie jednego z najbardziej zaawansowanych technologicznie państw."

⁷¹ Case II CSK 406/10 (Supreme Court, 16 February 2011).

⁷² Case II CSK 541/10 (Supreme Court, 16 February 2011).

⁷³ Case II CSK 326/10 (Supreme Court, 16 February 2011).

⁷⁴ Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (2000) O.J. L 160.

⁷⁵ *Enron Directo SA* (High Court of Justice in London, 4 July 2002 and 10 December 2002).

⁷⁶ *C-341/04 Eurofood IFSC Ltd.* (CJEU, 2 May 2006).

The application of EU law may require not only references to the CJEU case law, but sometimes also to the decisions of the EU Member States' courts. On one hand there are rulings in which Polish courts enter into a discussion with CJEU and foreign courts, by making detailed analysis and presenting their own conclusions. On the other, there are also examples of the decisions of ordinary courts in which courts simply enumerate appropriate CJEU's rulings to support their opinions, without much critical deliberation.⁷⁷

2.4. Other Areas of Judicial Dialogue

Other instances, where ordinary courts deal with international law and discuss international or foreign courts' decisions escape any categorization. These cases are lumped in this final part, as they do have one common feature, namely their sole purpose is to strengthen the courts' own reasoning.

The first case discussed concerns the application of the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention).⁷⁸ In its judgment in I ACa 111/13⁷⁹ the Szczecin Appellate Court referred to the decisions of the French *Cour de Cassation*⁸⁰ and of the Belgian *Koophandel te Antwerpen*⁸¹ in which the Courts underlined that to determine the carrier's liability, the entirety of circumstances has to be taken into account, also whether the robbery had been committed by a third person. The Szczecin Appellate Court pointed out that the verification, whether the carrier followed all obligations and standards binding upon them requires taking into consideration particular circumstances of a given case. A robbery might, but as well might not, be a reason for a release of the carrier from his liability.

The Warsaw Appellate Court in I ACa 696/03⁸² and the Szczecin Provincial Court in VIII Ga 31/13⁸³ both cited the rulings of the Belgian *Hof van Beroep te Antwerpen*⁸⁴ and *Tribunal de Commerce de Liège*⁸⁵ and additionally the Warsaw Appellate Court referred to the decision of the French *Cour de Cassation*.⁸⁶ These

⁷⁷ The examples of decision of the Supreme Court's which contain decorative dialogue are the following: II PK 207/12 (27 February 2013), IV CSK 202/13 (28 February 2014), III CZP 113/13 (7 February 2014).

⁷⁸ Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) (19 May 1956).

⁷⁹ Case I ACa 111/13 (Szczecin Appellate Court, 9 May 2013).

⁸⁰ The Court referred to the particular case as: (French *Cour de Cassation*, 14 May 1992).

⁸¹ The Court referred to the particular case as: (Belgian *Koophandel te Antwerpen*, 3 March 1976).

⁸² Case I ACa 696/03 (Warsaw Appellate Court, 4 February 2003).

⁸³ Case VIII Ga 31/13 (Szczecin Provincial Court, 8 March 2013).

⁸⁴ The Court referred to the particular case as: (Belgian *Hof van Beroep te Antwerpen*, 8 November 1989).

⁸⁵ The Court referred to the particular case as: (Belgian *Tribunal de Commerce de Liège*, 27 June 1985).

⁸⁶ The Court referred to the particular case as: (French *Cour de Cassation*, 18 April 1989).

judgments were mentioned to strengthen the Courts' thesis that an entrepreneur acts as a forwarding agent only if this is stipulated expressly in the contract. In all other instances an entrepreneur is considered to be a carrier.

In all the above-mentioned cases ordinary courts used foreign decisions to support their own reasoning and to demonstrate that their interpretation of various provisions of the CMR Convention is in line with the opinions of other courts.

Ordinary courts use this technique especially if they deal with a groundbreaking interpretation or with new legal problems, e.g. in the field of financial instruments. The example is the decision of the Białystok Appellate Court⁸⁷ that concerned the contract of the currency option. The Appellate Court started its reasoning by comparing Polish and German regulations of the currency option contracts. It found many similarities and decided to analyze in detail the German case law, especially in the area of the bank's informative obligations towards its clients. The Appellate Court found German case-law relevant to interpret Polish regulations.⁸⁸

⁸⁷ Case I ACa 833/12 (Białystok Appellate Court, 21 January 2013). The Court referred to Case XI ZR 33/10 (German *Bundesgerichtshof*, 22 March 2011).

⁸⁸ "Dodać tylko należy, że z wyroku niemieckiego Trybunału Federalnego z dnia 22 marca 2011 roku (XI ZR 33/10), który dotyczy zakresu obowiązków informacyjnych i lojalnościowych banku wobec klienta w związku z zawieraniem transakcji pochodnych, wynika, że bank powinien odpytać klienta na okoliczność ryzyka inwestycyjnego, które jest w stanie podjąć – niezależnie od wykształcenia ekonomicznego klienta, wyjaśnić ryzyko 'produktu', tak by klient w zakresie tego 'produktu' miał zasadniczo ten sam poziom wiedzy co bank, uświadomić klientowi negatywną dla klienta, inicjalną wycenę produktu, gdyż taka wycena sama w sobie wskazuje na poważny konflikt interesów banku i klienta, uświadomić klientowi konflikt interesów, jeżeli struktura ryzyka 'produktu' jest przez bank celowo przesunięta na niekorzyść klienta. Trybunał Federalny nie wiązał przy tym obowiązków informacyjnych banku ze statusem konsumenckim klienta. Prowadzenie działalności gospodarczej przez klienta nie ma wpływu na obowiązki informacyjne banku. Istotny dla obowiązków informacyjnych banku jest jedynie brak wystarczającej wiedzy klienta dla oceny ryzyka z transakcji na poziomie zasadniczo zbliżonym, w zakresie zawieranej transakcji, do wiedzy banku. Kwalifikacje zawodowe klienta nie mają zasadniczo znaczenia. Trybunał Federalny zwrócił uwagę, że doświadczenie zawodowe klienta musiałoby właściwie dotyczyć przygotowywania i zawierania transakcji pochodnych, tak by klient niejako 'od kuchni' posiadał wiedzę na temat skutków konkretnej, zawieranej transakcji porównywalną z wiedzą banku. Ogólna wiedza na temat transakcji nie byłaby więc wystarczająca. Przyjęcie, że klient był zorientowany w ryzykach wywoływanych przez transakcję tylko na tej podstawie, iż zawierał transakcje w innym banku, jest nieuprawnione. Doświadczenie klienta uzasadniające odstąpienie od wyczerpującego poinformowania o właściwościach i możliwych skutkach transakcji musiałoby dotyczyć takich samych transakcji, przy czym nie chodzi tylko o typ transakcji, czy ich podtyp. Spostrzeżenia Trybunału Federalnego znajdują zastosowanie do realiów polskich, albowiem Trybunał ten rozstrzygał właściwie na podstawie ogólnych zasad odpowiedzialności odszkodowawczej *ex contractu* (§ 280 niemieckiego kodeksu cywilnego), a po części również na podstawie przepisów niemieckiej ustawy o obrocie papierami wartościowymi (§ 31.1.2 niemieckiej ustawy o obrocie papierami wartościowymi), odpowiadających regulacjom art. 471 k.c. i § 6 ust. 1 rozporządzenia Ministra Finansów z dnia 28 grudnia

3. Examples of a Decorative Dialogue

We have to recall that fake or decorative dialogue means the one “pretending to refer to the case-law of other courts but in fact just decorating the reasoning by random references to inappropriately collected and inaptly analysed decisions.”⁸⁹ While Polish courts engage infrequently in the proper judicial dialogue with other jurisdictions, the decorative references seem to be more common.

As an example of a decorative dialogue of Polish ordinary courts we can point to the reference to the Human Rights Committee in a decision which concerned family law and the State’s obligation to respect one’s private and family life, as enshrined i.a. in Art. 17 of the International Covenant on Civil and Political Rights

2005 roku w sprawie trybu i warunków postępowania firm inwestycyjnych oraz banków powierniczych (Dz. U. z 2006 roku Nr 2, poz. 8).”

“It must be added that it results from the judgment of the German Federal Tribunal of 22 March 2011 (XI ZR 33/10), which concerns the scope of information and loyalty obligations of bank towards its clients in connection with contracts of derivate transactions, that a bank should question its client on the investment risk that the client is able to undertake – regardless of client’s economic education. The bank should also explain the risk of a ‘product’, so that the client has the same level of knowledge of a ‘product’ as a bank itself, it should inform the client about a negative (from their stance), initial pricing of a product, as this pricing itself shows a serious conflict of interests of bank and its client, inform client about the conflict of interests, if the structure of the ‘product’s’ risk is wilfully shifted by bank to the disadvantage of its client. The Federal Tribunal did not connect the information obligations of a bank with a consumer status of its client. Running a business activity by a client has no influence on bank’s information obligations. The crucial aspect for bank information obligations is the lack of sufficient client’s knowledge on the evaluation of risks of transaction to the level fundamentally close to bank’s knowledge, as far as it concerns given transaction. Client’s professional skills are principally of no importance. The Federal Tribunal noticed, that client’s professional experience should be actually connected to preparation and conclusion of derivate transactions, so that the client had practical knowledge on the effects of a given transaction, comparable to the bank’s knowledge. A general knowledge on transaction is not enough. Assuming that the client was knowledgeable of risks caused by transaction only on this ground, that client had contracts with other bank, lacks justification. A client’s experience, justifying resignation from exhausting information about properties and possible effects of transaction should concern exactly the same transactions, but it does not mean only the type or subtype of it. The remarks of the Federal Tribunal are applicable in Polish reality, as the Tribunal solved the case actually on the basis of general rules of liability for damages *ex contractu* (§ 280 of the German Civil Code), and partially on the basis of the German statute on securities trading (§ 31.1.2 of the German statute on securities trading), which correspond to Art. 471 of the Polish Civil Code and § 6(1) of the regulation of the Ministry of Finance of 28 December 2005 on the terms and procedures for investment firms and trust banks (O.J. 2006.2.8).”

⁸⁹ M. Górski, *op. cit.* (n. 8).

(ICCPR).⁹⁰ In its ruling in case II CKN 321/99⁹¹ the Supreme Court made only a general remark, that according to the HRC the prohibition of unlawful interference in one's private life means that no intrusion is permissible, except for the situations strictly regulated by law. Nevertheless, the national legislation that regulates the interference of the State's organs in the sphere covered by Art. 17 ICCPR must comply with the objectives and terms of the Covenant. The Supreme Court did not indicate any specific decision of the Human Rights Committee. The sole aim of this general reference was to add value to its own reasoning. The Court additionally mentioned (briefly and generally) Art. 8 ECHR (the right to respect for private and family life) and the Polish Constitution (Art. 31⁹² and Art. 47⁹³) without indicating any decisions of the ECtHR or of the Polish Constitutional Tribunal.

For example, at one instance the Polish Supreme Court referred to the judgment of the International Court of Justice. In case V CSK 295/07,⁹⁴ the Court dealt with the effects of the nationalization acts of Polish authorities of 2005 and the indemnization agreement between Poland and the United States of America.⁹⁵ Following the agreement concluded to solve the problems of the property left by American citizens after the II World War on the territory of Poland, the United States accepted the sum of 40 000 000 USD in full settlement and discharge of all claims of nationals of the United States against the Government of Poland because of the nationalization and other forms of taking over property by Poland. The American citizens were supposed to address their claims before the US Government. If they accepted the damages, they had to renounce their property rights. Recently some of them questioned the amount of remuneration obtained or claimed damages if they had not used the procedure offered by the US authorities. The case at stake was one of many similar before Polish courts. The Supreme Court referred to its previous case-law and the judgments of the Polish Constitutional Court on just compensation in nationalization cases, and interestingly, also to the ICJ *Barcelona Traction*⁹⁶ decision. The Supreme Court highlighted that although the civilised nations are obliged to protect private property, the property right is not of an absolute character, it can be restricted by law, or even declined to an individual provided that a condition of just compensation is fulfilled. Regarding damages, the Court noted that there

⁹⁰ The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁹¹ Case II CKN 321/99 (Supreme Court, 18 August 1999).

⁹² The principle of proportionality.

⁹³ The right to respect for private and family life.

⁹⁴ Case V CSK 295/07 (Supreme Court, 12 December 2007).

⁹⁵ Agreement on settlement of claims of United States Nationals between the United States of America and Poland (16 July 1960).

⁹⁶ *Barcelona Traction, Light and Power Company (Belgium v Spain)* (ICJ, 24 July 1964).

is no common international practice⁹⁷ and only in this respect the Court cited *Barcelona Traction*, unfortunately without mentioning any specific paragraphs of the judgment. In its decision the ICJ did not examine the merits of the case, the property rights claims nor made any statements concerning the acceptable level of protection of this right. The dispute before the ICJ was between Belgium and Spain and it concerned the Spanish acts of nationalization, *inter alia* of the property of the Barcelona Traction, Light and Power Company, Limited, whose property rights were infringed. The main issue before the ICJ was to determine which State may exercise the diplomatic protection. It appeared that it was not Belgium, that brought the case to the ICJ but Canada.⁹⁸ The case was therefore dismissed.

4. Examples of a Failed Dialogue

Failed dialogue denotes such instance of a dialogue that misses “the opportunity to refer to the case law of other courts at all where one should reasonably expect that such jurisprudence is presented.”⁹⁹ There are way too many of examples

⁹⁷ “Na marginesie powyższych rozważań, należy jeszcze zwrócić uwagę, że ocena prawna aktów nacjonalizacji czy też wywłaszczenia jest wyjątkowo złożona i nie może ograniczyć się tylko do przepisów u.d.w. Należy oddzielić od siebie sam problem wpisu prawa własności Skarbu Państwa jako rezultatu nacjonalizacji mienia osób prywatnych od jego przesłanek w prawie wewnętrznym z jednej strony oraz aspektów prawnomiędzynarodowych odpowiedzialności odszkodowawczej państwa za akt nacjonalizacji z drugiej strony. Prawo własności nie jest prawem absolutnym, choć do ogólnych zasad prawa narodów cywilizowanych należy jego ochrona; nie ma także powszechnej praktyki międzynarodowej, gdy chodzi o zasady indemnizacji z tytułu wywłaszczeń (por. m.in. wyrok Międzynarodowego Trybunału Sprawiedliwości w sprawie *Belgia przeciwko Hiszpanii – Barcelona Traction, Light and Power Company*, Zbiór Orzeczeń MTS 1970, s. 3 i n.). Jak podkreśla się zarówno w orzecznictwie Sądu Najwyższego (por. wyrok z dnia 23 września 2004 r., III CK 401/03, OSNC 2005 nr 7–8, poz. 148), jak i Trybunału Konstytucyjnego (postanowienie z dnia 24 października 2000 r., SK 31/99, OTK-ZU 2000 nr 7, poz. 262), przejęcie przez Skarb Państwa mienia obywateli innych państw następowało na podstawie szeregu aktów normatywnych, do których należy m.in. dekret z dnia 8 marca 1946 r. o majątkach opuszczonych i poniemieckich (Dz. U. Nr 13, poz. 87 z późn. zm.) czy też tzw. dekrety nacjonalizacyjne. W ocenie Sądu Najwyższego w składzie rozpoznającym niniejszą sprawę, Układ rządowy pomiędzy USA a PRL dotyczył nie tyle nabycia własności jako takiego, ile raczej zasad wypłaty odszkodowań za mienie przejęte zgodnie z prawem obowiązującym ówczesnie w Polsce.”

⁹⁸ The seat of the company was located in Toronto, Canada, but it was connected to Belgium due to the fact that the company’s shareholders were Belgian nationals.

⁹⁹ Górski M., *op. cit.* (n. 8).

across the research conducted in this project. This section offers a short selection of such instances where courts' 'hands-off' approach may be considered as highly problematic.

4.1. Human Rights

There are many judgments concerning human rights, that are based solely on references to the decisions of Polish courts and tribunals, without any reference to the rulings of international bodies. The Wrocław Appellate Court's decision¹⁰⁰ on lustration proceedings may serve as an example. The Court carefully analysed the decisions of the Supreme Court and of the Constitutional Tribunal. It examined the nature of lustration proceedings to determine whether it is of a criminal character. Although this issue was decided by the European Court of Human Rights in *Moczulski v Poland*,¹⁰¹ the Appellate Court hardly observed that both the Constitutional Tribunal and the ECtHR consider this procedure to be a criminal one.¹⁰²

4.2. International Customary Law

Even though, as it seems, the judgments concerning State immunity permit Polish ordinary courts for a detailed analysis of the decisions of foreign jurisdictions, the opportunity is not always seized. Case III CSK 293/07¹⁰³ was brought to the Supreme Court by a Polish company against Turkey. The former claimed compensation for a violation of its property right by unlawful seizure of company's property on a basis of the regulation of the Turkish Ministry of Energy. The Court was aware that it had to apply customary international law and even underlined that it is authorized to do that under the Polish Constitution (i.a. Art. 9 which states that the Republic of Poland shall respect international law binding upon it). However, the Courts' inquiry into international customary law on State immunity is highly disappointing. Since customary law is based on *usus* and *opinio iuris*, the court had to analyse also the case law of domestic and international courts.¹⁰⁴ Instead of invoking domestic or international courts' decisions, the Supreme Court mentioned

¹⁰⁰ Case II AKz 542/10 (Wrocław Appellate Court, 26 October 2010).

¹⁰¹ *Moczulski v Poland*, App. no. 49974/08 (ECtHR, 19 November 2011).

¹⁰² "Zarówno Trybunał Konstytucyjny, jak też Europejski Trybunał Praw Człowieka (o czym w sposób zdecydowany i jednoznaczny pisze Trybunał Konstytucyjny między innymi w wyroku z dnia 11 maja 2007 r., sygn. akt K 2/07; zob. także wyrok Trybunału Konstytucyjnego z dnia 4 lipca 2002 r., P 12/01, OTKA 2002, nr 4, poz. 50) wielokrotnie stwierdzały, że postępowanie lustracyjne ma charakter penalny. Świadczy o tym zarówno charakter czynu, za który sprawca ponosi odpowiedzialność, charakter i dolegliwość sankcji za ten czyn przewidzianych, jak też reguły postępowania, w toku którego stwierdzane jest ewentualne popełnienie czynu zarzucanego i orzekane są sankcje będące jego prawną konsekwencją."

¹⁰³ Case III CSK 293/07 (Supreme Court, 13 March 2008).

¹⁰⁴ C. Mik, 'Jus cogens in contemporary international law' (2013) Polish Yearbook of International Law XXXIII 50.

its own rulings¹⁰⁵ underlining that the principle of State sovereignty does not allow Polish courts to adjudicate cases against other States acting within their sovereign powers (*acta iure imperii*), however the immunity does not cover non-sovereign acts (*acta iure gestionis*). The Court referred as well to the 1961 Vienna Convention on Diplomatic Relations¹⁰⁶ and the European Convention on State Immunity,¹⁰⁷ but only superfluously.

Comparable approach can be observed in the case which factual background was similar to *Natoniewski* cited above. It concerned compensation for the actions of German armed forces during the World War II. The plaintiff claimed compensation from the Federal Republic of Germany for the alleged breach of his personal rights resulting from genetic damages caused by medical experiments carried out on his father as a prisoner of a German concentration camp. The Warsaw Provincial Court in its decision in I C 862/07¹⁰⁸ referred only to the judgment of the CJEU in C-292/05 *Erini Lechouritou*¹⁰⁹ to emphasize that acts committed by the military belong to *acta iure imperii* acts of a State. They do not fall under the scope of civil matters and therefore a civil court cannot adjudicate them. The Provincial Court took no notice of other decisions of foreign or international courts that were cited in *Natoniewski*. Thus the Court missed the opportunity offered by the case to participate in the judicial dialogue.

5. Conclusions

The presented research results demonstrate that except for the decisions of the European Court of Human Rights and the Court of Justice of the European Union, the Polish ordinary courts, albeit rarely, refer to the case law of the International Court of Justice, the Human Rights Committee and the courts of other States. The reason why such rare references occur rarely lies in the scope of ordinary courts' jurisdiction, which is focused on private law relations, based primarily on domestic law. The subject matter of the cases only sometimes may require taking into account international or foreign judgments. It happens especially if the case has some link to international law, such as human rights law, State immunity (customary international law) or European Union law.

¹⁰⁵ See Supreme Court cases: R 133/26 (2 March 1926); I C 1680/27 (10 February 1928); II C 413/37 (31 August 1937); III PZP 9/90 (26 September 1990); I PKN 562/99 (11 January 2000); I CK 380/02 (13 November 2003).

¹⁰⁶ Convention on diplomatic relations (Vienna, 18 April 1961).

¹⁰⁷ European Convention on State Immunity (Basel, 16 February 1972).

¹⁰⁸ Case I C 862/07 (Warsaw Provincial Court, 3 September 2008).

¹⁰⁹ Case C-292/05 *Erini Lechouritou and others v Dimosio tis Demokratias tis Germanias* (CJEU, 15 February 2007).

The most common practice of ordinary courts is to quote the decisions without their detailed examination. The purpose of such citation is only to support the courts' own reasoning. However, there were also exceptional rulings of a comparative and critical character as the judgment of the Wrocław District Court in X P 384/13 concerning the freedom of speech of an employee, the judgment on the obligation to remove a Sikh's turban in certain circumstances as in *Mr. S.P.* (I CSK 439/13), the order of the Warsaw Provincial Court in XXI Pz 95/14 on State immunity from the enforcement proceedings and the judgments of the Polish Supreme Court in *Natoniewski* (IV CSK 465/09), the decision of the Warsaw Appellate Court in case concerning clickable links (I ACa 1663/13), the three cases concerning the notion of an entrepreneur's seat for the purposes of the insolvency proceedings (II CSK 406/10, II CSK 541/10 and II CSK 326/10) and the judgment of the Appellate Court in Białystok on contract of currency option (I ACa 833/12). In the above mentioned judgments the Polish courts not only merely cited the decisions of other jurisdictions, but they analysed them in detail and widely discussed, considering whether an analogous reasoning could be applied with respect to Polish law.

For a judicial dialogue to have its proper discursive character, Polish courts should not only refer to the rulings of international and foreign courts, but their views should be noticed likewise by international or foreign courts. It is worth noticing, that the Supreme Court's decision in *Natoniewski* contributed to the international dialogue on immunities of State, owing to its English translation published in Polish Yearbook of International Law. It subsequently was discussed by the International Court of Justice in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* and by the European Court of Human Rights in *Jones and Others v the United Kingdom*. One must conclude, therefore, that if Polish judges wish to have their part in a discussion on vital issues of international law, their decisions should be made accessible in foreign languages.

It must be appraised that some of the Polish ordinary courts try, however rarely, to participate in the dialogue with the courts of different jurisdictions. Even though the lack of knowledge of a given foreign language (for example a modern Greek) impedes the judges from becoming acquainted with foreign judgments, they learn about the external jurisdictions with the help of the Ministry of Justice or, more often, legal publications in a specific field. It is obvious that the activity of scholars in the sphere of comparative law becomes thus more important.

One of the examples where the scholarly work had an impact on a reasoning of a court was the decision of the Warsaw Appellate Court in I ACa 410/13,¹¹⁰ where basing on the book of J. Rosén¹¹¹ the Court quoted the ruling of the England

¹¹⁰ Case I ACa 410/13 (Warsaw Appellate Court, 28 October 2013).

¹¹¹ J. Rosén, *Intellectual Property at the Crossroads of Trade* (Edward Elgar 2012). The Court wrote that it cited the text of Amanda Michaels from the mentioned book. It must be pointed out, however, that whilst Amanda Michaels is a known author in the field of the intellectual property law, she is not one of the authors of the invoked book.

and Wales High Court in *Jean Christian Perfumes Ltd and Anor v Thakrar*.¹¹² The aim of this citation was to strengthen the opinion presented by the Warsaw Appellate Court in the statement of reasons. Another example is the resolution of the Polish Supreme Court (I KZP 21/06¹¹³), in which the Court, citing the article of a scholar,¹¹⁴ referred to the two decisions of the High Court of Ireland in *Fallon*¹¹⁵ and to opinion of the Belgian *Cour de Cassation*.¹¹⁶ The aim of these references was the presentation of different approaches of national courts of other EU member States to the analyzed subject matter (European arrest warrant). Similarly, the above mentioned cases on the application of the CMR Convention¹¹⁷ referred to foreign decisions on the basis of their quoting in the articles in the journal *European Transport Law*.

In the judgment in *Natoniewski* the Polish Supreme Court got the information about the quoted international and foreign decisions and their content from the opinion of the Ministry of Justice, which was delivered on the basis of the Code of Civil Procedure.¹¹⁸ The other sources were the websites of the CJEU or the International Civil Service Commission or Polish Professional software (e.g. LEX). The Court found some information in the legal literature, e.g. the Polish magazine *Kwartalnik Prawa Publicznego (Public Law Quarterly)*.

The judicial dialogue of Polish ordinary courts suffers from several drawbacks. Usually the review of international or foreign decisions is superficial, as it is restricted to a mere reference, therefore it can be classified as a decorative dialogue. Unfortunately, there are also some other factors or improper practices that hamper judicial dialogue. For ordinary courts the most noticeable problem is an adequate quoting of international and foreign decisions that sometimes produce humorous results. The most remarkable example is naming the ECtHR as “the European

¹¹² *Jean Christian Perfumes Ltd & Anor v Thakrar (t/a Brand Distributor or Brand Distributors Ltd)* (England and Wales High Court, 27 May 2011). Unfortunately, the Warsaw Appellate Court cites the judgment with the inaccuracies. The England and Wales High Court is named “English High Court”, which is incorrect.

¹¹³ Case I KZP 21/06 (Supreme Court, 21 July 2006).

¹¹⁴ M. Hudzik, ‘Europejski nakaz aresztowania a nieletni sprawcy czynów zabronionych – zagadnienia wybrane’ (2006) 8 *Europejski Przegląd Sądowy* 22. What is interesting, is the fact that the article was published in August 2006, whereas the Court’s resolution is of July 2006 and the Court indicated, that the official publication of the article was pending at that time.

¹¹⁵ *Minister for Justice Equality and Law Reform v Fallon aka Micheal O Falluin* (High Court of Ireland, 9 September 2005), *Minister for Justice Equality and Law Reform v Fallon aka Micheal O Falluin* (High Court of Ireland, 14 October 2005), The Supreme Court inaccurately wrote the party’s name (Falkon instead of Falluin).

¹¹⁶ Case P.05.0065.N (Belgian *Cour de Cassation*, 25 January 2005).

¹¹⁷ Case I ACa 111/13 (Szczecin Appellate Court, 9 May 2013), Case I ACa 696/03 (Warsaw Appellate Court, 4 February 2003), Case VIII Ga 31/13 (Szczecin Provincial Court, 8 March 2013).

¹¹⁸ Art. 1143(3) of the Code of Civil Procedure reads: “A court *ex officio* determines and applies proper foreign law. A court may ask the Minister of Justice for the information on the text of this law and for the explanation of foreign judicial practice.”

Court of Human Rights in S.” where ‘S.’ stands for ‘Strasbourg’ or ‘the Court of Justice in L.’ with ‘L.’ meaning ‘Luxembourg’.¹¹⁹ The citation often lacks names of parties, dates of judgments or case numbers.¹²⁰ These inaccuracies are easy to overcome; nevertheless, they may clearly hamper the judicial discourse.

¹¹⁹ “Wprowadzie w orzecznictwie Europejskiego Trybunału Praw Człowieka w S. oraz Sądu Najwyższego, język i forma wypowiedzi prasowych podlegają ochronie, ale jednak w granicach prawa do czci tak jak swoboda wypowiedzi”, [in:] Case I ACa 931/14 (Lodz Appellate Court, 30 December 2014). “Orzecznictwo Europejskiego Trybunału w S.”, [in:] Case I ACa 617/13 (Białystok Appellate Court, 20 December 2013).

¹²⁰ “M.A. N., C. i inni przeciwko Polsce – decyzja ETPC z dnia 14 maja 2013 r., skarga nr [...] (w:) M.A. N., Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2013, LEX/el., 2014”, [in:] III AUa 21/14 (Szczecin Appellate Court, 23 September 2014); “orzeczenie z dnia 26 kwietnia 1979 r. w sprawie [...] v. Wielka Brytania (I), skarga [...], LEX nr 80817; orzeczenie z dnia 23 maja 1991 r. w sprawie O. v. Austria, skarga [...], LEX nr 81177; orzeczenie z dnia 8 lipca 1986 r. w sprawie L. v. Austria, skarga [...], LEX nr 81012”, [in:] I ACa 662/12 (Lodz Appellate Court, 1 October 2012); “Jak wskazał Europejski Trybunał Praw Człowieka w wyroku z dnia 19 kwietnia 2001 r. (P. przeciwko Grecji, sprawa 28524/95)”, [in:] I ACa 966/12 (Warsaw Appellate Court, 31 January 2013); “Pozostaje ona zatem w wyraźnej opozycji do wskazań zawartych w uzasadnieniu w wyroku ETPCz z dnia 10 maja 2011 r. (nr skargi [...])”, [in:] II Aka 185/14 (Białystok Appellate Court, 18 September 2014); “W żadnym przeto wypadku wyrok Europejskiego Trybunału Praw Człowieka z 14 czerwca 2011 r. – sprawa M. G. przeciwko Polsce, skarga nr [...] nie mógł mieć precedensowego charakteru w niniejszej sprawie”, [in:] V ACa 535/12 (Katowice Appellate Court, 13 February 2014); “Dla rozstrzygnięcia omawianego zagadnienia istotne znaczenie ma też wyrok Europejskiego Trybunału Praw Człowieka z 2 marca 2010 r., nr 13102, P. K. przeciwko Polsce, w którym podkreślono”, [in:] I ACa 40/14 (Warsaw Appellate Court, 26 June 2014); “Na tle tej dyrektywy, Trybunał Sprawiedliwości w sprawie C-388/07 rozpoznał kilka pytań prejudycjalnych w przedmiocie wykładni dyrektywy”, [in:] IV IP 300/09 (Wroclaw Provincial Court, 16 July 2010); “Sprawa mieści się więc w pojęciu sprawy cywilnej i handlowej, rozumianej w sposób ugruntowany w orzecznictwie Trybunału Sprawiedliwości (por. np. wyrok ETS z dnia 14 listopada 2002 r., C-271/00 Slg. 2002, I-10489)”, [in:] IV CSK 202/13 (Supreme Court, 28 February 2014); “Także Trybunał Sprawiedliwości Unii Europejskiej w wyroku z dnia 19 grudnia 2012 r. wydanym w sprawie prejudycjalnej A. e. A. (C-325/11)”, [in:] I ACz 1479/13 (Białystok Appellate Court, 5 December 2013); “porównaj między innymi wyroki ETS z dnia 11 lipca 2008 r. C-195/08 PPU, Dz. Urz. UE, C-223 z dnia 30 sierpnia 2008 r. i z dnia 22 grudnia 2010 r., C-491/10, PPU, Dz. U. UE, C-2011.63/23 z dnia 26 lutego 2011 r. i z dnia 22 grudnia 2010 r., C-497/10, PPU, Dz. U. UE, C-2011.55.17 z dnia 19 lutego 2011 r.”, [in:] I CSK 426/14 (Supreme Court, 17 September 2014). It is worth noticing, that the ‘PPUs’ used in all of the cases are not the names of the parties to the proceedings, but they are a shortcut for ‘preliminary ruling’ (*pytanie prejudycjalne*). “W wyroku ETS z dnia 13 grudnia 2007 r. wydanym w trybie prejudycjalnym rozstrzygnięto bowiem, że...”, [in:] I ACz 186/12 (Katowice Appellate Court, 6 March 2012); “tak m.in. wyrok Trybunału Sprawiedliwości z 10 kwietnia 1984 r. w sprawie 14/83 von C., pkt 26; wyrok z 13 listopada 1990 r. w sprawie C-106/89 M., pkt 8; wyrok z 5 października 2004 r. w połączonych sprawach C-397/01 do C-403/01 P. i in., pkt 113 i 115”, [in:] I ACa 1166/13 (Warsaw Appellate Court, 11 March 2014). It is worth noticing that “wyrok Trybunału Sprawiedliwości z 10 kwietnia 1984 r. w sprawie 14/83 von C.” means the “case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen (CJEU, 10 April 1984)”, which is a very well-known and recognizable judgment of the CJEU.

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VII. International Refugee Law and Judicial Dialogue from the Polish Perspective

Michał Kowalski*

1. The Specificity of International Refugee Law and Judicial Dialogue

International refugee law governs rules on granting protection to all human beings who were forced to leave their countries of origin because of the fear of persecution. As such it governs predominantly the States' obligations towards those in need and formulates human rights obligations. Yet, one should not overlook that the origins of international refugee law are of totally different character – they were shaped, starting from the beginning of the twentieth century, as legal instruments aimed at facilitating States to deal with migration flows. Indeed, migration flows, including these of mass character, are permanently present in international relations and may significantly disturb the functioning of particular States and the international society as a whole. Thus, the existence of a relevant international legal framework appeared to be a must

* Dr habil., Associate Professor, Faculty of Law and Administration, Jagiellonian University in Cracow, Poland. The author has been an adjudicating member of the Polish Refugee Board since 2009 and in this capacity has contributed to the development of the Board's case law, including some of the decisions referred to in the present text. All the case-law referred to as of 30 April 2016.

– above all from the perspective of States' interests. It is only after World War II and in the context of the development of international human rights protection system that international refugee law turned to be human rights oriented. Nevertheless, States' interests left their unequivocal imprints on the modern international refugee law.

The turning point for the modern international law was the adoption in 1951 of the Geneva Convention relating to the Refugee Status (1951 Geneva Convention),¹ which was subsequently amended by the 1967 New York Protocol.² The 1951 Geneva Convention introduced in its famous Art. 1A the definition of the term 'refugee' and the 1967 New York Protocol lifted the relevant time and geographical limitations to the definition,³ which made it truly universal in its application. Since then the definition of the term 'refugee' has become widely accepted and introduced into national legal systems. Thus the 1951 Geneva Convention refugee definition forms nowadays the basis for legal frameworks of national refugee regulations as well as for regional refugee regulations such as the Common European Asylum System created within the European Union (EU).

Article 1A of the 1951 Geneva Convention states that the term 'refugee' should apply to any person who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Thus, it is crystal clear from the very wording of the definition that it is open to interpretations that may vary. Indeed, the adopted understandings of the term persecution or of each of the five persecution grounds alter the scope of the definition. The same applies to other aspects of the definition and its application, especially as the 1951 Geneva Convention and the 1967 New York Protocol are silent on conditions for the refugee status determination procedure and in fact do not state any clear legal obligation to grant refugee status. Instead, the prohibition of *refoulement*

¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Geneva Convention). As for 16 February 2016 there were 145 States-parties to the 1951 Geneva Convention.

² Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (New York Protocol). As for 16 February 2016 there were 146 States-parties to the 1967 New York Protocol.

³ Note, however, that the geographical limitations existing prior to the adoption of the 1967 New York Protocol may apply further with the significant example of Turkey, which applies the refugee definition to persons coming from Europe only.

was foreseen in Art. 33(1) of the 1951 Geneva Convention, which provides for the prohibition of expulsion or return of a refugee “to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Thus, the international legal framework of refugee protection remains within the significantly discretionary right to grant asylum from persecution and the obligation to refrain from *refoulement*. Concepts such as the internal protection (flight) alternative, the save third country or the first country of asylum are – in their legal ambiguity – telling examples in this respect.

The above-mentioned characteristics of international refugee law should be analysed against the background of two important features. Firstly, there is no specific international court to apply international refugee law. Although the 1951 Geneva Convention provides in Art. 38 the judicial clause under which any dispute between the States-parties relating to its interpretation or application is to be referred to the International Court of Justice, this provision has never been so far applied. It is not surprising, as applying international refugee law is predominantly about granting or refusing protection to those in need and States persistently tended to secure their discretion in this respect. Yet, one has to remember about an enormously important role of the United Nations High Commissioner for Refugees (UNHCR), which was set up in 1950. Since then – and apart from offering factual protection to those replaced – the UNHCR has been shaping the international legal framework of refugee protection. It does so with a help of soft law measures, such as the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees⁴ as well as other UNHCR’s numerous documents including guidelines and comments. Although non-binding, they significantly influence the States’ practice and they remain the principal reference points on international refugee law.

The other aspect that should be mentioned is strictly linked with the first one, i.e. the crucial role of national determination authorities including national courts for the interpretation of international refugee law. Indeed, the national courts interpret and apply international refugee law and, in consequence, influence its development as they form States’ treaty practice under the 1951 Geneva Convention and the 1967 New York Protocol. They may also contribute to the creation of parallel customary norms. This results in a tendency of national courts to refer to foreign courts’ decisions. This kind of judicial dialogue (in its broadest understanding) is stimulated by the characteristics of the 1951 Geneva Convention as a treaty of a particular kind. A. Tzanakopoulos identifies three main characteristics that make “certain treaties particularly likely to become

⁴ UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ (Geneva 1992, reedited).

the subject of judicial dialogue.”⁵ The first is the subject of the treaty as “the treaties dealing with issues that most States are likely to encounter in day-to-day domestic administration are of obvious importance to domestic courts: they are likely to be invoked in domestic court proceedings.”⁶ The 1951 Geneva Convention is explicitly mentioned by Tzanakopoulos in this context as ‘the prime example.’⁷ The other two characteristics identified are the discretionary nature of a treaty and the multilateral character of a treaty.⁸ Indeed, given the previous observations, the 1951 Geneva Convention – although this time not labeled as such by Tzanakopoulos – may well aspire to the ‘prime example’ status also in these two regards.

National courts’ refugee law references to the case law of foreign jurisdictions seem to be more developed in the common law systems.⁹ Despite the common legal tradition that undoubtedly makes such references more natural, the language aspect seems to be a practical and a very helpful facilitator, as English is the common language of most common law systems.¹⁰ Obviously, national courts’ references to the case law of foreign jurisdictions take place also in civil law systems with frequent references to common law jurisdictions.¹¹ Again, the status of English as the modern *lingua franca* is not to be underestimated. It is especially so, as the UNHCR has been always involved in promoting interpretative ‘good practices’ of national courts by making them available in its publications. The process has been fundamentally facilitated since the beginning of the Internet era.

In Central and Eastern Europe (the CEE) international refugee law has become the issue only since the turn of the 1980s and the 1990s. It was then, i.e. after the end of the Cold War era and after the democratization of the region, that the 1951 Geneva Convention and the 1967 New York stopped to be perceived, as it previously used to be in the Soviet bloc, as instruments of the ‘imperialistic West’. The CEE States consecutively acceded the 1951 Geneva Convention and the 1967

⁵ A. Tzanakopoulos, ‘Judicial Dialogue as Means of Interpretation’, [in:] H. Aust, G. Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 80.

⁶ *Ibidem*, p. 79.

⁷ *Ibidem*.

⁸ *Ibidem*, p. 80–82.

⁹ F. Cafaggi et al., *Judicial Interactions Techniques – Their Potential and Use in European Fundamental Rights Adjudication* (European University Institute 2014), p. 40.

¹⁰ Héléne Lambert points out that “the British courts (including the Scottish Court of Session) have often explicitly referred to common law jurisprudence in asylum cases, in particular to decisions from Canada, New Zealand, Australia and the USA when interpreting certain provisions of the Refugee Convention”, H. Lambert, ‘Transnational Judicial Dialogue, Harmonization and the Common European Asylum System’ (2009) 58 *International and Comparative Law Quarterly* 529 with references.

¹¹ See e.g.: E. Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’ (2008) 102 *American Journal of International Law*, p. 262 with references.

New York Protocol¹² and introduced the refugee definition to their national legislations. The process was gradual. In Poland, for instance, the first comprehensive legislative regulation on granting international protection to foreigners was adopted in 1997 only. The process could be slow as the CEE States were definitely not the major destination countries for asylum-seekers at that time. Also, the UNHCR played an active role in supporting the CEE States in creation of national legislative and institutional refugee legal framework. In the context of professional training offered by the UNHCR, references to the case law of foreign jurisdictions regarding the interpretation of the refugee definition or the application of the *non-refoulement* principle were self-evident. Again, the fact that the most accessible and illustrative materials were available in English played an important role in the process.

Nevertheless, two additional aspects gradually grew to influence the development of national refugee laws in the CEE States. The first was the increasing role of the European Court of Human Rights (the ECtHR), which since the late 1990s and the early 2000s has been perceived as the *de facto* asylum court. The other aspect was the accession process to the EU, which coincided with the intensive development of the EU migration and asylum policy. Both aspects were so comprehensive and of such significance that it seems justifiable to speak of the Europeanization of international refugee law.

2. The Europeanization of International Refugee Law and Judicial Dialogue

According to some doctrinal opinions, until the mid-eighties of the twentieth century, i.e. until the Member States of the then European Communities took the first inter-governmental actions aimed at forming common migration and asylum policies, the European asylum policy had not existed at all.¹³ Such an approach seems to underestimate the earlier activities of the Council of Europe, which had been persistently promoting liberal standards of refugee protection with both legally binding and non-binding measures. One must admit, nevertheless, that the actual influence of these strivings was rather limited. The role of the Council of Europe in shaping the European standards of refugee protection

¹² The 1951 Geneva Convention and the 1967 New York Protocol were simultaneously acceded by, e.g., Hungary on 14 March 1989; Poland on 27 September 1991; then Czechoslovakia on 26 November 1991 (after the dissolution of Czechoslovakia the Czech Republic and Slovakia became States-parties to the Convention and the Protocol on 11 May 1993 and 4 February 1993, respectively). The Baltic States acceded the Convention and the Protocol in 1997 only (Estonia on 10 April 1997, Lithuania on 28 April 1997 and Latvia on 31 July 1997).

¹³ D. Joly, *Heaven or Hell?: Asylum Policies and Refugees in Europe* (Macmillan Press 1996), p. 44.

has further diminished since the inception and subsequent evolution of the EU migration and asylum policies. This is no doubt correct, save for one important exception, i.e. the European Convention on Human Rights (the ECHR) and the related jurisprudence of the Strasbourg court.

It must be emphasized that neither the ECHR, nor its additional protocols provide for the right to asylum. However, it cannot be contested that human rights protection standards developed under the ECHR by the ECtHR apply also to asylum-seekers within the jurisdiction of the States-parties and form relevant and effective guarantees. The respective case law of the ECtHR has been developing since the 1990s. Article 3 ECHR is definitely of the greatest importance in this respect. Its interpretation (intensively developed by the ECtHR since the famous 1989 *Soering* case¹⁴) introducing the prohibition of extradition, expulsion or return that might result in torture, inhuman or degrading treatment or punishment established the standard of protection reaching far beyond the *non-refoulement* principle, as provided for in Art. 33 of the 1951 Geneva Convention. The standard developed under Art. 3 ECHR as well as other international human rights guarantees prohibiting torture contributed to the development of the *non-refoulement* principle as a customary international norm which – as may be claimed – has nowadays a significantly wider scope than its treaty equivalent encompassed in the 1951 Geneva Convention and, as such, may be attributed the peremptory character.¹⁵

The protection guaranteed to asylum-seekers under Art. 3 ECHR illustrated very well that the limitation of the 1951 Geneva Convention personal scope of application excluding individuals who, though not falling within the definition of a ‘refugee’ were in a real need of international protection. The ECHR guarantees contributed indirectly to the establishment of the new forms of international protection: the subsidiary protection and the temporary protection. Additionally, the protection of asylum-seekers granted under Art. 3 ECHR influenced the European States’ interpretation of the notion of refugee as provided for in Art. 1A of the 1951 Geneva Convention. It is clearly visible, for instance, in cases where the persecution is suffered from the hands of non-State actors.

The guarantees granted under Art. 3 ECHR must be also taken into account as far as the mechanisms of determining the State responsible for examining the applications for asylum lodged in one of the EU Member States. The ECtHR claimed so already in the 2000 *T.I.* decision¹⁶ in relation to the United Kingdom obligations under Art. 3 ECHR in connection with its obligations under the 1990 Dublin

¹⁴ *Soering v the UK*, App. no. 14038/88 (ECtHR, 7 July 1989).

¹⁵ G.S. Goodwin-Gill, J. McAdam, *The Refugee in International Law* (3rd ed., Oxford University Press 2007), p. 201 and 345.

¹⁶ *T.I. v the UK*, App. no. 43844/98 (ECtHR, inadmissibility decision, 7 March 2000).

Convention.¹⁷ The relevant case law has been subsequently evolving in relation to the EU Dublin II Regulation with the significant examples of the well-known cases of *M.S.S.*¹⁸ and *Tarakhel*.¹⁹

Moreover, the obligations of the ECHR States-parties towards asylum-seekers must be also taken into account in the context of procedural guarantees directly or indirectly linked with the asylum procedure. It is so in relation to the asylum-seekers detention standards (Art. 5 ECHR), as well as in relation to the right to effective remedy in the cases of: firstly, potential expulsion or return that might result in violation of Art. 3 ECHR (Art. 13 in conjunction with Art. 3 ECHR); secondly, denial of family reunification (Art. 13 in conjunction with Art. 8 ECHR); and thirdly, decision on detention (Art. 5.4 ECHR). What is more, Art. 3 ECHR may also apply to the conditions of the asylum-seeker detention.

Thus, although the ECtHR does not interpret neither the 1951 Refugee Convention, nor the 1967 New York Protocol, the significance of the ECHR for asylum-seekers' protection remains obvious. One can even refer to the doctrinal opinion that under the ECHR – and especially under its Art. 3 – it is justifiable to speak of the implied right to *de facto* asylum.²⁰ Interesting enough, the opinion submitted already in 1990, i.e. at the time when the asylum case law of the ECtHR was yet *in statu nascendi*. However, from the present day perspective it is obvious that the modern European asylum legal framework has been decisively shaped in the context of measures developed by the EU Member States.

The standards developed by the EU Member States regionally complement regulations of the universal international refugee law based on the 1951 Geneva Convention and the 1967 New York Protocol. The Common European Asylum System (the CEAS), established within the EU and consisting of a set of asylum directives and regulations, is explicitly based – as provided in the primary EU law²¹ – on these international agreements as its cornerstones. Yet, the EU regional standards

¹⁷ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities and measures for its implementation (the Dublin Convention) (1997) O.J. C 254/1. The 1990 Dublin Convention entered into force on 1 September 1997. After the communitarisation of the EU migration and asylum policies under the Amsterdam Treaty the Dublin II Regulation was adopted in 2003 (Council Regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003) O.J. L 50/1) and was subsequently replaced by its recast version of 2013 known as Dublin III Regulation (Regulation 604/2013/EU of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (2013) O.J. L 180/31).

¹⁸ *M.S.S. v Belgium and Greece*, App. no. 30696/09 (ECtHR, 21 January 2012).

¹⁹ *Tarakhel v Switzerland*, App. no. 29217/12 (ECtHR, 4 November 2012).

²⁰ T. Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum' (1990) 2 *International Journal of Refugee Law* 361.

²¹ Art. 78.1 TFEU and Art. 18 CFR.

are significantly innovative and as such they have been influencing – at least to some extent – the universal ones. It is so with, e.g., the criteria and mechanisms for determining a State responsible for examining an asylum application; the temporary protection regime; establishing the legal framework of the subsidiary (to the refugee status) protection; interpreting the refugee definition in the context of internal protection (flight) alternative, gender or sexual orientation related persecution. What is more, the CEAS legal measures have been placed under the jurisdiction of the Court of Justice of the EU (the CJEU; formerly the European Court of Justice) and since then its asylum case law has become significant and, at least to some extent, has contributed to the mentioned standards' development. The CJEU interprets the EU secondary asylum legislation and in consequence, as it is legally based on the 1951 Geneva Convention and the 1967 New York Protocol, it interprets the provisions of the latter instruments as well.²² Indeed, as Roland Bank puts it:

the supranational setting of the [EU] law provides a framework of law that is much more powerful than the usual interplay between international and national law. It directly impacts on the national asylum systems by establishing, interpreting and, to a certain extent, enforcing binding rules in the application of EU law by EU [M]ember [S]tates that would have to be measured by the 1951 [Geneva] Convention and its 1967 [New York] Protocol.²³

In the view of the above, it is apparent that asylum cases that are to be adjudicated on national level in the EU Member States demand references to international, supranational and national legal sources that coincide and interact. Thus, the judicial dialogue on refugee law dialogue becomes even more important. What is more, the complex relation of EU law and the ECHR, as well as the relevant status of the latter under the former must also be taken into account. It is especially the case since the CJEU refers in its case law to legal issues covered also by the ECtHR case law and this results in the European judicial dialogue *par excellence*.

²² R. Bank, 'The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law' (2015) 27 *International Journal of Refugee Law* 220. Roland Bank notes that in fact "[r]egarding the 1951 [Geneva] Convention, the CJEU is the first international court to pronounce itself on questions arising in its application" (ibidem, 241). Yet, the quoted author is rather critical of the CJEU's role in this respect so far (passim).

²³ Ibidem, 214.

3. International Refugee Law and Judicial Dialogue, Conversation or Interaction?

The understanding of judicial dialogue as adopted by the editors of this volume comprises every reference in a national court's decision either to a decision of another national court of foreign jurisdiction or to an international court's decision. It seems, however, that while dealing with international refugee law a broader perspective on judicial dialogue may be useful or even indispensable. At least, this seems to be the case in Europe in the context of the described Europeanization of international refugee law. The two regional international courts, i.e. the ECtHR and the CJEU, although not asylum courts *per se*, dominated, in fact, the interpretation and application of international refugee law in Europe. Consequently, they have formally or informally influenced national asylum courts' case laws. What is more, both European courts could not have escaped entering into a dialogue on asylum matters with each other. Therefore, as far as the European judicial dialogue in asylum matters is concerned, four possible scenarios can be distinguished:

- 1) a national court refers in its decision to a decision of an international court;
- 2) a national court refers in its decision to a decision of another national court of foreign jurisdiction;
- 3) an international court refers in its decision to a decision of a national court;
- 4) an international court refers in its decision to a decision of another international court.

In asylum cases all situations mentioned above may take place, yet with various intensity. Without entering into a detailed analysis at this stage, it seems appropriate to claim that in the European context the situations listed under points one and four should be frequent as they are legally indispensable, whereas the situations listed under points two and three seem to be possible, yet far less obvious, and as such rather rare. Indeed, the first listed situation will take place in the context of safeguarding the ECHR guarantees to asylum-seekers under the jurisdiction of the States-parties and, as far as the relevant EU Member States are concerned, in the context of the EU preliminary ruling procedure. The situation listed under point four will result, firstly, from the fact that both European courts are obliged to address the same or overlapping legal issues on asylum matters. Also, the ECHR status under EU law will be an additional factor in this respect. Indeed, the national asylum courts in the EU Member States may be placed in an uncomfortable position while confronted with not necessarily coherent pronouncements of the ECtHR and the CJEU. Examples will follow in the subsequent part of the present text.

The second of the mentioned situation is possible, as national courts will apply the same international legal norms: first of all, the refugee definition under the 1951 Geneva Convention. Yet, the reference to the case law may concern many other legal issues (also under EU law as implemented by the EU Member States) as well as factual findings. A foreign court's decision, if appropriately current, may be a valuable source on a country of origin information. Lastly, the situation mentioned under point three above may also take place with the relevant procedures before the international courts. The attempt to establish the European consensus by the ECtHR as the ECHR interpretation method may serve as a good example.

Before entering into a contextualized analysis of the above mentioned scenarios one should note that they may significantly vary in their character, too. Therefore, a more differentiated approach to the character of relations among asylum courts may appear helpful. Indeed, “academics use different terms for referring to the different forms of exchanges that occur between judges and courts around the globe. The term ‘dialogue’ has so far been the most common term used by legal academia to refer to this phenomenon, in addition, terms such as ‘transnational judicial dialogue’, ‘conversation’, and ‘judicial interaction’ have also been employed.”²⁴ Vast literature has been devoted to the analysis and characterizations of these exchanges in different contexts.²⁵ Risking generalization, one may state that judicial dialogue “entails an ongoing exchange of arguments in order to reach common understandings. Thus, dialogue requires some sort of reciprocity among the judicial actors involved and it develops on a case by case basis over time.”²⁶ The other categories are of broader character, consist of more actors involved and include more informal relations among courts. O. Frishman points to three main forms of courts’ interactions: face-to-face interactions, IT-based communication and cross-citations.²⁷ The latter is to be equated with the judicial dialogue in the sense referred to above: “a way for courts to exchange their understanding of the best legal solution to a certain problem.”²⁸ However, one should not underestimate the two former ways of courts’ interactions. They remain less formal, yet they may turn out to be very influential. International Refugee Law is a very illustrative example in this respect. The refugee judges networks and associations such as the influential International Association of Refugee Law Judges²⁹ provide – through conferences, workshops, trainings, projects etc. – for actual face-to-face contacts which may prove to be very helpful in achieving harmonized approaches to particular legal problems. Again, in the EU context pro-

²⁴ F. Cafaggi et al. (n. 10), p. 38, references omitted.

²⁵ See e.g.: *ibidem*, 38–40 with extensive doctrinal references.

²⁶ *Ibidem*, p. 39, references omitted.

²⁷ O. Frishman, ‘Transnational Judicial Dialogue as an Organisation Field’ (2013) 19 *European Law Journal*, p. 747.

²⁸ *Ibidem*, p. 748.

²⁹ Established in 1995 and consisting of regional Chapters. See the Association’s Internet site at <www.iarlj.org> (access: 30 April 2016).

essional trainings for judges organized by the European Asylum Support Office within its Judges' Network fulfill a similar function. Obviously, this kind of interaction is strictly linked to an IT-based communication. In addition, professional asylum resources offered by different entities and accessible online are of high importance. The UNHCR remains the most influential actor in this respect with its 'refworld' asylum resources portal.³⁰

4. The Judicial Dialogue on Refugee Law in the Polish Context

4.1. Introductory Remarks

In the following section the contextualised instances of a judicial dialogue in the Polish practice of granting international protection to foreigners will be analysed. Of prime importance is the refugee status determination procedure that is initiated by an application for international protection and which, under the national law, consists of the determination of grounds for granting refugee status as well as of grounds for subsidiary protection.³¹ The Head of the Office for Foreigners (*Szef Urzędu do Spraw Cudzoziemców*) as the first instance and the Refugee Board (*Rada do Spraw Uchodźców*) as the appeal instance are the competent authorities in this context. A Refugee Board decision may be appealed to an administrative court. The judicial administrative procedure consists of two instances. The first instance is the Warsaw Administrative Court (*Wojewódzki Sąd Administracyjny w Warszawie*) and its judgements may be appealed (a cassation appeal) to the Supreme Administrative Court (*Naczelny Sąd Administracyjny*). The present analysis will focus on the case law of the Polish administrative courts. Nevertheless, the case law of the Refugee Board will be taken into account, too. The Refugee

³⁰ See at: Refworld database <www.refworld.org> (access: 30 April 2016).

³¹ The procedure obliging a foreigner to return (the return procedure) bears separate characteristics and is now regulated under the Foreigners' Act of 12 December 2013. Within the return procedure two other forms of protection may be granted to a foreigner, i.e. the permit to remain for humanitarian reasons (the humanitarian permit) and the permit for tolerated stay (the tolerated stay permit). One of the premises to grant the humanitarian permit is the right to respect for private and family life within the meaning of Art. 8 ECHR. Until 1 May 2014 this aspect was taken into account within the refugee status determination procedure under the premises for granting the then tolerated stay permit (at that time the tolerated stay permit was the third form of granting protection to foreigners, if refugee status and subsidiary protection were refused and granting the then tolerated stay permit excluded expulsion decision).

Board is a twelve-member body divided into four adjudicating panels (some decisions may be taken also by a single member of the Refugee Board). The members of the Refugee Board are independent and bound by the law only. Yet, the quasi-judicial character of the Refugee Board may be challenged as the Refugee Board does not settle a dispute between the parties but reconsiders an administrative case instead. Thus the Refugee Board does not exercise a purely judicial function. It is not clear whether the Refugee Board is covered by the concept of 'a court or a tribunal' under EU law. The Refugee Board has not tried to submit a reference for a preliminary ruling to the CJEU so far. Regardless of this fact, it may be noted that no Polish administrative court submitted a reference for a preliminary ruling referring on refugee law issue so far either.

The analysis will focus on relations between the courts that were listed in section 3 above under points one and two, i.e. in situations in which a national court refers in its decision to a decision of an international court or to a decision of another national court of foreign jurisdiction. The judicial dialogue between international courts and its significance for a national judge (adjudicator) will be also taken into account.

The analysis is divided into four subsections. Firstly, the general characteristics of the analysed references making up the refugee law judicial dialogue will be presented (4.2). Subsequently, the three selected particular issues will be analysed: the question regarding the understanding of the social group concept under the refugee definition (4.3); the application of the internal protection (flight) alternative principle (4.4); and the question of denial of access to adequate medical treatment in a country of origin as a ground for granting subsidiary protection (4.5).

4.2. The General Characteristics of the Polish Contribution to the Judicial Dialogue on Refugee Law

The conducted case law analysis shows that references to decisions of international courts and of national courts of foreign jurisdictions are not at all frequent. It is so especially in the second case. This flows from the fact that accessibility of such decisions is highly limited. The other major obstacle is the specificity of national regulations of, both, substantive and procedural nature.

In this context it is not surprising that the rare, identified examples of references to national courts' decisions do not regard legal questions but factual determinations of situations in the country of origin concerned. An illustrative example of such a reference is the decision of the Refugee Board³² in which the reference is made to the New Zealand Refugee Status Appeals Authority's decision³³ in order to invoke the same assessment that Sikhs who live in India outside the Pun-

³² Case RdU-93-1/S/14 (Refugee Board, 29 May 2014). All the Refugee Board decisions referred to in the present text are unpublished and on file with the author.

³³ Refugee Appeal 76456 (New Zealand: Refugee Status Appeals Authority, 15 March 2010).

job territory enjoy the same social and economic rights as other Indian nationals and that discrimination they might experience in this respect cannot be classified as persecution.

Of similar character was the reference in the 2003 Supreme Administrative Court judgement.³⁴ The case concerned an applicant from Nigeria, who left the country of origin due to the declared threat from the Ogboni society. In his appeal to the Supreme Administrative Court the applicant referred to national decisions from Australia and Canada in which cases based on the same facts were adjudicated positively for the applicants. In its judgement the Supreme Administrative Court quashed the appealed decision of the Refugee Board (the judgement was delivered in the framework of the single judicial administrative procedure binding at that time) because of deficiencies in evidentiary procedure and stated that the circumstances regarding the threat from the Ogboni society in Nigeria must be clarified in more detail. Yet, the Supreme Administrative Court made a reference to the UK court's judgement in which it considered the threat from the Ogboni society in Nigeria and decided the case negatively for the applicant.³⁵

Another brief reference to the UK court's decision was identified in the 2015 Administrative Court's judgement.³⁶ The Court approvingly referred to the Refugee Board's findings on the identification of the groups in high risk of persecution in Iran, which were based on the expert opinions and the identical findings in the UK court judgment.³⁷

It is characteristic for all of the above examples that references were made to the decisions of courts from English speaking States only. They were all written in English and made accessible online in the open access refugee law databases. It is also characteristic that all references were of very laconic and general character.

The references to a foreign national court's decision regarding legal questions are even less frequent. In fact, only one such decision has been identified. This is the 2008 Supreme Administrative Court judgement.³⁸ There the Supreme Administrative Court referred to the interpretation of the concept of a social group as a reason for persecution on gender grounds within the definition of a refugee

³⁴ Case V SA 1494/02 (Supreme Administrative Court, 29 January 2003). All the Supreme Administrative Court and the Regional Administrative Courts judgements referred to in the present text are available via *Centralna Baza Orzeczeń Sądów Administracyjnych* (Central Administrative Courts' Decisions Database) at <<http://orzeczenia.nsa.gov.pl/cbo/query>> (access: 30 April 2016).

³⁵ *Omoruyi v Secretary of State for the Home Department* Imm AR 175 (Appellate Court Civil Division, 2001) available via The University of Michigan Law School, *Refugee Case Law*, <www.refugeecaselaw.org> (access: 30 April 2016).

³⁶ Case IV SA/Wa 2152/14 (Warsaw Administrative Court, 22 January 2015).

³⁷ *S.B. Iran v Secretary of State for the Home Department* (no source reference included in the Warsaw Administrative Court's judgement).

³⁸ Case II OSK 237/07 (Supreme Administrative Court, 8 May 2008).

under Art. 1A of the 1951 Refugee Convention. Such concept of a social group was used in national decisions in Canada, the US and the UK. The Supreme Administrative Court judgement will be analysed in more detail in subsection 4.3 below.

The Polish administrative courts' and the Refugee Board's references to the ECtHR and CJEU case law on refugee law are definitely more frequent. For the ECtHR case law, this was particularly frequent before the 1 May 2014 major amendment of 2003 Act on granting protection to foreigners on the territory of the Republic of Poland. Before that amendment the refugee status determination procedure covered also the phase of determination of grounds for the tolerated stay permit, i.e. the auxiliary form of protection granted to foreigners in Poland. The statutory grounds for the tolerated stay permit included, among others, violations of selected guarantees of the ECHR as far as they excluded expulsion of a foreigner. Thus, references to law of the ECHR as established in the case law of the ECHR determining the scope of the particular ECHR standards were, in fact, of mandatory character. The references were made mainly to decisions against other States-parties to the ECHR as there were no Polish cases concerning expulsions in such context. Particularly frequent were references to standards established by the ECtHR under Art. 8 ECHR, which excluded expulsion on the basis of the right to respect for family life. Numerous decisions of the Refugee Board may be identified in which the relevant standard was reconstructed in detail and the application structure of Art. 8 ECHR was used.³⁹ Yet, the case law of the Refugee Board was diversified and one could also point to many decisions in which the relevant considerations on the right to respect for family life were not adequate or even fake. In the latter case the references to the old cases were made via published compilations of the ECtHR case law extracts. Also, the case law of the Polish administrative courts in the present context is quite broad and includes examples of references to the case law of the ECtHR and the CJEU.⁴⁰

As far as the tolerated stay permit is concerned, one decision of the Refugee Board is particularly worth mentioning. This is the 2009 decision on granting the tolerated stay permit to a Chechen fighter.⁴¹ The decision includes extensive references to the ECtHR case law on Art. 3 ECHR. The Refugee Board firstly referred to numerous judgements of the ECtHR against Russia in order to demonstrate that the standard of Art. 3 ECHR had been in Russia consistently and widely violated in many its aspects. Subsequently the Refugee Board stated that

according to the well-established case law of the ECtHR (starting with the judgements in cases of *Soering v the United Kingdom* of 7 July 1989, application no. 14038/88; A 161;

³⁹ See e.g. Refugee Board cases: RdU-1182-1/S/09 (14 January 2010); RdU-161-1/S/12 (28 May 2012); RdU-72-5/S/08 (14 October 2013).

⁴⁰ See e.g.: case IV SA/Wa 1387/13 (Warsaw DAC, 15 October 2013).

⁴¹ Case RdU-129-4/S/07 (Refugee Board, 3 April 2009).

the judgement regarded surrendering of a foreign national for extradition; and *Cruz Veras and others v Sweden* of 20 March 1991, application no. 15576/89; A 201; the judgement regarded expulsion of a foreign national) both surrendering and expulsion of a foreign national that would put him or her at risk of treatment prohibited under Art. 3 ECHR results in its violation. Thus, the guarantees of Art. 3 ECHR imply the prohibition of surrendering as well as of expelling a foreign national to the State in which he or she would be at risk of prohibited treatment. The absolute and non-derogable character of the protection under Art. 3 ECHR implies further that the guarantees resulting from it must not be excluded in any circumstances and notwithstanding any threat from the individual concerned which has been recently confirmed by the ECtHR in the judgement in case of *Saadi v Italy* of 28 February 2008 (application no. 37201/06; see especially para. 124–149 with references to earlier case law of the ECtHR).⁴²

The references to the extradition under the ECtHR case law were apparently made because of independent extradition proceedings, which were then pending simultaneously. The references to the ECtHR case law were of crucial importance as it was established that the applicant was at risk of serious violation of human rights in the country of origin, including the risk of torture. Granting of the refugee status was excluded, as was granting subsidiary protection, because the applicant was sentenced for criminal offence already while in Poland and the relevant security authorities issued a document stating that the applicant was a threat to the public security and order. Yet, the latter was not the premise for refusal to grant the tolerated stay permit. The then binding law was, however, not fully coherent and the threat to the public security and order constituted a premise for withdrawal of the permit. Nevertheless, the Refugee Board granted the tolerated stay permit to the applicant and underlined that absolute character of the protection resulting from Art. 3 ECHR and stated that:

according to the principle of subsidiarity being the basis of the ECHR (Art. 1) it is the national authorities of the States-parties to the ECHR that are predominantly responsible for safeguarding the conventional guarantees. The ECHR forms part of the domestic legal order

⁴² “Zgodnie z ustalonym orzecznictwem ETrPC (począwszy od wyroków w sprawach *Soering przeciwko Zjednoczonemu Królestwu* z dnia 7 lipca 1989 r., skarga nr 14038/88; A 161; wyrok dotyczył sytuacji przekazania cudzoziemca w trybie ekstradycji; i *Cruz Veras i inni przeciwko Szwecji* z dnia 20 marca 1991 r. (skarga nr 15576/89; A 201; wyrok dotyczył sytuacji wydalenia cudzoziemca) tak przekazanie, jak i wydalenie cudzoziemca, które skutkowałyby narażeniem go na traktowanie zabronione w art. 3 EKPC, prowadzi do jego naruszenia. Gwarancje art. 3 EKPC implikują więc zakaz tak przekazania, jak i wydalenia cudzoziemca do państwa, w którym byłby narażony na zabronione traktowanie. Absolutny i niederogowalny charakter ochrony na podstawie art. 3 EKPC implikuje też, że wynikające z niego gwarancje nie mogą zostać wyłączone w żadnych okolicznościach i niezależnie od zagrożenia, które jednostka może stanowić, co w ostatnim czasie zostało potwierdzone przez ETrPC w wyroku w sprawie *Saadi przeciwko Włochom* z dnia 28 lutego 2008 r. (skarga 37201/06; zob. zwłaszcza par. 124–149 i tam cytowane wcześniejsze orzecznictwo ETrPC)”, *ibidem*.

and may be applied directly and according to Art. 91 with conjunction with Art. 241.1 of the Constitution of the Republic of Poland of 1997 [references omitted] has precedence over a regular law if provisions of the latter cannot be reconciled with the ECHR.⁴³

The Warsaw Regional Prosecutor appealed the Refugee Board decision, which constituted the only case of such appeal since the establishment of the Refugee Board in 1999. The Warsaw Administrative Court in its judgment of 4 December 2009 dismissed the appeal and fully shared the argumentation of the Refugee Board's reasoning.⁴⁴

As far as grounds for granting refugee status as well as for granting subsidiary protection are concerned, the references to the case law of the ECtHR appear in contexts, which will be subject to a separate analysis in subsections 4.3–4.2 below.

As mentioned above, so far no Polish administrative court has referred a question regarding refugee law issues to the CJEU. Nevertheless, the significance of the CJEU case law for the interpretation of the EU asylum *acquis* has been, as indicated in section 2, consistently increasing in the recent years. Thus, the interpretative positions of the CJEU must be taken into account also by Polish courts, which is the case in practice. Yet, the direct references to particular judgements of the CJEU are made both in the case law of administrative courts and that of the Refugee Board albeit they are not frequent. They appear, for instance, in cases in which an applicant (especially if provided with legal aid) refers to a particular judgement within the framework of the procedure.⁴⁵ More importantly, direct references also appear if the interpretative position of the CJEU determines particular decision of a case. It is so, e.g., in cases dealing with the refusal to perform military service in an armed conflict as a reason for persecution. In some cases the Refugee Board referred directly to the interpretative standard as established

⁴³ “W myśl leżącej u podstaw EKPC zasady subsydiarności (art. 1 EKPC) to na organach krajowych państw stron EKPC ciąży podstawowy obowiązek zapewnienia przestrzegania gwarancji konwencyjnych. EKPC stanowi część krajowego porządku prawnego i jest stosowana bezpośrednio, a zgodnie z art. 91 w związku z art. 241 ust. 1 Konstytucji Rzeczypospolitej Polskiej z 1997 r. (Dz. U. 97.78.483 z późn. zm.) ma pierwszeństwo przed ustawą jeżeli ustawy nie da się pogodzić z EKPC”, *ibidem*.

⁴⁴ Case V SA/Wa 874/10 (Warsaw Administrative Court, 4 December 2009). Also the extradition proceedings ended up with a court's decision prohibiting the extradition. All that resulted in discontinuation of the proceedings before the ECtHR; *Mamilov v Poland*, App. no. 18358/07 (ECHR, inadmissibility decision/striking out of the list of cases, 20 October 2010).

⁴⁵ See e.g.: case RdU-908-1/S/09 (Refugee Board, 23 October 2009). The Refugee Board pointed out that the representative of the applicant wrongly referred to the evidence standard as established by the CJEU in the *Elgafaji* judgement (Case C-465/07, *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie*, CJEU, 17 February 2009) because the case under consideration before the Refugee Board regarded the country of origin (Republic of Guinea) where neither international armed conflict nor non-international armed conflict within the meaning of Art. 15(c) of the 2004 Qualification Directive had been pending at the time.

by the CJEU in *Shepherd*.⁴⁶ Other examples are cases dealing with the question of denial of access to adequate medical treatment in the country of origin as a ground for granting subsidiary protection. In some cases the Refugee Board as well as a regional administrative court referred directly to the interpretative position of the CJEU in *M'Bodj*.⁴⁷ The latter question will be dealt with more broadly in subsection 4.5.

Other interesting examples are decisions of the Refugee Board regarding applicants seeking refugee status because of the danger of persecution based on sexual orientation. Indeed, asylum claims related to sexual orientation and gender identity have become broadly discussed in the recent years and resulted in a real European judicial dialogue between the CJEU⁴⁸ and the ECtHR⁴⁹ with some important contributions from national courts.⁵⁰ There were also a few such cases decided by the Polish authorities, yet this happened before the delivery of the CJEU judgements. It is worth stressing that decisions of the Refugee Board appeared to be consistent with subsequent interpretative positions of the CJEU and to some extent they were even significantly more liberal.⁵¹ The Refugee Board stated, among others, that the very penalization of a homosexual act in a country of origin amounted to an act of persecution unless it may be demonstrated that a relevant law is not at all applied in practice. Also, the Refugee Board stated clearly that there are no objective methods allowing for definite medical assessment of one's sexual orientation and consequently they must not be applied in the refugee status determination procedure. According to the Refugee Board position, the sexual orientation should be determined upon an applicant's declaration, yet it requires verification of his

⁴⁶ Case C-472/13, *Andre Lawrence Shepherd v Bundesrepublik Deutschland* (CJEU, 26 February 2015). See e.g.: the following decisions of the Refugee Board, which all regarded the Ukrainian applicants and all included identical references to paragraphs 47–56 of the *Shepherd* judgement: RdU-746-1/S/15 (3 September 2015); RdU-794-1/S/15 (3 September 2015); RdU-780-1/S/15 (30 September 2015); RdU-1050-1/S/15 (9 November 2015).

⁴⁷ Case C-542/13, *Mohamed M'Bodj v État belge* (CJEU, 18 December 2014).

⁴⁸ CJEU cases: C-199/12–C-201/127, *X, Y and Z v Minister voor Immigratie en Asiel* (7 November 2013); C-148/13–C-150/13, *A, B, C v Staatssecretaris van Veiligheid en Justitie* (2 December 2014).

⁴⁹ Recent ECtHR cases: *M.E. v Sweden*, App. no. 713398/12 (Chamber, 26 June 2014), *M.E. v Sweden*, App. no. 713398/12 (Grand Chamber, 8 April 2015). See also ECtHR cases: *F. v the UK*, App. no. 17341/03 (inadmissibility decision, 22 June 2004) and *I.I.N. v the Netherlands*, App. no. 2035/04 (inadmissibility decision, 9 December 2004).

⁵⁰ See: *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* (the United Kingdom Supreme Court, 7 July 2010), para. 82. For commentary see: J. Weßels, 'HJ (Iran) and HT (Cameroon) – Reflections on a new test for sexuality-based asylum claims in Britain' (2012) 24 *International Journal of Refugee Law*, p. 815.

⁵¹ For the extensive analysis see: M. Kowalski, 'Sexuelle Orientierung im Flüchtlingsrecht und im allgemeinen Migrationsrecht Polens unter besonderer Berücksichtigung der Verifizierungsproblematik im Verfahren', [in:] C.D. Classen, R.D. Ichter, B. Łukańko (eds), '*Sexuelle Orientierung' als Diskriminierungsgrund. Regelungsbedarf in Deutschland und Polen?* (Mohr Siebeck 2016), p. 316.

credibility in general. One of the Refugee Board decisions including the above mentioned positions was deemed by the UNHCR as an example of jurisprudential good practice, translated *in extenso* into English and made available in the refworld database.⁵²

4.3. Defining the Concept of a ‘Social Group’

The already mentioned 2008 Supreme Administrative Court judgement deserves particular attention here because of numerous references to a multitude of foreign judgments. It is a rare example of a Polish court referring to decisions of national courts of foreign jurisdictions as indicated above in section 3.2 of the present text. The Court adjudicated on the question of a membership in a particular social group as a reason of persecution due to gender within the context of Art. 1A of the 1951 Geneva Convention and it included references to the national decisions made in Canada, the US and the UK. The Supreme Administrative Court judgement is important indeed, as it is the first Polish decision declaring that women may constitute a particular social group within the meaning of the refugee. The Supreme Administrative Court quashed the appeal judgement of the DAC due to, among others, complete ignorance of this aspect in the judgement of the first instance and in the decisions of the Head of the Office for Foreigners and the Refugee Board.

The Supreme Administrative Court reconstructed the concept of a social group starting with the references to cases of national courts of foreign jurisdictions and only subsequently referred to the definition of, the then binding, 2004 Qualification Directive. The national cases referred to (*nota bene* without any source references) were the judgement of the Supreme Court of Canada of 5 March 1990 in *Attorney General of Canada v P.F. Ward* and the decision of the US Board of Immigration Appeals of 1 March 1985 in *Acosta-Solorzano v INS* – no doubt influenced the scope and the very wording of the definition of a social group as adopted in Art. 10(d) of the 2004 Qualification Directive. It reads:

a group shall be considered to form a particular social group where in particular: – members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and – that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Thus, it may be claimed that the references to national decisions made by the Supreme Administrative Court in this respect were only of ornamental character.

⁵² Case RdU-178-1/S/12 (Refugee Board, 25 July 2012) unofficial English translation by the UNHCR available at <<http://www.refworld.org/docid/5037a3892.html>> (access: 30 April 2016).

References made by the Supreme Administrative Court that were definitely of greater importance regarded national decisions in which a particular social group was determined on gender grounds. It was so in the cited case concerning a 19-year-old Mexican woman who was the victim of domestic violence committed by her father. The Court determined in this case that family should be considered as a particular social group.⁵³ In the case before the Supreme Administrative Court the appellant was the Russian national coming from Dagestan who claimed that she was a victim of domestic violence inflicted by her husband. Of crucial importance in this case was the reference to the well-known and widely commented decision of the UK House of Lords in *Islam and Shah* of 1999.⁵⁴ The basis in the *Islam and Shah* case was, as the Supreme Administrative Court put it, “determination that a person concerned lived in a society stigmatizing women who were perceived as behaving against social and cultural norms being binding and widely accepted in that society.”⁵⁵ It was suggested in the *Islam and Shah* case, though not directly concerning the analysis of the Supreme Administrative Court, that alternatively to the determination of recognising all women in Pakistan as constituting a particular social group, it was possible to adopt additional criteria allowing for narrower definition of a particular social group consisting of women sharing also other common characteristics such as “Pakistani women accused of transgressing social mores and who are unprotected by their husbands or other male relatives.” The Supreme Administrative Court’s position may be perceived as in favour of such approach aimed at recognizing certain narrower groups of women in a particular society as a social group within the context of the refugee definition. Yet, the Supreme Administrative Court has not elaborated on this issue explicitly and the issue still remains debatable in the recent case law.⁵⁶

Nevertheless, the Supreme Administrative Court explicitly stated that in case of danger of persecution from non-State actors

the condition of the absence of State’s protection must not be understood in every case as an unconditioned obligation of personal exhausting of the relevant domestic procedures. The fact that the appellant has not referred herself to the state authorities for protection does

⁵³ *Aguirre Cervantes v INS* (21 March 2001) as accessed via (2001) 13 International Journal of Refugee Law 586.

⁵⁴ *Islam v Secretary of State for the Home department; R. V. Immigration Appeal Tribunal, ex p. Shah* (1999) 2 AC 629 (HL).

⁵⁵ “Stanowito ustalenie, że strona żyła w społeczeństwie piętnującym kobiety postrzegane jako postępujące w sposób niezgodny ze społecznymi i kulturalnymi normami obowiązującymi i powszechnie akceptowanymi w tym społeczeństwie”, case II OSK 237/07 (Supreme Administrative Court, 8 May 2008).

⁵⁶ See especially: case RdU-705-2/S/15 (Refugee Board, 27 April 2016) including the separate opinion.

not have the decisive significance for the dismissal of the refugee status request. Important is determining whether the appellant would have obtained protection if she had requested for it.⁵⁷

This position has been strengthened by the reference to the *Islam and Shah* judgment where the UK House of Lords determined that in Pakistan women's charges against their husbands are not only ineffective but may also result in increased danger of them being mistreated.

The analysed Supreme Administrative Court judgement is an illustrative example of an interpretation of international law by a national court. By referring to other national decisions in the form of cross-citations (in the *Islam and Shah* the UK House of Lords referred to other national cases which were referred by the Supreme Administrative Court as well) national courts pursue judicial dialogue *par excellence* (proper judicial dialogue). The Supreme Administrative Court contributed to that dialogue engaging in the discussion with the pronouncements of the UK House of Lords. Regrettably, the research carried out in preparation of the present paper shows that this is an isolated example. Again, one should remark that all references mentioned are to decisions of courts from English speaking States, which are available in open access refugee law databases.

Moreover, it should be remarked that the commented Supreme Administrative Court judgement's influence on the case law of the Polish refugee status determination authorities and administrative courts was rather modest. The cases regarding, widely understood, domestic violence against women are decided positively for applicants, only if they are found credible. This is a very challenging threshold for this kind of cases and the evaluation is carried out not with the view to grant refugee status but rather subsidiary protection because of serious harm consisting of torture or degrading or inhuman treatment (previously also with the view to grant a tolerated stay permit for the same reasons).

The acceptance for recognizing women as constituting a particular social group in a certain country of origin is itself not questioned and that especially in the light of the last sentence of Art. 10(d) of the 2011 Qualification Directive.⁵⁸ Yet, in the present Polish case law it seems to be understood as limited

⁵⁷ "Warunek braku ochrony ze strony państwa nie może być w każdym przypadku rozumiany jako bezwzględny obowiązek wyczerpania dostępnych w kraju procedur ochronnych osobście. Okoliczność, że skarżąca nie zwróciła się do organów państwa o pomoc nie może mieć decydującego znaczenia dla uzasadnienia odmowy nadania statusu uchodźcy. Istotne jest ustalenie, czy skarżąca otrzymałaby pomoc państwa, gdyby się o nią zwróciła", case II OSK 237/07 (Supreme Administrative Court, 8 May 2008).

⁵⁸ "Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group." See also Art. 60 of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210.

to situations in which it is possible to determine that in a particular country of origin every woman is at risk of persecution because of being a woman only. Indeed, this is very restrictive standard as such situations will be very rare in practice.

In the context analysed, one may illustratively point out the 2014 Warsaw Administrative Court judgement⁵⁹ regarding the case of a Chechen woman claiming that because of the social situation in Chechnya, her social status as a single mother with a minor child places her within a social group of women in the same situation. The Court did not share this line of argumentation and limited itself to the statement that being a single mother is not sufficient, as the claimant had not proved her membership to an organised group of single mothers in the country of origin. Conditioning the recognition for a particular social group on “membership in an organised group of women” proves a deep misunderstanding of the concept. The Warsaw Administrative Court’s judgement lacks not only references to any foreign case law but also to the Supreme Administrative Court judgement of 2008. The case law of the Refugee Board is not harmonious, either. Indeed, in this kind of cases the judicial dialogue would undoubtedly contribute to a more uniform and foreseeable application of the binding law.

4.4. Applying the Internal Protection (Flight) Alternative Principle (‘the IPA principle’)

Another significant example of judicial dialogue in the context of refugee law is applying the internal protection (flight) alternative (IPA) principle. This is a very important and current issue in the Polish practice of dealing with asylum applications lodged by Ukrainians from Crimea under Russian occupation and from the Donetsk and Luhansk regions. Decisions taken by the Polish authorities in such cases are in vast majority negative exactly due to the application of the IPA principle. Thus, it is a decisive aspect of such cases.

The IPA was foreseen neither in the 1951 Geneva Convention nor in the 1967 New York protocol, yet, it forms nowadays the unquestionable part of refugee law.⁶⁰ Beyond the international refugee law the same mechanism is applied in the

⁵⁹ Case IV SA/Wa 1557/14 (Warsaw Administrative Court, 29 October 2014).

⁶⁰ As it is stated in para. 91 of the UNHCR Handbook: “The fear of being persecuted need not always extend to the *whole* territory of the refugee’s country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.” See also: UNHCR, Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees (23 July 2003)

general human rights law. For instance, the ECtHR routinely engages the IPA principle to adjudicate on cases regarding expulsion or other legal or factual forms of transfer of a foreigner to a third State where the foreigner's rights would be endangered on the part of the territory only.⁶¹ Indeed, it was the case law of the ECtHR that has significantly contributed to the reliance on the internal relocation of persons in search of protection also in refugee law context, the CEAS including. The IPA was directly foreseen in Art. 8 of the Qualification Directive of 2004, which was subsequently slightly modified in its recast version of 2011. It is explicitly transposed into Polish law in Art. 18 of the 2003 Act on granting protection to foreigners. Yet, one should remember that under Art. 8 of the Qualification Directive the IPA may be applied but the Member States may choose to apply more favourable standards of treatment.

While applying the IPA at least four basic factors must be taken into account.⁶² Firstly, before the IPA is applied, it must be first determined that a person concerned would be at a risk of persecution or could suffer a serious harm on a part of a territory of a country of origin. Secondly, the IPA should not, in principle, be applied when the perpetrators are the authorities of the country of origin or they tolerate acts of persecution or serious harm. Thirdly, the safe parts of the country of origin should be identified as precisely as possible. Finally, the IPA application requires the establishment of criteria for assessing the situation in safe parts of a country of origin and for answering the question as to whether conditions there safeguard access to effective protection. These are the criteria mentioned in last sentence of Art. 8(1) of the Qualification Directive according to which a person concerned can “safely and legally travel to and gain admittance to that [safe] part of the country and can reasonably be expected to settle there.” All that should be assessed, following Art. 8(2) of the Qualification Directive with “regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.”

As far as the assessment of Ukrainian applications by the Polish authorities is concerned, the first two factors mentioned above are not problematic. In principle, applicants from Crimea meet the criteria to be granted refugee status

HCR/GIP/03/04; *The Michigan Guidelines on the Internal Protection Alternative* (11 April 1999) – Goodwin-Gill G.S., McAdam J. (n. 16) 123.

⁶¹ See: *Chahal v the UK*, App. No. 22414/93 (ECtHR, 15 November 1996). As far as the more recent case law is concerned see e.g.: the illustrative cases referring to the changing situation in Somalia: *Salah Sheekh v the Netherlands*, App. no. 1948/04 (ECtHR, 11 January 2007), *Sufi and Elmi v the UK*, App. nos 8319/07 and 11449/07 (ECtHR, 28 June 2011), *K.A.B. v Sweden*, App. no. 886/11 (ECtHR, 5 September 2013), *R.H. v Sweden*, App. no. 4601/14 (ECtHR, 10 September 2015).

⁶² For an extensive discussion, see: L. Aldenhoff, G. Clayton, P. McDonough, *Actors of Protection and the Application of the Internal Protection Alternative. European Comparative Report* (European Council on Refugees and Exiles, 2014), <<http://www.ecre.org/component/downloads/downloads/996.html>> (access: 30 April 2016). Also: UNHCR, *Guidelines on International Protection No. 4...*, para. 7.

and applicants from the Donetsk and Luhansk regions meet the criteria to be granted subsidiary protection due to the situations in the parts of the country of origin they come from. Also, it is beyond doubts that the sources of persecution or serious harm are not the Ukrainian authorities but other entities, be that Russian authorities and/or non-State actors supported by the latter. Moreover, the Ukrainian authorities are unable to stop and prevent their activities. What remains challenging while applying the IPA to the Ukrainian applications are the two other factors and particularly the last of them – establishing the relevant criteria for assessment of actual accessibility of effective protection.⁶³

Turning now to the question of judicial dialogue in the context of the IPA, it was already mentioned above that the IPA references to national decisions may regard assessment of factual situations in particular countries of origin, especially in their safe parts, and as such they have the character of the country of origin sources of information. It was exactly the case of the 2003 Supreme Administrative Court judgement and the 2014 Refugee Board decision, both referred to in the subsection 4.2 above. However, the Polish references to foreign national decisions with regard to the normative framework of the IPA have not been identified.⁶⁴ Nevertheless, in the IPA cases, the Polish decisions include frequent references to the UNHCR's guidelines as well as sporadic ones to the ECtHR case law. The latter is the example of a reference of a national court to a decision of an international court as indicated above in point 1 of the subsection 3 of the present text.

The references to the ECtHR case law appeared in the cases in which the Refugee Board dealt with the appropriate standard of actual accessibility of effective protection. In one of such cases the decision of the Refugee Board was quashed by the Warsaw Administrative Court judgement due to the Refugee Board's inadequate evidentiary findings on actual accessibility of protection in the safe part of Ukraine including access to employment, social benefits, medical and psychological care, educational opportunities and permanent housing as basic and indispensable conditions safeguarding normal living.⁶⁵ According to the Court, only

⁶³ This subsection is based on: M. Kowalski, 'Konflikt na Ukrainie a praktyka udzielania ochrony cudzoziemcom na terytorium Rzeczypospolitej Polskiej' [Ukrainian Conflict and the Practice of Granting Protection to Foreigners on the Territory of the Republic of Poland], [in:] D. Pudziańska (ed.), *Status cudzoziemca w Polsce w świetle współczesnych wyzwań międzynarodowych* [Foreigner's Status in Poland in Light of the Contemporary International Challenges] (Wolters Kluwer 2016), p. 96. See there for an extensive analysis.

⁶⁴ Even though it is perfectly possible as shown by the 2008 Czech Supreme Administrative Court's judgement. When considering the standards of the IPA application, the Court referred to the UNHCR guidelines and one ECtHR judgement (*Salah Sheekh v the Netherlands*). In addition, the Court also evoked the UK House of Lords judgement in *Januzi, Hamid and others v Secretary of State for the Home Department* of 15 February 2006; Judgement of the Supreme Administrative Court of the Czech Republic (*Nejvyšší správní soud*) of 24 January 2008, *E. M. v Ministry of Interior*, 4 Azs 99/2007-93. Extracts in English are available in refworld database.

⁶⁵ Case IV SA/Wa 681/15 (Warsaw Administrative Court, 22 September 2015).

if the mentioned conditions are fulfilled the actual accessibility of effective protection is safeguarded. Yet, the Refugee Board disregarded the Court's position and appealed to the Supreme Administrative Court.⁶⁶ In the reasoning supporting the appeal claim, the Refugee Board shared the Court approach that, while assessing whether an applicant can reasonably be expected to settle in the safe part of the country of origin, apart from personal safety considerations also considerations regarding the standard of living must be taken into account. Yet, the Refugee Board put into question the criteria the Warsaw Administrative Court applied for assessing whether expectations to settle in the safe part of the country of origin are reasonable. According to the Refugee Board position, the Court's approach was not to determine what would be the minimal standard allowing for a refugee to settle down, but what were the conditions for a general wellbeing of the person concerned.

The Refugee Board's arguments in the appeal claim were directly influenced by the ECtHR case law. The Refugee Board presented its detailed analysis of the 2011 ECtHR judgement in *Sufi and Elmi* in which the ECtHR stated, referring also to its previous case law, that "Article 3 [of the ECHR] does not preclude the Contracting States from placing reliance on the internal flight alternative provided that the returnee could travel to, gain admittance to and settle in the area in question without being exposed to a real risk of Article 3 ill-treatment"⁶⁷ and that such ill-treatment may in exceptional cases result also from socio-economic and humanitarian conditions, if grounds against removal are 'compelling'. The Refugee Board referred to the ECtHR position as far as it conditioned the applicability of the IPA on determinations made with the help of the test established in the *N. v the UK* (compelling humanitarian grounds⁶⁸) or of the test established in the *M.S.S. v Belgium and Greece* (official indifference in a situation of serious deprivation or want incompatible with human dignity⁶⁹). It must be noted that the choice of the relevant test was dependant on the sources of the insufficient humanitarian situation. The Refugee Board quoted the ECtHR position that the *N.* case test was appropriate if extremely dire humanitarian conditions resulted exclusively or mainly from poverty or lack of resources following a naturally occurring phenomenon, such as a drought. Yet, in circumstances in which dire humanitarian conditions emanate not only from poverty and naturally occurring phenomena but also from direct and indirect actions of the parties of the conflict (as it was the case in Somalia and evaluated in *Sufi and Elmi*), the ECtHR accepted the *M.S.S.* test as more appropriate. Taking this into account the Refugee Board concluded

⁶⁶ The cassation complaint (*skarga kasacyjna*) of the Refugee Board against the Warsaw Administrative Court judgement of 22 September 2015 in case IV SA/Wa 681/15 (Refugee Board, 7 January 2016) unpublished and on file with the author.

⁶⁷ *Sufi and Elmi* (n. 62), para. 294.

⁶⁸ *N. v the UK*, App. no. 26565/05 (ECtHR, 27 May 2008), paras 42 and 43.

⁶⁹ *M.S.S.*, para. 253.

that the condition of a safe settlement option in a part of a country of origin free from the risk of persecution or serious harm and including the reasonable settlement criterion, in case of the situation in Ukraine should be perceived in the way that unless compelling humanitarian grounds regarding the prevailing circumstances in the safe part of Ukraine or individual circumstances of the person concerned existed and in consequence excluded the settlement option, the IPA might be applied.

The above example was an interesting effort aimed at harmonisation of the case law of the Polish refugee status determination authorities and administrative courts based on the case law of the ECtHR. In this respect it would be a true example of proper judicial dialogue. Yet, the effort appeared to be unsuccessful as the appeal claim was rejected on purely procedural grounds. It is very unfortunate indeed, as the case law of the Polish authorities remains highly diversified within the analysed scope. In another Ukrainian case – which was almost identical to that mentioned above – the Warsaw Administrative Court shared the reasoning of the Refugee Board and dismissed the appeal. It stated, among others, that it

shares the position formulated by the [ECtHR] in the cases referred to by [the Refugee Board] [...] in which it was accepted that States are obliged not to expel foreigners only in situation in which extreme poverty is predicted, when the foreigner concerned is a person wholly dependent on State support and he or she is faced with official indifference of his or her State's authorities which is incompatible with human dignity. It is about the living conditions in the place of relocation that are so bad that the foreigner's existence, his or her life as well as his or her health (understood as the need to safeguard the basic medical care) may be endangered to such a degree that it actually results in a necessity to return the territory where the risk of persecution exists.⁷⁰

However, it should be stressed that in numerous other decisions of the Refugee Board dealing with the IPA principle application and especially in the context of the appropriate standard of the actual accessibility of effective protection, there are no references whatsoever to the case law of the ECtHR. Instead, the numerous references may be identified to the UNHCR guidelines and to the 'reasonableness'

⁷⁰ "Podziela stanowisko sformułowane przez Europejski Trybunał Praw Człowieka w powołanych przez organ wyrokach [...], w których uznano, iż państwa mają obowiązek powstrzymania się od wydalania cudzoziemców jedynie w sytuacji prognozy skrajnego ubóstwa, gdy cudzoziemiec jest osobą całkowicie zależną od pomocy państwa i znalazł się w obliczu obojętności organów swojego państwa, nie do pogodzenia z godnością człowieka. Chodzi tu o warunki życia w miejscu relokacji na tyle złe, że egzystencja cudzoziemca, jego życie, a także zdrowie (rozumiane jako potrzeba zapewnienia mu podstawowej opieki medycznej) może być na tyle zagrożona, iż realnie skutkuje koniecznością powrotu na teren, na którym istnieje zagrożenie prześladowaniem", case IV SA/Wa 694/15 (Warsaw Administrative Court, 24 September 2015).

test. According to this test it is required to determine whether in the relocation region the person concerned may lead ‘a relatively normal life’ without undue hardship.⁷¹ This is the dominant position adopted by the Refugee Board, which has been also approved in the case law of the administrative courts.

4.5. Granting Subsidiary Protection and the Denial of Access to Adequate Medical Treatment

The consideration of the relationship between the subsidiary protection when an applicant is in need of an adequate medical treatment is the subject of another bulk of case law exemplifying the judicial dialogue in the Polish context. In these particular cases if an applicant is denied protection, his suffering is caused by the lack of access to the adequate medical treatment. Another problem that is worth analysing in the context of the judicial dialogue on refugee law is the question of granting international protection to the seriously ill in case their return to the country of origin would cause their suffering due to the lack of access to adequate medical care and the necessary treatment. Of course, in a situation in which the denial of access to adequate medical treatment would be intentional due to one of the reasons enumerated in the refugee definition the person concerned would meet the criteria to be granted refugee status. Such situations are extremely rare though. The situations which are much more frequent are the ones in which a seriously ill foreigner would be deprived of the adequate medical treatment in case of return to his or her country of origin because of poor health system there resulting in no access to particular medical treatment. This is the frequent case of persons with HIV and AIDS-related conditions coming from numerous African States in which the health systems do not guarantee an adequate (or any) treatment.

Yet, the persons concerned could be, as it seems, covered by subsidiary protection under Art. 15(b) of the Qualification Directive, which defines the risk of serious harm consisting of torture or inhuman or degrading treatment or punishment of an applicant in the country of origin. Thus, this provision directly corresponds with the prohibition of Art. 3 ECHR. According to the ECtHR, in exceptional cases the removal of the ill foreigner to his or her country of origin may constitute a violation of Art. 3 ECHR and, therefore, cannot be executed. For the first time the ECtHR decided so in the famous 1997 judgment *D. v the UK*⁷² and subsequently established a *de facto* precedent in the 2008 *N. v the UK* Grand Chamber judgement where it determined a very high threshold of ‘compelling humanitarian grounds’ as the only exceptional situation in which the removal is to be excluded. Indeed, this is a very restrictive standard and as such it has

⁷¹ See e.g. Refugee Board cases: RdU-956-1/S/15 (22 April 2016); RdU-588-2/S/15 (17 March 2016); RdU-560-2/S/15 (4 December 2015).

⁷² *D. v the UK*, App. no. 30240/96 (ECtHR, 2 May 1997).

been under a harsh critique in the doctrine and by the non-governmental organisations. Also, it is characteristic that the *N.* standard has been criticised within the ECtHR itself and numerous judges expressed their calls for the liberalisation of the standard in diversified separate opinions annexed the ECtHR judgements.⁷³ Nevertheless the *N.* standard remains to be applied by the ECtHR. It should be noted, however, that the standard offers some flexibility in application of the ‘compelling humanitarian grounds’ standard to the circumstances of a particular case. It is especially so in case of national authorities making the relevant decisions.

In the Polish practice on granting international protection it was exactly the *N.* standard, which formed the reference point in applying Art. 15(2) of Act on granting protection to foreigners, which is an exact equivalent of Art. 15(b) of the 2011 Qualification Directive. In rare cases did the Refugee Board explicitly refer to the ECtHR case law establishing the relevant interpretation of Art. 3 ECHR and granted subsidiary protection to a seriously ill applicant. An illustrative example of such decision is a case of a young female applicant from Sudan who was very seriously ill, including being HIV positive, was an orphan and presumable was a victim of trafficking in human beings. When granting subsidiary protection to the person concerned, the Refugee Board stated that:

in the case exceptional and compelling humanitarian grounds occur, in the light of which the applicant would be denied the very basic medical care in the country of origin and that would result in placing her in danger of suffering of such a degree of mistreatment that it meets the criteria for endangering the applicant for serious harm consisting in inhuman or degrading treatment.⁷⁴

The Refugee Board decision included the explicit references to both the *D.* and the *N.* judgements of the ECtHR.

In December 2014 the question of interpretation of Art. 15(b) of the 2004 Qualification Directive (yet it is relevant for the 2011 recast version as well) was decided by the CJEU in *M’Bodj* case. The CJEU considered the preliminary questions of the Belgian court and provided an explanation as to the scope of subsidiary protection under Art. 15(b) of the 2004 Qualification limiting in a radical manner

⁷³ Opinion partiellement concordante commune aux Juges Tulkens, Jočienė, Popović, Karakaş, Raimondi et Pinto de Albuquerque, *Yoh-Ekale Mwanje v Belgium*, App. no. 10486/10 (ECtHR, 20 December 2011); Concurring opinion of Judge Lemmens joined by Judge Nussberger and Dissenting opinion of Judge Power-Forde, *S.J. v Belgium*, App. no. 70055/10 (ECtHR, 27 February 2014, Chamber), Dissenting opinion of Judge Pinto de Albuquerque, *S.J. v Belgium*, App. no. 70055/10 (ECtHR, 15 March 2015, Grand Chamber).

⁷⁴ “W sprawie zachodzą wyjątkowe i nieodparte okoliczności humanitarne, w świetle których wnioskodawczyni byłaby w kraju pochodzenia pozbawiona podstawowej opieki medycznej, co narażałoby ją na cierpienia o takim stopniu dolegliwości, że spełniają one znamiona doznania przez wnioskodawczynię poważnej krzywdy przez narażenie jej na nieludzkie lub poniżające traktowania”, case RdU-246-1/S/13 (Refugee Board, 29 August 2013).

the possibility of granting this form of international protection to the seriously ill. The CJEU referred directly to the judgement of the ECtHR in the *N.* case and to the standard established there.⁷⁵ Against these pronouncements, it stated that

none the less, the fact that a third country national suffering from a serious illness may not, under Article 3 ECHR as interpreted by the [ECtHR], in highly exceptional cases, be removed to a country in which appropriate treatment is not available does not mean that that person should be granted leave to reside in a Member State by way of subsidiary protection under Directive 2004/83. In the light of the foregoing, Article 15(b) of Directive 2004/83 must be interpreted as meaning that serious harm, as defined by the directive, does not cover a situation in which inhuman or degrading treatment, such as that referred to by the legislation at issue in the main proceedings, to which an applicant suffering from a serious illness may be subjected if returned to his country of origin, is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care.⁷⁶

What is more, the CJEU explicitly stated that the Member States are not entitled to introduce or to retain more favourable standards in this respect because “it would be contrary to the general scheme and objectives of Directive 2004/83 to grant refugee status and subsidiary protection status to third country nationals in situations which have no connection with the rationale of international protection.”⁷⁷

Consequently, the *M'Bodj* judgement, in fact, excluded granting subsidiary protection to the seriously ill foreigners, save the situations in which they would be intentionally deprived of health care. Such restriction will also apply to those who must not be removed due to the guarantees under Art. 3 ECHR. Such restrictive interpretation of torture, inhuman or degrading treatment under Art. 15(b) of the Qualification Directive *vis-à-vis* the ECtHR interpretation of Art. 3 ECHR seems to be arbitral and thus doubtful. One has to remember however, that at the very same day as the *M'Bodj* judgement was delivered the CJEU delivered another judgement in case of *Abdida*,⁷⁸ in which it confirmed other guarantees under EU law for the persons concerned on the basis of the Return Directive. Thus, the CJEU reasoning on the Return Directive, as described vividly by Steve Peers described, “transforms an instrument of repression into (in some cases) an instrument for protection.”⁷⁹ The line of the CJEU argumentation perceived jointly in both cases

⁷⁵ *M'Bodj* (n. 48), para. 39.

⁷⁶ *Ibidem*, paras 40–41.

⁷⁷ *Ibidem*, para. 44.

⁷⁸ Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* (CJEU, 18 December 2014).

⁷⁹ S. Peers, 'Could EU law save Paddington Bear? The CJEU develops a new type of protection' (*EU Law Analysis*, 21 December 2014), <<http://eulawanalysis.blogspot.co.uk>> (access: 30 April 2016).

may be assessed as surprising and deserves a separate analysis exceeding the scope of the present text.

The CJEU position has been rapidly taken into account and referred to in the Polish practice. This may be labelled as the rapid appropriation of the outcome of the European judicial dialogue to the domestic level. The Warsaw Administrative Court judgement of 22 January 2015⁸⁰ (so delivered slightly over one month after the *M'Bodj* and *Abdida* judgements) is especially worth attention. The Court referred to both of the judgements directly. It started rather surprisingly with references to the *Abdida* judgement, which were completely irrelevant for the case and subsequently referred to paragraphs 39–41 of the *M'Bodj* judgement and stated that it precluded granting subsidiary protection to the claimant concerned. The position of the CJEU with direct references to paragraphs 40–41 of the *M'Bodj* judgement is also included in the decisions of the Refugee Board refusing to grant subsidiary protection unless an applicant is intentionally deprived of health care.⁸¹ Thus, the question of granting the persons concerned other forms of protection will be decided in separate return procedure. However, those to whom the protection was granted (they could be granted the humanitarian stay permit or tolerated stay permit under the 2013 Act on foreigners⁸²) will enjoy a significantly less favourable status – especially, but not exclusively, as social conditions are concerned – *vis-à-vis* those enjoying subsidiary protection.

Undoubtedly, the question under analysis will continue to be the subject of the European judicial dialogue. It has been already heralded by the dissenting opinion of the ECtHR Judge Paulo Pinto de Albuquerque annexed to the *S.J.* judgement of 2015, in which he criticised sharply the CJEU judgements in *M'Bodj* and *Abdida* and concluded that “the messy state of the European case law, with its flagrant internal contradictions, makes it even more urgent to review the standard set out in *N.* in the light of international refugee law and international migration law.”⁸³

5. Conclusion

The Polish contribution to judicial dialogue on refugee law is rather modest and definitely could be more elaborate. It especially involves the almost non-existing cross-citations and references to the case law of foreign national courts. At the same time, the potential to exchange arguments in this way in order to reach common understandings of refugee law concepts and mechanisms is high

⁸⁰ Case IV SA/Wa 2152/14 (Warsaw Administrative Court, 22 January 2015).

⁸¹ See e.g. Refugee Board cases: RdU-1109-1/S/15 (7 April 2016); RdU-550-3/S/14 (22 April 2016).

⁸² Journal of Laws 2013, item 1650, as amended.

⁸³ Dissenting opinion of Judge Pinto de Albuquerque, *S.J.* (2015), para. 5.

and should not be neglected. Also, beyond judicial dialogue understood as cross-citation, informal ways of courts' interaction should not be underestimated, as they may be very influential. For obvious reasons they are very difficult to trace.

Due to the Europeanization of the refugee law the references in the Polish case law to the decisions of both the ECtHR and the CJEU are more frequent and to some extent remain mandatory. In this regard the growing importance of the CJEU case law is of highest significance. However, its influence may be perceived – at least to some extent – as controversial as was demonstrated in the analysed example of the *M'Bodj* case. This is also an illustrative example of the influence of the European courts' judicial dialogue on national case law.

Finally, one more aspect deserves to be brought up. The analysis conducted also shows that the references to both foreign national courts' and international courts' case laws are more frequent and in principle more detailed in the case law of the Refugee Board than in the case law of the administrative courts. It may be claimed that it is so because the Refugee Board is the specialised body dedicated to adjudicate refugee law cases only, whereas the administrative courts are not specialised in this respect and act within general judicial review of public administration. One may claim that this might be an additional argument for the need of reshaping the Polish national institutional framework and for establishing a specialised court or tribunal for refugees or – more broadly – for the law on foreigners' matters.

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VIII. Lithuanian Courts in Dialogue on International Law

Elżbieta Kuzborska*

1. Introduction

On 11 March 1990 Lithuania regained its independence. The Act on the Re-Establishment of the State of Lithuania immediately declared the need to 'stay the course' for democracy, human rights protection, and the rule of law. After 50 years of Soviet occupation, the Lithuanian state faced the challenge of a complete change of its political system, the form of the government, and the judicial system. The entirety of its case law, not to mention legal regulations, had to be altered accordingly. Additionally, the European Convention on Human Rights and Fundamental Freedoms was signed by Lithuania on 14 May 1993, and ratified on 27 April 1995.¹ From the very onset of its operations in 1993, the Constitutional Court of Lithuania (Constitutional Court) referred to the case law of the courts in Strasbourg (European Court of Human Rights) and Luxembourg (Court of Justice of the European Union) and their fundamental principles of democracy, human rights, civil society, legal certainty, proportionality, and accountable governance.

* Dr iur., Member of Board of the Association of Polish Academics in Lithuania, Member of Association of Polish Lawyers in Lithuania.

¹ European Convention on Human Rights as amended by Protocols Nos 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, adopted on 4 November 1950 in Rome.

The continuous reference to international standards in the case law of Lithuanian courts has become increasingly visible. This is connected to the need to apply European Union law and to observe the ECHR's standards, but is also at the same time linked to a greater awareness by the Lithuanian courts that their jurisprudence is increasingly integrated with the European judicial area. While in the first years of the EU membership the Lithuanian courts rather cautiously, or even 'decoratively', evoked EU regulations, the current conduct is perhaps more 'real', though with a certain degree of 'lightness' in the invocation of relevant EU provisions and in rejecting or accepting the interpretation of international standards put forward by the parties in proceedings. Here to light come other interlocutors in 'judicial dialogue': the parties in proceedings and their legal representatives. The analysis of the case law of the Supreme Court of the Republic of Lithuania, as well as of the Lithuanian Supreme Administrative Court leads to the conclusion that the interlocutors of the judicial dialogue (and especially lawyers) are better and better educated and show more and more understanding of the application of the law and the case law of the CJEU and the ECtHR.

To introduce shortly the Lithuanian judicial system one should recall that Lithuania has 62 specialized and general competence courts. The courts of general competence include: 49 district courts (*apylinkių teismai*), 5 regional courts (*apygardų teismai*), the Lithuanian Court of Appeal (*Lietuvos apeliacinis teismas*), and the Lithuanian Supreme Court (*Lietuvos Aukščiausiasis Teismas*). They examine civil and criminal cases, with district courts also examining violations of administrative law. Civil and criminal cases may be heard in the regional courts, the Lithuanian Court of Appeal and the Lithuanian Supreme Court. The specialized courts consist in five regional administrative courts (*apygardų administraciniai teismai*) and the Lithuanian Supreme Administrative Court (*Lietuvos vyriausiasis administracinis teismas*). These courts deal with administrative matters. The Constitutional Court (*Konstitucinis teismas*) deals with the questions of constitutionality of laws.

After the 2004 Lithuania's accession to the EU, these national courts became the 'EU courts', in the sense of executing and applying EU law, and ensuring the effectiveness of the rights and freedoms guarded by the Union. The Lithuanian courts also operate as courts complementary to the Strasbourg court guaranteeing the adequate human rights standards and protection. Moreover, in accordance with the principle of subsidiarity, the Lithuanian national courts are the courts of first instance assessing the country's compliance with international law. Similarly, the national judges are increasingly aware of the consequences of non-application of Strasbourg and Luxembourg standards. For the above reasons, Lithuanian courts in their rulings do refer to the decisions of international courts and tribunals, to international law, and to international standards.

The purpose of the following analysis, among others, is to evaluate the role of Lithuanian courts in protecting and implementing international law standards

through judicial dialogue, along with the underlying purpose, nature, frequency, and practical challenges, as well as difficulties that this involves. Alongside this exploration, answering the following complementary questions is essential a) whether the Lithuanian courts treat the ECHR as an instrument to ensure the domestic legal system's compliance with international law, and in what form they refer to the international law (do they invoke conventional and other source of international law, or international case law?), b) do Lithuanian courts quote international law in a subsidiary manner, as mentioned earlier, basing their judgments mainly on the provisions of Lithuanian law, and, c) does the reference to international standards merely play a 'decorative' role?²

2. The Legal Basis for Judicial Dialogue in the Domestic Law

According to Article 135 of the Constitution of the Republic of Lithuania “[i]n implementing its foreign policy, the Republic of Lithuania shall follow the universally recognised principles and norms of international law, shall seek to ensure national security and independence, the welfare of its citizens, and their basic rights and freedoms, and shall contribute to the creation of the international order based on law and justice”, while Article 138 of the Constitution states that: “international treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania.” According to the Law on International Agreements ratified international treaties are applied directly and take precedence over legislation and other domestic legal acts.³

The Constitutional Court in its rulings repeatedly affirms the primacy of ratified international treaties, but stresses that they cannot apply to the Constitution:

Faithfulness of the Republic of Lithuania to the universally recognized principles of international law has been declared in the Act of the Supreme Council of Republic of Lithuania on 11 March 1990, and in the Act of the Re-Establishment of the State of Lithuania. This means that compliance with freely accepted international commitments and respect of universally recognized norms of international law (including the principle of *pacta sunt servanda*) constitutes a part of the legal tradition and a constitutional principle of the restored independent State of Lithuania. [...] It should be emphasized that the Constitutional Court has repeatedly stated that ratified international agreements gain the force of law. This doctrinal principle

² The author would like to express her gratitude to Dr Jolanta Apolewicz for her assistance in researching Lithuanian case law for this article.

³ Article 11 of the Law on International Treaties VIII-1248 (*Lietuvos Respublikos Tarptautinių sutarčių įstatymas*, 22 June 1999).

cannot be explained in a way that presumes that the Republic of Lithuania may fail to comply with international agreements when international standards are contrary to the [domestic] legal regulation contained in laws or constitutional provisions. On the contrary, the constitutional principle concerning compliance with accepted international commitments and respect of universally recognized norms of international law mean that in those cases where national legislative acts (*inter alia* legislation or constitutional provisions) provide for an approach which contradicts with the content of an international agreement, the international agreement should be applied.⁴

Similarly, the Lithuanian Supreme Administrative Court in its judgments recognized the direct application of the ECHR provisions by Lithuanian courts and public authorities. On the one hand, in case of any conflict between the provisions of the Convention and domestic law, Lithuanian Supreme Administrative Court gives priority to the treaty. On the other hand, the Supreme Court in one of its rulings held that Lithuanian courts are not obliged to apply directly international soft law.⁵

The Constitutional act on membership of the Republic of Lithuania in the European Union sets the primacy of the whole *acquis communautaire* over national law, except for the Constitution: “[t]he norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of the legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.”⁶

International treaties and agreements approved by the Government but not ratified in the domestic system do not have priority over legislation, but they do take precedence over regulations and can also be applied directly. For example, the Lithuanian Supreme Administrative Court confirmed the precedence of bilateral international agreements over domestic law: “the applicant is a German company, hence the dispute over the tax should be resolved on the basis of the Lithuanian-German agreement on the avoidance of the double taxation of income and capital, which has precedence over national law.”⁷

The Law on courts indicates that courts must adhere to the Constitution, legislation, international agreements, regulations, and other Lithuanian legal

4 Translation from Lithuanian – J. Apolewicz, case 17/02-24/02-06/03-22/04 (Constitutional Court, 14 March 2006).

5 Constitutional Court’s decision, 17 October 1995.

6 The Constitutional act on membership of the Republic of Lithuania in the European Union (*Lietuvos Respublikos Seimas Įstatymas IX-2343* (Žin., 2004-07-13); *Lietuvos Respublikos Konstitucijos papildymo Konstituciniu aktu “Dėl Lietuvos Respublikos narystės Europos Sąjungoje” ir Lietuvos Respublikos Konstitucijos 150 straipsnio papildymo įstatymas*), Article 2.

7 Translation from Lithuanian – J. Apolewicz, case 3K-3-357/2014 (Lithuanian Supreme Court, 20 June 2014).

acts currently in force that are not contrary to legislation. The courts are obliged to follow the rulings of the Constitutional Court, take into account the judgments of the Supreme Court, as well as the rulings of the Lithuanian Supreme Administrative Court. The courts must apply EU legal standards. They must adhere to the judicial rulings of EU courts, and decisions in preliminary rulings. In turn, the Code of Administrative Proceedings provides that courts cannot apply legislation, which would be contrary to the Constitution; when applying the standards of EU law, the court must be guided by the judicial decisions of EU institutions and preliminary rulings. On the other hand, Article 780 of the Code of Civil Procedure states that in civil proceedings involving foreign parties the provisions of the Code are applied if an international agreement, to which Lithuania is a party, do not provide for a different regulation of the matter at issue.

Therefore, in Lithuanian law there is a strong basis for the direct application of international law and the principle of the supremacy of international law, though not when it comes to the Constitution. Although the law does not refer to the consideration of the judgments of foreign courts, it is undeniable that their use (especially the judgements of European national courts) in order to support a national position is customarily accepted in the European cultural and legal space. An almost complete absence of the reference to the foreign jurisprudence is, however, noticeable in the rulings of the Constitutional Court, the Lithuanian Supreme Administrative Court and the Supreme Court, likely due to the non-existence of such tradition in Lithuania in this respect. When it comes to the practical and technical side of preparing the texts of content decisions and judgements, it is important to emphasize that the courts 'informally' refer to the decisions and judgements of foreign courts (including especially Polish and German cases due to the large convergence of legal regulations) in similar cases. There is evidence of 'indirect' use of case law of foreign countries by Lithuanian courts in the Lithuanian Supreme Administrative Court Bulletin, which contains a review of the case law of foreign courts and the Supreme Administrative Courts.

3. General Considerations Concerning Judicial Dialogue in Lithuania

It should be emphasized that the Lithuanian Supreme Administrative Court and the Supreme Court are the most active courts in terms of judicial dialogue in Lithuania. These courts, compared to the Constitutional Court and common courts, will more often refer to international law and the practice of international

tribunals. It is thought common courts rarely invoke international standards because of their heavy workload, explaining in principle why only the Lithuanian Supreme Administrative Court and Supreme Court have enough time and sufficient human resources for the wider use of judicial dialogue.

This part of the study aims to provide an overview of the general trends concerning the references by Lithuanian courts of international law and enumerate the particular sources of law Lithuanian courts raise in their judgements. Given more recent trends, it should be stated that the Lithuanian Supreme Administrative Court and Supreme Court invoke international law in about 6 to 10% of their judgments.⁸ In the vast majority, these situations involve EU law, the standards of the European Convention of Human Rights and Fundamental Freedoms (ECHR), and the case law of the European Court of Human Rights (ECtHR). For their part, on average Lithuanian common courts refer to Convention or EU standards in only a few dozen cases a year. Bearing in mind that a district court on average considers 7700 cases every year and a regional court 6900,⁹ domestic justifications that include international law covers only around 1 to 2%.

There exists no widespread tradition of referring to international customary law in Lithuanian case law, unless international law or jurisprudence directly appeals to them. For example, the Lithuanian Supreme Administrative Court stated: “One of the universally recognized principle of international law is the principle of sovereign equality. It has been expressed in Article 2 of the Charter of the United Nations, Article 23 of the Vienna Convention on Diplomatic Relations.”¹⁰

An important initiative of the Lithuanian Supreme Administrative Court in the context of uniformity in the practice of common courts in interpreting and using international standards is the already mentioned publication *Lithuanian Supreme Administrative Court Bulletin* (lit. *LVAT biuletenis*), which is published twice a year and addressed to all Lithuanian judges and interested institutions.¹¹ It discusses the most important Lithuanian Supreme Administrative Court judgments, as well as provides a review of the case law of the tribunals and of the supreme admin-

⁸ For example, in 2014 Lithuanian Supreme Administrative Court issued 3545 judgments and 171 decisions, of which in 203 judgments and 10 decisions international sources of law were invoked. The vast majority of these were European Convention on Human Rights and the jurisprudence of the European Court of Human Rights (182 judgments and 5 decisions). For comparison, in 2011 Lithuanian Supreme Administrative Court in 196 cases referred to the EU law, and in 308 to the ECHR standards.

In turn, the Lithuanian Supreme Court in 2014 issued 1224 rulings, of which in 140 invoked the international sources – mostly the ECHR, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Convention on the law applicable to traffic accidents (1971), in several cases to the International Convention on the Rights of the Child, in 10 cases to the Geneva Convention on the Contract for the International Carriage of Goods by Road (1956).

⁹ Transparency International, Vilnius Branch, <<http://atvirasteismas.lt/>> (access: 1 July 2016).

¹⁰ Case A7-335/2003 (Lithuanian Supreme Administrative Court, 24 June 2003).

¹¹ Bulletin costs around 14 euro.

istrative court of foreign countries. The review of this publication's recent issues leads to the conclusion that it contains numerous references to EU law and practice of the CJEU, and recalls the standards of the ECHR and its additional protocols, as well as the case law of the ECtHR. The Lithuanian Supreme Administrative Court publication also brings forth examples of the interpretation of domestic law and the rules of law (such as *res judicata*, *non bis in idem*, etc.) in the light of international standards. A similar task in dissemination of the knowledge concerning international standards and uniformisation of judicial practices in this respect can be found in the Supreme Court's newsletter *Judicial Practice* (lit. *Teismų praktika*),¹² which, among others, includes an overview of ECtHR judgments.

Returning to an overview of judicial dialogue in the light of particular international treaties, the Lithuanian Supreme Administrative Court in recent judgments has repeatedly referred to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).¹³ Basing itself on its provisions, the Lithuanian Supreme Administrative Court has on several occasions described the definition of a 'person concerned' in the context of the protection of the public interest by a non-governmental organization. It has done the same for the definition of 'public interest': "For the purposes of the Aarhus Convention interested non-governmental organization should assist in solving environmental problems, promote environmental protection and meet the requirements determined by national law."¹⁴

Recently the Lithuanian Supreme Administrative Court, as well as the Supreme Court on a few occasions, have referred to the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,¹⁵ the Hague Convention on the Law Applicable to Traffic Accidents of 1971,¹⁶ the Protocol to the Madrid Convention on Registration of Marks International of 1989,¹⁷ and the Principles of International Commercial Contracts. Both courts directly applied provisions of these conventions.¹⁸

In cases concerning the protection of children's rights, the Lithuanian Supreme Administrative Court¹⁹ usually recalls the provisions ECHR, but also

¹² The topics discussed in recent issues of the bulletin in the context of international standards: children's rights, recognition of the judgements of arbitration courts, tenders, the right to a fair trial.

¹³ Adopted on 25 June 1998 in Aarhus.

¹⁴ If it is not indicated otherwise, translation from Lithuanian is made by the Author. Lithuanian Supreme Administrative Court's cases: A520-211/2013 (23 September 2013); A-146-342-14 (10 April 2014).

¹⁵ Adopted on 10 June 1958 in New York. In 2014 the Convention was invoked for 3 times.

¹⁶ Adopted on 4 May 1971 in the Hague.

¹⁷ Adopted on 27 June 1989 in Madrid.

¹⁸ For example Lithuanian Supreme Court's cases: 3 K-3-363/2014 (27 June 2014); 3 K-7-326/2013 (10 October 2013).

¹⁹ On average, every year there are several cases concerning rights of the child.

refers to the UN Convention on the Rights of the Child,²⁰ the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse,²¹ and the European Convention on the Legal Status of Children Born out of Wedlock²².

As for quoting international standards in criminal cases, the Supreme Court, in addition to the Strasbourg court's standards, applies, among others, the provisions and interpretation of the Council of Europe's Criminal Law Convention on Corruption,²³ as well as provisions of the Single Convention on Narcotic Drugs.²⁴

The Lithuanian Supreme Administrative Court and Supreme Court will on average at least a couple of times every year²⁵ invoke the Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR Convention).²⁶ In 2014, the Supreme Court recalled in four cases the interpretation of Convention's Article 29(1) stating, for instance, that:

In accordance with the case law of the Supreme Court of Lithuania, the application of Article 29(1) of the CMR Convention, a carrier's grave carelessness, taking into account the specific circumstances of the case, may be compared to deliberate actions and constitute the basis for carrier's full responsibility for the loss of goods. An example of this kind of deliberate misconduct might be breaking red lights, drink driving, violation of the work-rest regime and others. The doctrine agrees that the standard set out in Article 29(1) in case of deliberate damage or carrier-inflicted damage, which under national law is comparable with deliberate actions, is determined according to the provisions of national law and differs in particular countries.²⁷

In other cases, the Supreme Court directly referred to the provisions of the *Convention*, e.g. in determining the meaning of the transport documents for the effectiveness of the contract of carriage²⁸ or in determining the carrier's liability.²⁹

When ruling in matters of granting or refusing to grant a refugee status by the Department of Migration within the Ministry of Internal Affairs, the Lithuanian Supreme Administrative Court invoked the provisions of the UN Convention

²⁰ Adopted by General Assembly resolution 44/25 of 20 November 1989.

²¹ Adopted on 25 October 2007 in Lanzarote.

²² Adopted on 15 October 1975 in Strasbourg.

²³ Adopted on 27 January 1999 in Strasbourg. See: case 2 K-368/2014 (Lithuanian Supreme Court, 4 November 2014).

²⁴ Adopted on 30 March 1961 in New York. See: case 2 K-425/2014 (Lithuanian Supreme Court, 21 October 2014).

²⁵ In 2014 Lithuanian Supreme Court issued 10 cases of this kind, in 2015 Lithuanian Supreme Court – 8 cases and Lithuanian Supreme Administrative Court 3 cases.

²⁶ Adopted on 19 May 1956 in Geneva.

²⁷ Case 3 K-3-219/2014 (Lithuanian Supreme Court, 16 April 2014).

²⁸ Case 2 K-388-507/2015 (Lithuanian Supreme Court, 22 September 2015).

²⁹ Case 3 K-3-593-687/2015 (Lithuanian Supreme Court, 6 November 2015).

relating to the Status of Refugees,³⁰ as well as the practice of the ECtHR in assessing the merits of the application and the context of the real risks for an individual in case of deportation (see: Article 3 ECHR on the expulsion or extradition with exposure to torture, inhuman or degrading treatment or punishment).³¹

In cases involving discrimination on grounds of gender and disability in relation to labour legislation, the Supreme Court quoted provisions of the Convention on the Elimination of All Forms of Discrimination against Women³² and the Convention on the Rights of Persons with Disabilities,³³ among others, especially with reference to the burden of proof and the concept of discrimination based on disability, which “includes any form of discrimination, including denial of appropriate adjustment of working conditions [for the disabled worker – E.K.] (e.g. in determining an appropriate model of working time, in allocating of responsibilities, and in ensuring the integration in the workplace).”³⁴

Lithuanian courts refer also to other treaties, such as the European Convention on the Transfer of Sentenced Persons of 1983³⁵ and the Additional Protocol to this Convention of 1997, as well as Convention on the Control and Marking of Articles of Precious Metals.³⁶

With regard to bilateral agreements, the Lithuanian Supreme Administrative Court in a 2014 judgment referred to the Lithuanian-German Intergovernmental Agreement on cooperation in the sphere of culture of 21 July 1993³⁷ and the application of its Article 16:

The parties are unanimous on the fact that lost or illegally exported cultural works within their territory will be returned to their rightful owner or his successors. [...] Article 16 does not specify the time of disappearance or illegal export of cultural works. This means that it cannot be interpreted in a way that gives Parties the right to limit under their national law the range of cultural works, depending on the time of their disappearance or export.³⁸

In another judgment the Lithuanian Supreme Administrative Court invoked the Lithuanian-German Agreement on the avoidance of double taxation.³⁹

³⁰ Adopted on 28 July 1951 in Geneva.

³¹ Lithuanian Supreme Administrative Court every year examines several cases of this kind.

³² Adopted on 18 December 1979 in New York.

³³ Adopted on 13 December 2006 in New York.

³⁴ Case 3 K-3-199/2014 (Lithuanian Supreme Court, 11 April 2014).

³⁵ Adopted on 21 March 1983 in Strasbourg.

³⁶ Adopted on 15 November 1972 in Vienna.

See: J. Apolevič, E. Leonaitė, *Republic of Lithuania Materials on International Law 2014* (Brill Nijhoff, Boston 2016) 442.

³⁷ 1993 m. liepos 21 d. Lietuvos Respublikos Vyriausybės ir Vokietijos Federacinės Respublikos Vyriausybės sutartis dėl bendradarbiavimo kultūros srityje.

³⁸ Case 3 K-3-357/2014 (Lithuanian Supreme Court, 20 June 2014).

³⁹ Case A 438-2713/2011 (Lithuanian Supreme Administrative Court, 28 November 2011).

The references to soft law, including the recommendations and resolutions of the Council of Europe, aim at strengthening the arguments and reasoning of decisions and at helping in interpreting the provisions of national law. For example, the Lithuanian Supreme Administrative Court in its judgment of 13 July 2012⁴⁰ interpreted the norms of the Code of Administrative Procedure regarding the conditions for the application of provisional measures in the light of the Recommendation of the Committee of Ministers of the Council of Europe No. R (89)8 on Provisional Court Protection in Administrative Matters.

The Supreme Court in its judgments often refers to the resolutions of the Parliamentary Assembly of the Council of Europe. For example, in the judgment of 13 June 2014 when examining a cassation appeal, the Supreme Court invoked the Resolution on the Ethics of Journalism, stating that:

resolutions adopted by the Parliamentary Assembly of the Council of Europe have a recommendatory rather than binding force (Articles 22–23 of the Statute of the Council of Europe). By means of its resolution (No. I-1046) of 26 September 1995, the Seimas of the Republic of Lithuania expressed its approval regarding the resolution in question and its recommendation that concrete persons (journalists and employees of the press and other mass communication media, officials of state and municipal institutions) should observe the main ethical principles set out in the resolution. [...] [T]he panel of judges holds that the arguments set out in the cassation appeal regarding the failure of the courts to pay regard to the requirements set in Resolution No. 1003 (1993) of the Parliamentary Assembly of the Council of Europe on the ethics of journalism are unfounded.⁴¹

It is interesting, however, that in its ruling of 15 May 1998 the Senate of Judges of the Supreme Court of Lithuania noted the recommendatory character of the mentioned resolution but stated that its principles should be observed by journalists and employees of the mass communication media, as well as by state and municipal officials.⁴²

4. Domestic Measures for International Law Infringements

As far as the effect and the execution of an international judgment in a particular case is concerned, Article 456 of the Code of Criminal Procedure provides that a criminal case can be revised after the UN Human Rights Committee

⁴⁰ Case AS146-380/2012 (Lithuanian Supreme Administrative Court, 13 July 2012).

⁴¹ Case 3 K-3-322/2014 (Lithuanian Supreme Court, 13 June 2014).

⁴² Decision 1 (Lithuanian Supreme Court Senate, 15 May 1998).

considers that the conviction was in breach of the ICCPR or its additional protocols, or if the ECtHR acknowledges that the conviction was in breach of the ECHR or its additional protocols, if the nature and gravity of infringements raise serious doubts concerning the legitimacy of a conviction and a violation can be remedied only by reopening the case.⁴³ An ECtHR judgment can be also a basis for the revision of civil (Art. 366 Code of Civil Procedure)⁴⁴ and administrative proceedings (Art. 153 Code of Administrative Procedure).⁴⁵

In 2014, in two cases, the Supreme Administrative Court of Lithuania dealt with the impact of decisions adopted by international dispute resolution bodies on the administrative proceedings conducted by the Supreme Court of Lithuania. Both of the cases concerned Rolandas Paksas's disqualification from holding parliamentary office following his removal from the office of the President of the Republic of Lithuania through impeachment proceedings for a gross violation of the Constitution and a breach of the constitutional oath. The Constitutional Court also commented on the case.⁴⁶

The Lithuanian Supreme Administrative Court stated:

The reasoning provided by the European Court of Human Rights and its judgment lead to the conclusion that, by its judgment of 6 January 2011, the European Court of Human Rights did not impose on Lithuania any obligations in relation to the possibility for Rolandas Paksas, the applicant, to participate in elections of the President of the Republic of Lithuania; thus, there is no ground for stating that, at the present moment, the judgment of the European Court of Human Rights gives rise to the international obligation for the Republic of Lithuania to amend the national legislation in relation to presidential elections. [...] Lithuania is under the obligation to execute the judgment of the European Court of Human Rights; however, this can be implemented only by means of amending the Constitution of the Republic of Lithuania, as it was held by the Constitutional Court of the Republic of Lithuania in its special announcement "On the Implementation of the Judgment of the European Court of Human Rights of 6 January 2011" of 10 January 2011, as well as in its ruling of 5 September 2012,⁴⁷ where the Constitutional Court held that the sole means of removing the aforesaid incompatibility of the provisions of Article 3 of Protocol No. 1 of the Convention with the Constitution is the adoption of the respective amendment(s) to the Constitution.⁴⁸

⁴³ Law on courts I-480, Art. 456 (*LR teismų įstatymas*, 31 May 1994).

⁴⁴ Law on civil proceedings IX-743 (*LR civilinio proceso kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas*, 28 February 2002).

⁴⁵ Law on Administrative Proceedings VIII-1029 (*LR administracinių bylų teisenos įstatymas*, 14 January 1999); see: case P-756-46-14 (Lithuanian Supreme Administrative Court, 28 May 2014).

⁴⁶ See the contribution by I. Skomerska-Muchowska in this volume.

⁴⁷ Special statement of the Lithuanian Constitutional Court (*Lietuvos Respublikos Konstitucinio Teismo specialusis pareiškimas "Dėl Europos Žmogaus teisių teismo 2001 m. sausio 6 d. sprendimo įgyvendinimo"*, *Lietuvos Respublikos Konstitucinio Teismo 2012 m. rugsėjo 5 d. nutarimas*, 10 January 2011).

⁴⁸ Case R-525-8-14 (Lithuanian Supreme Administrative Court, 6 March 2014).

In the subsequent case concerning Rolandas Paksas, which was issued after the decision of the Human Rights Committee, the Supreme Administrative Court of Lithuania indicated:

The applicant points to the Views of the Human Rights Committee of the United Nations, adopted on 25 March 2014, concerning Communication No. 2155/2012 *Paksas v Lithuania* as a new circumstance, which became known to the applicant on 9 April 2014. In the said views, the Human Rights Committee of the United Nations noted that “the lifelong disqualifications imposed on the author lacked the necessary foreseeability and objectivity and thus amount to an unreasonable restriction under Article 25(b) and (c) of the Covenant [International Covenant on Civil and Political Rights], and that the author’s rights under these provisions have been violated.” The panel of judges holds that the circumstance indicated by the applicant does not satisfy the grounds for reopening proceedings, as provided for in Item 2 of Paragraph 2 of Article 153 of the Law on the Proceedings of Administrative Cases, since the aforementioned statements should be considered not as a new circumstance but as a new assessment of the facts that existed at the time of the consideration of the case, given by the Human Rights Committee of the United Nations already after the decision in the administrative case had been adopted.⁴⁹

The ECtHR’s judgment in *Cudak v Lithuania*⁵⁰ was also the basis for the reopening of proceedings. The case is interesting and requires a discussion broader than it is possible here since it clearly shows the limitations of state immunity. What’s important, Lithuania is not a party to UN Convention on Jurisdictional Immunities of States and Their Property,⁵¹ nor European Convention on State Immunity.⁵² The mentioned decision of the ECtHR has become an expression of the evolution of standards concerning immunity from legal proceedings, moving away from the restrictive theory of immunity, which in an absolute way was supposed to protect a State against any claims before the courts of other countries. The Grand Chamber of the Court found a violation of the applicant’s right to access to a court (Article 6(1) ECHR) due to the refusal of Lithuanian courts to proceed with a lawsuit against the Embassy of Poland in Vilnius after the Ministry of Foreign Affairs of Poland invoked immunity from jurisdiction, concluding that the duties entrusted to the applicant in the Embassy of Poland had “facilitated, to a certain degree, the exercise by the Republic of Poland of its sovereign functions.”⁵³ In its

⁴⁹ Case P-492-71-14 (Lithuanian Supreme Administrative Court, 30 April 2014).

⁵⁰ *Cudak v Lithuania*, App. no. 15869/02 (ECtHR, 23 March 2010).

⁵¹ Adopted on 2 December 2004 in New York.

⁵² Adopted on 16 May 1972 in Basel.

⁵³ A brief statement of facts: the applicant Alicja Cudak starting from 1.11.1997 was employed at the Polish Embassy in Vilnius as a secretary and switchboard (local staff member, an employment contract governed by the law of Lithuania). In 1999 AC appealed to the Lithuanian Ombudsman of Equal Opportunities claiming she was a victim of sexual harassment from the Polish diplomat. The proceedings before the Ombudsman proved the harassment.

judgment of 23 March 2010, the ECtHR stated that, although neither Lithuania nor Poland have signed and ratified the European Convention on State Immunity and the Convention on Jurisdictional Immunities of States and Their Property, the provisions of the latter (in particular Article 11 concerning employment contracts) should be treated as a codification of norms of customary international law.

The ECtHR admitted that the measures taken by the State due to the recognition of jurisdictional immunity couldn't disproportionately restrict the right of access to a court (Article 6(1) ECHR). According to the ECtHR, the applicant performing as a secretary did not perform functions closely related to the public authority, she did not have the status of a staff member of the diplomatic or consular corps, and was a citizen of the host country. The Court noted that the Lithuanian Government was unable to explain how the performance of her duties was related to the sovereign interests of the Polish government and the security interests of Poland, so it was assumed that the applicant's employment contract involved only the sphere of *acta jure gestionis* (acts of a commercial or private-law nature), and no sphere of *acta jure imperii* (acts of sovereign authority). The ECtHR stated that Poland's reference to immunity from the jurisdiction does not give the Lithuanian courts grounds to reject the claims concerning the employment contracts of the local staff of the Polish Embassy, since the principle of state immunity cannot be applied in cases of labour law involving the citizens of the host country working in foreign diplomatic missions. In conclusion, the Court stated that by upholding an objection based on State immunity and by declining jurisdiction to hear the applicant's claim, the Lithuanian courts, in failing to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and thus impaired the very essence of the applicant's right to access to a court. It was stressed that each case requires individual assessment in the context of the principle of proportionality.⁵⁴ It should be assessed that the judgment has revaluated and confronted the principle of absolute state immunity in international law.

Due to this ECtHR ruling, the Lithuanian Supreme Court on 7 October 2010 set aside the previous ruling in *Cudak* and ordered a retrial of the lawsuit concerning unlawful dismissal and monetary compensation. The case was examined in two instances. Domestic courts did not refer to or analyse the ECtHR's judgment involved, but focused mainly on the merits of the case and the provisions of Lithuanian labour law.⁵⁵

On 2.12.1999 AC was informed of her dismissal from work because of unauthorised absences on 22–29.11.1999. After making a complaint before Lithuanian against the employer – Embassy of Poland, Ministry of Foreign Affairs of Poland invoked immunity against jurisdiction. The court dismissed the claim, the court of appeal uphold it, Supreme Court found no violation as well.

⁵⁴ *Cudak v Lithuania*, App. no. 15869/02 (ECtHR, judgment, 23 March 2010), para. 74.

⁵⁵ The court of the first instance dismissed the claim. After A. Cudak appealed the court partially recognized her claim – found her dismissal to be illegal and awarded her the compensation of 50,000 litas (about 60,000 PLN, while AC demanded 500,000 litas), but did not reinstate

It should be mentioned that prior to *Cudak* case, the Lithuanian courts in a less systematic manner, on a case-by-case basis, examined two more cases concerning State immunity. On 5 January 1998 the Supreme Court issued a decision in the case of *Stukonis v United States embassy*, regarding an action for unlawful dismissal against the United States embassy in Vilnius. It found, *inter alia*, as follows: “State immunity does not mean immunity from institution of civil proceedings, but immunity from jurisdiction of courts. The Constitution establishes the right to apply to a court (Article 30) [...]. However, the ability of a court to defend the rights of a claimant, where the defendant is a foreign State, will depend on whether that foreign State requests the application of the State immunity doctrine [...]. In order to determine whether or not the dispute should give rise to immunity [...] it is necessary to determine the nature of the legal relations between the parties [...]”⁵⁶

On 6 April 2007 the Supreme Court delivered a judgment in a case *S.N. v the embassy of the Kingdom of Sweden*. It found that “despite the fact that the Kingdom of Sweden had not enacted any legislation on State immunity, it could nevertheless be seen from the case-law of the domestic courts that Sweden recognised the doctrine of restrictive State immunity.” In that case it was considered that the provisions of the United Nations Convention on Jurisdictional Immunities of States and their Property, adopted on 2 December 2004, could be taken into account, even though they were not binding, since they reflected a certain trend in international law in matters of State immunity. The Supreme Court further observed that the case law of the courts of both States, Lithuania and Sweden, based on common practice in international relations, confirmed that they had been adhering to a restrictive approach to State immunity, whereby a State could not claim immunity from jurisdiction if the dispute was of a private law nature. In such cases Sweden could not therefore object to the case being heard by the Lithuanian courts.⁵⁷

Summing up, in cases concerning State immunity Lithuanian courts invoked international customary law, rejecting a restrictive approach to State immunity.

Another issue relevant for our discussion is the enforcement of international judgments, which would require the introduction of changes in domestic laws. Without a doubt, decisions of the ECtHR in cases against Lithuania, which oblige the state to change legislation, and their application, are of particular importance. On the one hand, some are executed efficiently. These are, for example, cases concerning conditions in prisons result in the amendment of the domestic law. On the other hand, no appropriate legislative changes were taken to comply with the 2007 judgment *L. v Lithuania* to create the legal possibility of gender change surgery and enable subsequent changes in civil registry.⁵⁸

her, see: case 2-1212-553/2011 (Vilnius district court, judgment, 13 May 2011); case 2-1212-553/2011 (Vilnius Court of Appeal, judgment, 11 November 2011).

⁵⁶ See: *Cudak v Lithuania*, App. no. 15869/02 (ECtHR, 23 March 2010), para. 21.

⁵⁷ See: *ibidem*, para. 23.

⁵⁸ See: case A858-1452/2010 (Lithuanian Supreme Administrative Court, 29 November 2010).

5. The Application of EU Law

The following considerations refer to the application of EU law by national courts and its evolution since, as it was stated at the beginning of this contribution, Lithuanian courts are considered to be also the EU courts.

Before its accession to the EU, Lithuania was obliged to adapt national laws to EU regulations. In 2003, amendments to the Law on the Judiciary, Code of Administrative Offences, Code of Civil Procedure, and Code of Penal Procedure were adopted. The changes were aimed, first, at enabling the courts to apply the EU law, and second, at creating the basis to issue a preliminary ruling in case of doubt as to the existing regulations or interpretation of EU law: “The court, when considering the case, applies standards of EU law as well as the decisions of the EU judicial institutions EU, the preliminary rulings concerning the application of the existing EU law and its interpretation.”⁵⁹ Article 3(5) of the Code of Civil Procedure obliged courts to apply standards of EU law and to take into consideration the decisions of the EU judicial institutions and preliminary rulings concerning the application and interpretation of EU law.

These amendments entered into force on the date of Lithuania’s accession to the EU, but it must be remembered that the primary legislation of the EU obliged Member States to comply and apply the EU law. In addition, the Constitutional Act on Membership of the Republic of Lithuania in the European Union adopted after the country’s accession to the EU, affirms that EU law is an integral part of national law and should be applied directly, and established EU law’s precedence over national laws.

The Supreme Court was the first court in Lithuania to apply EU law, even before the country’s accession to the EU. When answering the question as to the basis and the purpose of the Supreme Court’s reliance on *acquis communautaire* before Lithuania’s accession to the EU – it must be noted that the Court did this for the pre-accession adjustment of national law to EU standards. In its judgment in the civil case of *UAB Sirowa v Office of Competition* in 1998, the Supreme Court briefly analysed and explained domestic regulations in the context of EU law, noting only that some of the national law provisions conform to the provisions of EU directives, without offering an analysis of the concepts and principles of EU acts, nor specifying the place of EU law in the Lithuanian law system.⁶⁰

Another example is the judgment in a civil case from 25 January 2000, *UAB “Birštono Mineraliniai vandenys ir Ko” v UAB “Naujiejį Birštono Mineraliniai*

⁵⁹ Law on Civil Proceedings 36–1340 (*Lietuvos Respublikos civilinio proceso kodekso 3 str. 5 dalis, Valstybės Žinios*, 2002).

⁶⁰ *Sirowa v Konkurencijos Taryba* 3 K-53/1998 (Lithuanian Supreme Court, 14 September 1998).

vandenys”,⁶¹ in which the Court, explaining the concept of ‘the place of origin’, used the provisions of European Commission Regulation (EEC) of 14 July 1992 No. 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. The Court noted “the place of origin of goods firstly is related to the geographical origin. Despite the fact that Lithuanian law on goods and trademarks does not contain the definition of geographical indications or geographical origin, however, the explanation of such definitions in relation to trademarks is in international documents.”⁶² As one can observe, the Court did avoid naming in a direct manner an EU regulation, nor did it specify on what grounds the EU law should be applied in a Lithuanian case. Furthermore, the Court did not analyse the binding force of the EU regulation in the Lithuanian legal system.⁶³

The first time the Supreme Court referred directly to EU law was in the judgment of 17 May 2000 in the civil case of *Aheuser-Busch Incorporated v Budejovitchy Budavar N and others*.⁶⁴ The Court noted that “taking into account the fact that contemporary intellectual property law is a result of long-standing unification and harmonization of law [...] and taking into account the aspirations of Lithuania to the EU integration and the consequent need to adapt national law with EU law, Article 3(4) of the Lithuanian Law on goods and trademarks should be interpreted and applied in the context of international law and EU law.”⁶⁵ The Supreme Court linked the obligation to apply EU law with the obligation of Lithuania on the pre-accession harmonization of national law.⁶⁶

It is worth mentioning that at that time Lithuania only had the basic domestic intellectual property laws. The Supreme Court therefore correctly referred to the EU solutions in this respect in order to properly resolve the dispute on the basis of national legislation. In the same vein, the Supreme Court ruled in a judgment of 15 December 2003 in a civil case, *Beecham Group v Kelupas*:⁶⁷

taking into account the specific nature of cases in this area [the protection of intellectual property – E.K.], which Lithuania has just formed, and that there is no significant Lithuanian

⁶¹ *Birštono mineraliniai vandenys ir Ko* 3 K-3-25/2000 (Lithuanian Supreme Court, 25 January 2000).

⁶² *Ibidem*.

⁶³ See: E. Strazdaite, *Europos Sąjungos teisės taikymas Lietuvos Respublikos teismuose* (Vilniaus universitetas 2007) 17.

⁶⁴ *Aheuser-Busch Incorporated v Budejovitchy Budavar N ir kt.* 3 K-3-554/2000 (Lithuanian Supreme Court, 17 May 2000).

⁶⁵ See per analogiam: *Smirnova v UDV North America* 3 K-3-167/2003 (Lithuanian Supreme Court, 7 January 2003).

⁶⁶ It should be emphasized that at the same time other courts of the countries-candidates for EU membership ruled in the same spirit. For example, The Constitutional Court of Poland in 1997 pointed out that the obligation to ensure compliance of national legislation with Community law results from the Association Agreement. See: E. Strazdaite, *op. cit.*, 17.

⁶⁷ *Beecham Group v Kelupas* 3 K-3-1103/2003 (Lithuanian Supreme Court, 15 December 2003).

courts practice in this respect, the correct interpretation and application of this law is of particular importance. [...] A significant fact is the high level of harmonization of trademark law at EU level, their impact on domestic law and courts practice, it is also important that starting from 1 May 2004 Lithuania will be bound by the Community trade mark law and, obviously, disputes concerning the national regulations will arise which the Lithuanian courts will be obliged to settle.

In other matters concerning the protection of intellectual property rights, the Supreme Court referred to the practice of the CJEU: “[t]he direction of the practice of the European Court of Justice shows that the average consumer is well informed, observant and circumspect.”⁶⁸

It should be noted that issues concerning the protection of intellectual property were the exception when it comes to the pre-accession direct acceptance of or reference to a specified EU legal standard by Lithuanian courts. During the same period in other judgments, the Supreme Court only took into account the existence of ‘international instruments’ in a broad sense of international law, without specific references to EU legislation. As some authors pointed out, this kind of disregard for EU law at that time resulted from an abstract understanding of the concept of the EU as an international organization.⁶⁹

In general, the application of EU law immediately after the 2004 Lithuania’s accession to the Union, when the Lithuanian courts were obliged to apply directly the Community law, was not without blemish. For example, in a civil case of 12 May 2004, *Lietuvos medicinos darbuotojų profesinė sąjunga v VŠĮ Kauno miesto greitosios medicinos pagalbos stotis*,⁷⁰ the Supreme Court referred to an EU Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community cited by the appellant, even though Lithuania had not transposed it into a national law.

In a civil case of 21 March 2005, *Julius Meinl International AG v Gustav Paulig Ltd*,⁷¹ the Supreme Court found the arguments of the defendant based on the CJEU case law inaccurate:

The defendant’s trademark has nothing special (the statement of the defendant, as if the word ‘PRESIDENT’ has some particular elements has no grounds) and the reference made by

⁶⁸ Lithuanian Supreme Court’s cases: *UAB Rasa, UAB Vegoplastas, UAB Druskininkų Rasa v R. Degutienės įmonė Kertupis* 3 K-3-875/2001 (1 October 2001); *Sėkmės sistemos v AB Lietuvos telekomas, UAB Lietuvos telekomo verslo sprendimai* 3 K-3-927/2001 (1 October 2001); *Distilleerderijen Erven Lucas Bols B.V. v UAB Bennet Distributors* 3 K-3-375/2003 (26 March 2003); E. Strazdaite, *op. cit.*, 19.

⁶⁹ See: E. Strazdaite, *op. cit.*, 19.

⁷⁰ *Lietuvos medicinos darbuotojų profesinė sąjunga v VŠĮ Kauno miesto greitosios medicinos pagalbos stotis* 3 K-3-301 (Lithuanian Supreme Court, 12 May 2004).

⁷¹ *Julius Meinl International AG v Gustav Paulig Ltd* 3 K-3-135 (Lithuanian Supreme Court, 21 March 2005).

the defendant to CJEU rulings in cases *Sabel BV v Puma AG*, No. C-251/95 and *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*, No. C-39/97, should be considered as groundless, as the cases [...] refer to 'a very clear' specific characteristics of the trademark's element.

Here the Supreme Court very widely invoked the practices of the CJEU in cases concerning the protection of intellectual property. Similarly, in the case of *Unilever N.V. v UAB Varta*,⁷² the Supreme Court rejected the arguments of the defendant, analysing and invoking what was at that time the latest CJEU case law concerning the dispute over the use of identical chemicals' packaging. This indicates at that time a growing understanding of the CJEU case law, and an increasing awareness by the parties in the dispute of the need to invoke the arguments and standards of EU law.

It should be noted that since the end of 2005 the practice of the Supreme Court concerning the application of EU law has become more clear and conscious, and the reasoning in its judgements stronger. In turn, the parties in their arguments have more often raised arguments concerning EU standards (directives, regulations) and practical aspects of the application of the *acquis communautaire*.

As for the quantitative assessment of the categories of cases in which the Supreme Court usually refers to the law and practice of the EU, unquestionably the first place goes to rulings related to the protection of intellectual property (patents, trademarks),⁷³ and to the principle of free movement of goods and services.⁷⁴ The Supreme Court in its judgements focuses on a verification of the assessment of judicial practice of the CJEU made by the common courts,⁷⁵ and on a verification of the parties' arguments in this respect and the assessment of national laws in the context of EU standards.⁷⁶ Thus the Supreme Court in a clear and direct way applied EU law in the *Nike International Ltd. v UAB Rivona*,⁷⁷ in particular Council Regulation (EC) No. 1383/2003.⁷⁸ The Court in its judgment held that the rules of national law should be interpreted and applied in a systemic way along with EU standards. It confirmed the direct effect of EU law in national law and stressed that due to Lithuania's membership in the EU, EU law has become a part of national law, hence national laws contrary to it cannot be applied.

⁷² *Unilever N.V. v UAB Varta* 3 K-3-150 (Lithuanian Supreme Court, 23 March 2005).

⁷³ See: Strazdaite E., *op. cit.*, 21.

⁷⁴ See *inter alia*: *Autoplastik v Laverna* 3 K-3-477-684/2015 (Lithuanian Supreme Court, 18 September 2015).

⁷⁵ *Sanofi-Synthelabo v Egis Gyogyszergyar RT* 3 K-3-202 (Lithuanian Supreme Court, 22 March 2006).

⁷⁶ *Kirkbi A/S (procesinis teisių perėmėjas – Danijos bendrovė Lego Juris A/S) v UAB Legosta* 3 K-3-209 (Lithuanian Supreme Court, 27 March 2006).

⁷⁷ *International Ltd. v UAB Rivona* 3 K-3-669 (Lithuanian Supreme Court, 20 December 2006).

⁷⁸ European Council Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.

As for the other categories of cases in which the Supreme Court refers to the *acquis communautaire* and its practical application, proceedings in civil matters must be mentioned. In this context the Supreme Court examined the notion of justice, delivery of notices and subpoenas, collection of evidence, and recognition and enforcement of judgments of EU Member States. In this respect, the Supreme Court usually refers to Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I);⁷⁹ Council Regulation (EC) No. 2201/2003 of 27 November 2003 (Brussels II bis) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, European Parliament and Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters,⁸⁰ Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, and Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings and others.

In some cases, the Supreme Court clearly shows the shortcomings of common courts when they improperly interpret the practice of the CJEU or apply national law without referring to the principle of the primacy of the EU law.⁸¹ For example, in matters concerning the protection of a child's rights, the Supreme Court emphasized the primacy of the EU law over the provisions of the Hague Convention on the Civil Aspects of International Child Abduction.⁸² Often, the Supreme Court relies on EU standards in matters relating to the energy sector.⁸³

Conversely, a typical example of the Lithuanian Supreme Administrative Court's reference to EU law can be found in its judgment of 2009 No. N575-1387/2009 on administrative violation in the field of wrapping car's windshields with foil to reduce light transmission. First, the Lithuanian Supreme Administrative Court specified its basis for the EU law application, the Constitutional Act "On membership

⁷⁹ Lithuanian Supreme Court's cases: *Ūkio bankas v Commerzbank AG* 3 K-3-685-219/2015 (23 December 2015); *R. Š. v Brenalan Investments Limited, Grand Go Group Limited i Grand Cru Airlines* e3 K-3-406-378/2015 (26 June 2015).

⁸⁰ See for example: case *Lietuvos Respublikos aplinkos ministerijos Aplinkos projektų valdymo agentūra v Dekont International s.r.o.* 3 K-3-690/2006 (Lithuanian Supreme Court, 29 December 2006).

⁸¹ See for example: Lithuanian Supreme Court's cases: *UAB Bleiras v TIMA TRANSPORTS* 3 K-3-170 (6 March 2006); *Lietuvos Respublikos aplinkos ministerijos Aplinkos projektų valdymo agentūra v Dekont International s.r.o.* 3 K-3-690 (29 December 2006); See for example: Lithuanian Supreme Court's cases: *UAB Kauno termofikacijos elektrinė v AB Lietuvos energija* (14 May 2012); *Kauno termofikacijos elektrinė v Lietuvos energijos gamyba* 3 K-3-4-378/2016 (3 February 2016).

⁸² Adopted on 25 October 1980 in the Hague. See: case *M.R. v I.R.* 3 K-3-91/2008 (Lithuanian Supreme Court, 7 January 2008).

⁸³ For example: case *Kauno termofikacijos elektrinė v Lietuvos energijos gamyba* 3 K-3-4-378/2016 (Lithuanian Supreme Court, 3 February 2016).

of the Republic of Lithuania in the European Union”, which in Article 2 states that the standards of EU law are part of the Lithuanian legal system, and that if this is due to the European treaties, norms of this law are applied directly and have precedence in the event of a conflict with provisions of national laws. It also quoted the judgement of the Constitutional Court, which explained that these provisions *expressis verbis* establish the conflict of law rule concerning the primacy of application of EU law in case of conflict with national laws, except for the Constitution.⁸⁴ Next, the Lithuanian Supreme Administrative Court stated:

Therefore national technical requirements for road vehicles cannot be applied in the case of their non-compliance with the standards of EU law, including the Treaty establishing the European Community. [...] Article 28 of the Treaty establishing the European Community specifies that: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.” The Treaty a principle of free movement of goods described as one of the fundamental principles of EU law (CJEU judgment of 12 June 2003 in *Eugen Schmidberger and others*, case No. C-112/00, para. 51), and Article 28 is applied directly (CJEU judgment March 22, 1977 on *Ianelli* case, No. C-74/76). According to the practice of the CJEU, quantitative restrictions are any means that fully or partially restrict import or export, and each rule of national law, which directly or indirectly, actually or potentially restricts trade within the Community should be assessed as a measure having equivalent effect to quantitative restrictions (CJEU judgment of 11 July 1974 in *Dassonville* case, No. C-8/74).

Next, the Lithuanian Supreme Administrative Court cited Article 4(3) of the Act on Proceedings in Administrative Matters, which states that a court in the application of EU law should be guided by the judgments and preliminary rulings of EU judicial institutions:

In considering this matter, the judgment of the CJEU of 10 April 2008 in the *EU Commission v Portugal* case (No. C-265/06) should be recalled, in which the CJEU ruled on the question whether the absolute ban on covering the front and side windows with a foil that reduces the light transmission is an obstacle to trade colour foil that was legally produced in another country. [...] The CJEU held that the mentioned prohibition is not proportional to the objectives pursued and found that the state, which prohibits wrapping the car’s windows with a foil of any colour does not comply with the Articles 28 and 30 of the Treaty establishing the European Community. [...] Although the college of judges notes that establishing a prohibition to wrap the car’s windows probably sought to ensure road safety, which, according to the practice of the CJEU, in some circumstances may justify restrictions on the free movement of goods (judgment of the CJEU of 5 October 1994 in *Van Schaik* case, No. C-55/93, para. 19; judgment of the CJEU of 21 March 2002 in *Cura Anlagen* case, No. C-451/99, para. 59), but in the present case there is no sufficient basis to justify the restriction. Unification

⁸⁴ Constitutional Court’s decisions (14 March 2006 and 21 December 2006).

of technical standards for motor vehicles essentially has three objectives to be achieved: road safety, environmental protection, guarantees concerning market purchase and sale of motor vehicles by removing technical limitations when it comes to this kind of trade. The Commission Directive of 30 October 2001 No. 2001/92/EC, which includes requirements for road safety, and provides that the transmission of light in the windscreen and front side windows of cars can be at 75% and 70% level must be taken into account. This allows to draw a conclusion on the fact that even seeking to ensure road safety, perhaps it would be sufficient to require compliance with the level of the transmission of light in the windscreen and front side windows [rather than introducing a complete ban – E.K.]. [...] Especially in Lithuania in general one can trade cars that have factory-tinted windscreen and front side windows, if they comply with the necessary light transmission requirement. Therefore, a broad and absolute prohibition concerning wrapping the car's windows with any foil has no justification because of disproportionality in the context of the objectives to be achieved. State institutions, which addressed the court, did not indicate any specific arguments and evidence that could fully justify the restriction on the movement of goods and limited their argumentation to general statements.

Considering the above, the Lithuanian Supreme Administrative Court stated that an absolute prohibition concerning wrapping a car's window with any foil that reduces light transmission in domestic law is contrary to EU law and the principle of the primacy of its legislation. This prohibition was deemed as restricting the free movement of goods, foils, within the Community and was considered equivalent to an unlawful quantitative restriction within the meaning of Article 28 of the Treaty establishing the European Union.⁸⁵

The Lithuanian Supreme Administrative Court in this case assessed in a comprehensive manner EU standards in the context of the free movement of goods, and interpreted EU law in the circumstances of the case, recognizing the contradiction of national rules with EU law.

6. Implementing Strasbourg's Standards – Review of the Examples of Judicial Dialogue

The special importance of the European Convention on Human Rights and Fundamental Freedoms in the Lithuanian legal system is expressed in the rulings of the Constitutional Court, as well as the Supreme Court. The Constitutional Court of Lithuania has stated that the human rights contained in the Constitution should be interpreted in the light of the ECHR provisions. It highlighted

⁸⁵ Case 575-1387-09 (Lithuanian Supreme Administrative Court, 28 December 2009).

the special significance of the case law of the ECtHR as a tool for the interpretation and application of domestic law.⁸⁶

Moreover, in one of its judgments, the Supreme Court tried to somehow ‘soften’ the primacy of the Constitution in respect of ratified international agreements, and attempted to reconcile its provisions with the ECHR in the context of the importance and significance of human rights standards:

The Constitution of the Republic of Lithuania and the Convention are aimed at achieving the same objectives of human rights protection at different levels – at the national and international level, respectively. The legal system of the Republic of Lithuania is based on the principle that any law or any other legal act, as well as any international agreements of the Republic of Lithuania (including the Convention), may not be in conflict with the Constitution. The Convention does not directly formulate any requirement (as this would be impossible to implement) that domestic legal norms must literally correspond to the content of the norms of the Convention. [...] A concrete state itself may establish by what the means to ensure the application of the provisions of the Convention. The interpretation of the compatibility (relationship) of the norms of the Constitution and the Convention should be notional and logical, rather than merely literal (word for word). [...] The provisions of the Convention that define human rights and freedoms may be applied along with the provisions of the Constitution, provided they do not contradict the latter [...]. In addition, the Constitutional Court noted that the jurisprudence of the European Court of Human Rights, as a source of interpretation of law, is equally relevant to the interpretation and application of Lithuanian law [...].⁸⁷

In its case law, the Lithuanian Supreme Administrative Court noted more than once that the nature of the ECHR, as a legal act of international origin, as well as its purpose, the protection of human rights, determines the fact that this Convention is directly applied in the course of court proceedings in the Republic of Lithuania, whereas in the event of a conflict with the national legislation, it has a priority over the national legislation.⁸⁸ “[t]he principle of direct application of the ECHR means that its provisions can be invoked before the Lithuanian courts, as well as in relations with public administration.”⁸⁹

Lithuanian courts often treat the provisions of the ECHR as a tool for interpretation of national law. For example: “for the purposes of interpreting the provisions of the Law on Police Activities in a systematic manner and ensuring the effective

⁸⁶ Constitutional Court’s decision (8 May 2000); see case 3 K-3-324/2014 (Lithuanian Supreme Court, 20 June 2014).

⁸⁷ Constitutional Court’s conclusion (24 January 1995); see case 3 K-3-324/2014 (Lithuanian Supreme Court, 20 June 2014).

⁸⁸ See e.g. case A575-164/2008 (Lithuanian Supreme Administrative Court, 14 April 2008).

⁸⁹ Lietuvos vyriausiojo administracinio teismo 2014 m. balandžio 9 d. aprobuotas Lietuvos vyriausiojo administracinio teismo praktikos, nagrinėjant bylas dėl bausmių vykdymo ir kardo-
mojo suėmimo institucijų, įstaigų ir pareigūnų veiksmų ir sprendimų viešojo administravimo srityje, apibendrinimas”, *Administracinė jurisprudencija* (2014) 26, pp. 460–564.

implementation of the obligations of Lithuania under Article 2 of the Convention, and in applying and interpreting the Lithuanian legal provisions governing the responsibility of officials for the use of force, account must be taken of the requirements formulated in the case law of the ECtHR in relation to Article 2 of the Convention.⁹⁰

6.1. The Right to a Fair Trial and other Procedural Guarantees

In approximately 40 to 50% of its judgments, the Lithuanian Supreme Administrative Court refers to international legislation concerning the standards of the right to a fair trial (Article 6 ECHR), the prohibition of torture, inhuman or degrading treatment or punishment (Article 3 ECHR) in the context of the conditions in Lithuania prisons, to the excessive length of judicial proceedings, arrests, etc. Most often the complaints concern the overcrowding of prisons or detention cells. In order to avoid further complaints against Lithuania before the ECtHR, Lithuanian courts broadly refer to treaty standards in this regard, usually granting compensation for violations. In such cases the Lithuanian Supreme Administrative Court, in the context ECHR standards, assesses whether prisoners suffered negative experiences, a sense of inferiority, and the necessity of imprisonment within the meaning of Article 3 of the Convention.

For example, in 2014 the Lithuanian Supreme Administrative Court invoked Article 6 ECHR together with the case law of the ECtHR in 9 cases of revision, in 8 cases of judicial assessment of the arguments presented by the parties,⁹¹ and in 4 cases concerning the right to a fair trial (in the context of ECtHR case law, the Court considered both objective and subjective criteria to determine a judge's impartiality).⁹² In 27 cases, the Lithuanian Supreme Administrative Court decided on procedural questions, for such as the following:

consideration should also be given to the right of the accused person to a hearing within a reasonable time (para. 1 of Article 6 of the Convention, para. 5 of Article 44 of the Code of Criminal Proceedings). In accordance with the case law of the ECtHR and Lithuanian courts, the reasonableness of the length of the proceedings is to be assessed in the light of concrete circumstances of the case and having regard to the criteria formulated by the ECtHR – the complexity of the case as well as the conduct of the applicant and the respective authorities in the course of organising the proceedings; the significance of the proceedings (what was at stake) for the accused person.

⁹⁰ Case 2 K-P-1/2014 (Lithuanian Supreme Court, 30 January 2014), *Teismų praktika* (2014) 40 402.

⁹¹ For example: Lithuanian Supreme Administrative Court's cases: A-146-95-14 (10 February 2014); A-442-707-14 (9 October 2014).

⁹² For example: case P-492-71-14 (Lithuanian Supreme Administrative Court, 30 April 2014).

The Lithuanian Supreme Administrative Court in its judgments invokes a standard of Article 4 of Protocol 7 to the ECHR regarding the clarification of the principle of *ne bis in idem*.⁹³

The Supreme Court in 2015 considered the standard of Article 6 ECHR in the context of the excessive length of proceedings invoked in 14 criminal and civil cases. The Supreme Court assessed the legitimacy of the duration of the proceedings taking into account the particular circumstances of the case and the criteria formulated in the ECtHR practice such as the level of complexity of the case, the behaviour of an applicant and state institutions in the organization of the judicial proceedings, the importance of the process for an applicant.⁹⁴

[t]he right to a fair hearing, as consolidated in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms [...], may not be sacrificed to secure speedy proceedings. In accordance with the case law of the European Court of Human Rights, although Article 6 of the Convention requires that court proceedings be expeditious, this article also gives a particular importance to the proper administration of justice (see, for example, *Maltzan and Others v Germany* (GC), (dec.), No. 71916/01, decision of 2 March 2005, para. 132). Thus, in substance, the judge of a national court, while being the chief executive of the proceedings, decides on the need of concrete procedural measures in order to, first of all, fairly solve the case.⁹⁵

The reference to the ECHR standard is also found in earlier cases:

the appellant relies on the standard of Article 6 ECHR concerning the excessive length of judicial proceedings. [...] The provisions of the *Lithuanian Code of Civil Procedure* essentially fulfil the obligation of the state articulated in Article 6(1) ECHR with regard to the organization of the judicial system in a way that guarantees that state institutions are doing everything in order to conduct the proceedings without undue delay or interruption (e.g.: *Makarenko v Ukraine*, No. 43482/02, judgment of 1 February 2007, para. 37). Therefore, the length of civil proceedings, as defined in Article 6(1) ECHR, is not measured by the duration of the proceedings, but by the improper conduct of the process, when the process has been unjustifiably suspended or delayed [...] (see: *a contrario Veljkov v Serbia*, No. 23087/07, para. 88, 19 April 2011; *Wildgruber v Germany*, No. 42402/05, para. 61, 21 January 2010). [...] Therefore, the college of judges considers that the court of first instance organized the proceedings in an appropriate manner and notices no possible breach ECHR.⁹⁶

⁹³ Lithuanian Supreme Administrative Court's cases: A-556-1535-14 (28 October 2014); A-444-2727/2012 (9 August 2012); A-520-2823/2012 (17 September 2012); A-662-1579-14 (19 May 2014).

⁹⁴ Case 3 K-3-302/2014 (Lithuanian Supreme Court, 6 June 2014), see e.g.: Lithuanian Supreme Court's cases: *Norkūnas v Lithuania* 302/05 (20 January 2009); *S. R. v Lietuvos valstybė* 3 K-7-375/2011 (2 December 2011).

⁹⁵ Case 3 K-3-236/2014 (Lithuanian Supreme Court, 24 April 2014).

⁹⁶ Case 3 K-3-455/2014 (Lithuanian Supreme Court, 20 October 2014).

In its judgments, the Lithuanian Supreme Administrative Court formulated the doctrinal principle according to which the conditions of detention cannot constitute a violation of human dignity or fundamental rights that are guaranteed by the Constitution and the ECHR. It is invoked both in resolving administrative disputes concerning the conditions of detention, as well as in matters concerning the legitimacy of imposing disciplinary penalties.⁹⁷ In the context of inhuman or degrading treatment, the Lithuanian Supreme Administrative Court will in addition to the standard contained in the ECHR invoke Article 5 of the Universal Declaration of Human Rights,⁹⁸ Article 7 of the International Covenant on Civil and Political Rights,⁹⁹ the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁰⁰ and Article 4 of the Charter of Fundamental Rights of the EU.¹⁰¹

The Supreme Court often considered closely the content of Article 7 ECHR with regard to the prohibition of punishment without legal basis¹⁰² and the principle of the presumption of innocence. The principle of the presumption of innocence has been confirmed not only in domestic law, but also on the international level in Article 6(2) ECHR, which provides that each person accused of a crime is deemed innocent until guilt is proven according to the law. In judicial practice, when interpreting and applying the rules of Article 44(6) of the Code of Criminal Procedure, the ECtHR case law plays an important role in matters concerning Article 6(2) ECHR. The ECtHR in its judgments noted that a breach of the presumption of innocence occurs when the court's decision related to an accused in a criminal matter reflects an opinion on the guilt of the person without proving it according to the law. It is sufficient (even in the absence of any formal request) if the court's deduction indicates that the court considered a suspect guilty.¹⁰³ According to the ECtHR, there should be a clear distinction between a clear statement on the issue of guilt (in the absence of a final judgment) and a statement on the issue of direct suspicion of committing a crime. The first one violates the principle of presumption of innocence, and the second is in accordance with Article 6 ECHR.¹⁰⁴

⁹⁷ Lietuvos vyriausiojo administracinio teismo 2014 m. balandžio 9 d. aprobuotas Lietuvos vyriausiojo administracinio teismo praktikos, nagrinėjant bylas dėl bausmių vykdymo ir kardo mojo suėmimo institucijų, įstaigų ir pareigūnų veiksmų ir sprendimų viešojo administravimo srityje, apibendrinimas", *op. cit.*

⁹⁸ Adopted on 10 December 1948 in Paris.

⁹⁹ Adopted on 16 December 1966 in New York.

¹⁰⁰ Adopted on 10 December 1984 in New York.

¹⁰¹ Charter of Fundamental Rights of the EU, 2000/C, 364/01.

¹⁰² See e.g. case 2 K-P-93/2014 (Lithuanian Supreme Court, 11 April 2014).

¹⁰³ ECtHR cases: *Minelli v Switzerland*, App. no. 8660/79 (25 March 1983); *Englert v Germany*, App. no. 10282/83 (25 August 1987); *Nölkenbockhoff v Germany*, App. no. 10300/83 (25 August 1987); *Capeau v Belgium*, App. no. 42914/98 (13 January 2005).

¹⁰⁴ *Vulakh and others v Russia*, App. no. 33468/03 (ECtHR, 10 January 2012).

The principle of *audi alteram partem* was explained in one of the judgments of the Supreme Court in 2014. In the cassation, the appellant pointed to the right to a fair trial under Article 6(1) ECHR (the need to ensure the principle of *audi alteram partem*):

At this point, the importance of the general principles concerning guarantees of the *audi alteram partem* made by the ECtHR must be recalled. Provided for by Article 6, the concept of the fairness of the process includes the right of the parties to present evidence of their claims and demands, as well as the right to comment on all the evidence that could affect the outcome (see: *Nideröst-Huber v Switzerland*, 18 February 1997, Reports 1997-I, p. 108, para. 24; *KS v Finland*, No. 29346/95, para. 21, 31 May 2001; *Duraliyski v Bulgaria*, No. 45519/06, 3 March 2014, para. 30). This principle refers to the statements of the parties in the process, government officials (see: *Kress v France* [GC], No. 39594/98, para. 65, ECtHR 2001 VI), representatives of the state administration (see: *Krčmář and Others v The Czech Republic*, No. 35376/97, paras 38–46, 3 March 2000) or the court whose decision is being appealed (see: cited case: *Nideröst-Huber v Switzerland*). In addition, the ECtHR found that judges should also respect the principle *audi alteram partem* [...] (see: *Prikyan and Angelova*, No. 44624/98, 16 February 2006, para. 42; *Clinique des Acacias and Others v France*, Nos 65399/01, 65406/01, 65405/01 and 65407/01, para. 38, 13 October 2005; *Skondrianos v Greece*, Nos 63000/00, 74291/01 and 74292/01, paras 29–30, 18 December 2003 and other). In this context, it is important that the parties of the process trust the justice system: this trust, among other things, is based on the belief that the case in the proceedings will be heard in terms of all its components. In other words – parties to the dispute have a reason to expect that they will be asked to comment on the issue of a particular document or argument (see: *mutatis mutandis*, *Krčmář and Others v The Czech Republic*, No. 35376/97, para. 43, 3 March 2000).¹⁰⁵

In the case of damage caused by the illegal actions of officials, the Supreme Court analysed the international provisions in matters concerning the European Convention on Mutual Assistance in Criminal Matters of 1959,¹⁰⁶ the European Convention on the Transfer of Proceedings in Criminal Matters of 1972,¹⁰⁷ and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 2000,¹⁰⁸ and concluded that

even in special cases where officials of a foreign state within the framework of legal cooperation in a certain field could perform actions on the territory of the Republic of Lithuania, the Lithuanian State is responsible for the damages caused by their actions to Lithuanian entities.¹⁰⁹

¹⁰⁵ Case 3 K-3-363/2014 (Lithuanian Supreme Court, 27 June 2014).

¹⁰⁶ Adopted on 20 April 1959 in Strasbourg.

¹⁰⁷ Adopted on 15 May 1972 in Strasbourg.

¹⁰⁸ Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 2000/C, 197/01.

¹⁰⁹ Case 3 K-3-634/2013 (Lithuanian Supreme Court, 4 December 2013).

6.2. The Protection of Private and Family Life

Based on the standards for the protection of private and family life (Article 8 ECHR), the Lithuanian Supreme Administrative Court decided, among others, on an applicant's right to give birth at home and to obtain a full necessary assistance:

The applicant requested that the Ministry of Health should ensure her proper care when giving birth at home and should obligate the health care institutions subordinate to the Ministry to provide the applicant with necessary assistance, or that the acts implementing the relevant laws be amended and the appropriate legislation amendments be initiated, so that health care institutions and qualified specialists could provide the applicant with necessary assistance. [...] The violation of Article 8 of the Convention, as found in the judgment of the ECtHR in the case *Ternovszky v Hungary* and which was pointed to by the applicant, does not, in itself, constitute any ground for holding in the case at issue that there has been a violation of Article 8 of the Convention with regard to the applicant. The aforementioned case was considered by the ECtHR in the context of particular circumstances and within the legal regulation of the state concerned. The interpretation provided in that judgment by the ECtHR, to the effect that the circumstances of giving birth incontestably form part of one's private life, is similarly relevant to the case at issue. However, in the opinion of the panel of judges, under the circumstances of the case at issue, there is no ground for stating that the right of the applicant to the privacy of her personal life has been violated in terms of Article 8 of the Convention. [...] In the case at issue, the applicant has not proved in what way the defendant has violated, or created preconditions for violating, the privacy of her personal life.¹¹⁰

In 2015 the Lithuanian Supreme Administrative Court invoked the right to private and family life within the Article 8 ECHR in 10 cases.

6.3. Freedom of Expression

In relation to freedom of expression protected by Article 10 ECHR, the Lithuanian Supreme Administrative Court and the Supreme Court in their case law have both shown that in the situation of conflict with the protection of dignity and privacy, the key issue is to balance the conflicting values. In such matters Lithuanian courts have evoked the interpretation to be found in ECtHR case law, especially in the context of the limits of freedom of expression. In the case of the scope of freedom of expression concerning advertisement that violates socially accepted moral principles, the ECtHR has additionally referred to Articles 19 and 20 ICCPR.¹¹¹ In 2015, with reference to treaty standards relating to freedom of ex-

¹¹⁰ Case A-146-24-14 (Lithuanian Supreme Administrative Court, 22 January 2014).

¹¹¹ Case P-492-119-14 (Lithuanian Supreme Administrative Court, 20 November 2014).

pression, the Lithuanian Supreme Administrative Court considered five cases, and the Supreme Court six.

As for damages to one's reputation in publications, the Lithuanian Supreme Administrative Court stated that:

The European Court of Human Rights has indicated that the safeguard for freedom of expression is afforded by Article 10 of the Convention with regard to the press on the condition that they provide reliable information in accordance with the ethics of journalism (the judgment of 14 June 2007 in *Hachette Filipacchi Associés v France*, etc.). [...] in the opinion of the panel of judges, in the case under consideration, the applicant, when publishing the publications in question, failed to comply with the requirements of the *Code* and, thus, breached the limits of freedom of expression; whereas the limitation on freedom of expression for the purposes of protecting the rights and reputation of a person, as indicated before, is reasonable both in terms of national and international legal norms; therefore, the applicant's freedom of expression was not violated.¹¹²

6.4. Rights of a Child

In matters concerning the protection of children's rights, Lithuanian courts frequently refer to Article 8 ECHR as well as to the provisions of the Convention on the Rights of the Child and the Hague Convention on the Civil Aspects of International Child Abduction.

In the case of international child abductions, the Supreme Court analysed both the right to respect for private life as well as the welfare of the child in the context of the particular circumstances of one case:

[The] ECtHR in its judgments often outlined that national measures that prevent the enjoyment of the right to respect for private life (e.g. the decision to grant custody to one parent) limit the right to respect for private life, which may lead to a breach of Article 8 ECHR, if the restriction is illegal, does not have a legitimate aim within the meaning of Article 8(2) and is not 'necessary in a democratic state' (e.g. *Diamanate and Pelliconi v San Marino*, App. no. 32250/08, 27 September 2011, paras 171–172). It should be noted that the principle that results from the case law of the ECtHR and Article 8 ECHR is that the state in deciding on the care of the child uses a wide discretion, which becomes narrower when deciding on the contacts of the child with a parent (because there is a risk of interruption of the relationship between parents and a little child), (see: *Diamanate and Pelliconi v San Marino*, No. 32250/08, 27 September 2011, paras 175 et seq.). In any case, the most important thing in such cases is to assess the welfare of the child. This includes taking into account the views of the child (expressed directly or through the custodian). The case law of the ECtHR emphasizes the importance of the opinion of the child – the older a child is, the more importance is given to his opinion (in *Hokkanen v Finland*, the Court found that

¹¹² Case A-662-1078-14 (Lithuanian Supreme Administrative Court, 12 May 2014).

a twelve years old girl is mature enough to take her opinion into consideration). [...] However, the opinion of the child is only one piece of evidence, it is necessary to assess other significant circumstances (e.g. *Gineitienė v Lithuania*, No. 20739/05, 27 July 2010, para. 38). [...] Other circumstances of the case (taking away a child abroad, proceedings on the return of the child under the *Hague Convention*) allow the conclusion of the irresponsibility of the mother, her selfishness and disregard concerning the interests of the child (in terms of contacts with both parents).¹¹³

In assessing the scope of the needs of the child, the Supreme Court in its judgments invoked both the Convention on the Rights of the Child (Articles 3, 27), as well as the provisions of national law (Article 3155 of the Civil Code, Articles 7, 8, 11–14, 18 of the Law on the protection of the rights of the child).¹¹⁴ The Court widely invoked international standards in cases concerning sexual abuse of children. In 2014 it recalled the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 2000, the Recommendation of the Committee of Ministers 2004/68/EC on combating the sexual exploitation of children and child pornography, the Convention of the Council of Europe on the protection of children against sexual exploitation and sexual abuse of 2007, as well as the Directive of the EU Parliament and the EU Council 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.¹¹⁵

Often, international standards and practice of the ECtHR are considered in cases concerning the custody of children, in which Lithuanian courts generally analyse child's welfare, taking into account all the circumstances of the case.¹¹⁶

6.5. The Right to Liberty and Security of a Person

As for Article 5 ECHR on the right to liberty and security of person, the Lithuanian Supreme Administrative Court and Supreme Court have referred to it frequently in matters concerning the civil liability of the State Treasury for damage caused by the unlawful actions of officers, prosecutors, and judges, as well as in the context of the assessment of the legality of detention. For example, in its judgment of 2014 the Supreme Court declared: "Hearing the case, the court has not sufficiently examined whether during the arrest of the applicant, there was sufficient evidence to suspect she had committed a crime. The Court has not assessed the main circumstances, has not examined the merits of suspicion within

¹¹³ Case 3 K-3-455/2014 (Lithuanian Supreme Court, 20 October 2014).

¹¹⁴ See e.g.: case 3 K-3-325/2014 (Lithuanian Supreme Court, 20 June 2014).

¹¹⁵ Lithuanian Supreme Court's cases: 2 K-432/2014 (11 November 2014); 2 K-7-87/2014 (18 February 2014).

¹¹⁶ See: Lithuanian Supreme Court's cases: 2 AT-38-2014 (1 July 2014); 3 K-3-444/2014 (17 October 2014); 3 K-3-454/2014 (24 October 2014); 3 K-3-202/2014 (11 April 2014).

the meaning of Article 5 para. 1(c) ECHR, and hence the Supreme Court decides to refer the case back to the court of appeal.¹¹⁷

As regards the use of temporary coercive measures, and the right to a hearing within a reasonable time, the Supreme Court stated:

For deprivation of liberty to be in conformity with the requirements of Article 5 para. 1 ECHR, first, it must be 'legal', including in involving a national procedure; in this respect the ECtHR refers to national regulations. In addition, any deprivation of liberty must be justified by the objective of Article 5 ECHR in the protection of the individual against arbitrariness [...] (*Liuiza v Lithuania*, App. no. 13472/06, judgment of 31 July 2012; *Jėčius v Lithuania*, No. 34578/97, judgment of 31 July 2000). In addition, the arrested suspect has the right to a hearing as soon as possible (Article 5(3) ECHR).¹¹⁸

The Supreme Court also raised this treaty standard in matters relating to the excessive length of pre-trial detention.¹¹⁹

6.6. Freedom of Association

The Supreme Court in one of its cases concerning the freedom of association issued on the exclusion of an individual from a hunting association:

The right to free association is both constitutional and treaty law. Article 11 ECHR confirms two equivalent rights – the right to free association (not to join an association) and the right of associations to determine their rules of operation, management, internal order, and the freedom in the selection of its members. [...] The case law of the ECtHR explains that Article 11 ECHR cannot be understood as requiring of associations and organizations that they include in their ranks any person who requests so. Where associations are formed of people who, professing the same values and ideals, pursuing common objectives, an inability to control the issue of membership would be a negation of the effectiveness of that freedom (*Associated Society of Locomotive Engineers & Fireman (ASLEF) v United Kingdom*, No. 11002/05, judgment of 27 February 2007). When the collision of two conflicting interests – of an association and of its members – takes place, in each case it is important to determine a fair and appropriate balance. The court, in assessing any restrictions on treaty rights, is basing its findings on an analysis of the conditions of legality, proportionality and necessity in a democratic society. The ECtHR noted that although pluralism, tolerance and open-mindedness are a sign of a democratic society, sometimes individual interests must be subordinated to the interests of the group; however democracy does not always mean the primacy of the majority opinion: in each case there should be a balance, ensuring fair and proper treatment of minorities, without any abuse of a dominant position (*Associated Society of Locomotive*

¹¹⁷ Case 3 K-3-346/2014 (Lithuanian Supreme Court, 27 June 2014).

¹¹⁸ Case 3 K-3-302/2014 (Lithuanian Supreme Court, 6 June 2014).

¹¹⁹ Case 3 K-3-129/2014 (Lithuanian Supreme Court, 10 January 2014).

Engineers & Fireman (ASLEF) v United Kingdom, No. 11002/05, judgment of 27 February 2007).¹²⁰

In its judgment of 2010, the Lithuanian Supreme Administrative Court confirmed the right of assembly of sexual minorities, referring to, among others, to the ECtHR judgement of 3 May 2007 in *Bączkowski v Poland*, which emphasized the importance of pluralism in a democratic society and the need to protect the rights of sexual minorities.¹²¹

6.7. Prohibition of Discrimination

One of the examples of a broader reference to an international standard in the field of non-discrimination is the Supreme Court's judgment of 2014 in a case involving incitement to ethnic hatred:

The college of judges in the application of Article 170 of the *Penal Code* (incitement to hatred on national, racial, ethnic, religious or any other ground) draws attention to the provisions of the Lithuanian Constitution, as well as the provisions of EU law and international law, which prohibits discrimination against persons or groups of persons on grounds of nationality, race, sex, origin, religion or any other affiliation. The prohibition of discrimination was established in many international and European law instruments. In the context of the case at issue the attention should be paid to the *International Convention on the Elimination of All Forms of Racial Discrimination*. Article 4 of the Convention indicates that Member States condemn and prevent any propaganda and activities of the organization, which [...] justifies the superiority of one race or nationality over others, in any form of incitement to hatred or racial discrimination. States, taking into account the principles of the *Universal Declaration of Human Rights*, as well as Article 5 of the mentioned Convention are required to prohibit the incitement to hatred in national law. [...] Based on Article 6 of the Convention, States have an obligation to ensure to everyone an effective legal and judicial protection against any act of racial discrimination, which violates the Convention. [...] Article 20(2) ICCPR prohibits incitement to hatred on national, racial or religious grounds. An important role in clarifying the scope of the prohibition of discrimination and the obligations of States in this respect involves Article 14 ECHR and the practice of the ECtHR. It should be noted that Article 14 cannot be invoked alone, but only in relation to the rights and freedoms of the Convention or additional protocols. [...] The ECtHR has repeatedly stated that any different treatment on grounds of ethnic origin may have an objective justification in a modern democratic society which respects the principles of pluralism and respect for other cultures. Discrimination based on ethnic origin is a form of racial discrimination (*Mižigárová v Slovakia*, No. 74832/01, judgment of 14 December 2010, para. 114). The case law of the ECtHR

¹²⁰ Case 3 K-3-485/2014 (Lithuanian Supreme Court, 12 November 2014); see case *V. L. v Tau-ragės medžiotojų klubas Sakalas* 3 K-7-470/2009 (Lithuanian Supreme Court, 15 December 2009).

¹²¹ Case AS822-339/2010 (Lithuanian Supreme Administrative Court, 10 May 2010).

stresses that racial discrimination deserves special condemnation because of its dangerous consequences and requires a particular attention and decisive action from the State (*Nachova and Others v Bulgaria*, Nos 43577/98 and 43579/98, judgment of 6 July 2005, para. 145; *Aksu v Turkey*, Nos 4149/04 and 41029/04, judgment of 15 March 2012, para. 44). According to the ECtHR's practice, racist ideas which seek to incite hatred or violence, according to Article 17 ECHR (prohibition of abuse of rights) in particular do not enjoy protection under Article 10 ECHR (freedom of expression) (e.g. *Molnar c. Roumanie*, No. 16637/06, décision du 23 octobre 2012; *Ivanov v Russia*, No. 35222/04, decision of 20 February 2007). [...] According to the case law of the ECtHR in cases of infringement of Article 2 ECHR (right to life), Article 3 ECHR (prohibition of torture) and Article 14 ECHR, state institutions which investigate these matters are required to clarify whether they have been committed because of racial hatred, or whether such beliefs influenced the incident (e.g. *Abdu c. Bulgarie*, No. 26827/08, arrêt du 11 mars 2014; *Yotov c. Bulgarie*, No. 43606/04, arrêt du 23 octobre 2012; *Beganović v Croatia*, No. 46423/06, judgment of 25 June 2009; *Angelova and Iliev v Bulgaria*, No. 55523/00, judgment of 26 July 2007; *Šečić v Croatia*, No. 40116/02, judgment of 31 May 2007; *Nachova and Others v Bulgaria*). [...] The identity of ethnic groups in the jurisprudence ECtHR is treated as an essential aspect of identity and private life (*Ciubotaru v Moldova*, App. no. 27138/04, judgment of 27 April 2010, paras 49, 153).¹²²

However, Lithuanian courts have not always interpreted the international principle of non-discrimination properly. For example, the 2013 decision of the Lithuanian Supreme Administrative Court on the unification of the Lithuanian language exam for schools with Lithuanian language of instruction and national minority schools, without an adequate transitional period, shows shortcomings in this respect. In its justification, the Lithuanian Supreme Administrative Court, quoting the provisions of the Framework Convention for the Protection of National Minorities¹²³ and the OSCE Hague Recommendations on educational rights of national minorities¹²⁴ did not find a breach of the principle of non-discrimination in relation to pupils from non-Lithuanian schools. Moreover, the Court declared that measures to assist minority pupils in their assessments during exams to be unconstitutional because they were contrary to the principle of equality.¹²⁵ It seems that for the Court in this case, positive measures aimed at achieving substantive equality were paramount to an act of discrimination.¹²⁶ Such an

¹²² Case 2 K-359/2014 (Lithuanian Supreme Court, 14 October 2014).

¹²³ Adopted on 1 February 1995 in Strasbourg.

¹²⁴ Adopted in October 1996 in the Hague.

¹²⁵ Pupils from minority schools had to catch up the difference of 818 hours of Lithuanian language lessons (compared to pupils from schools with Lithuanian language of instruction) within 2 years since the introduction of the amendments of Law on Education in 2011. First unified exam was held in 2013. The Ministry of Education and Science of Lithuania introduced evaluative facilitations for students of non-Lithuanian language schools in order to partially compensate the unequal opportunities during the exam. LNSA in its judgment considered these facilitations to be contrary to the constitutional principle of equality.

¹²⁶ Case I261-16/2013 (Lithuanian Supreme Administrative Court, 18 June 2013).

approach seems to ignore, and to violate, the basic premises in the international protection of the rights of national minorities, which are based on the principle of non-discrimination and the protection of the identity and special characteristics of minorities. The Advisory Committee of the Council of Europe, which regularly assesses the application of the provisions of the Framework Convention in Lithuania, pointed to the defects in Court's reasoning.¹²⁷ However, the reference made by the Court to soft law (the Hague Recommendations) – despite the misinterpretation of their provisions – should be considered as a positive development.

7. The Challenges for the Judicial Dialogue in Lithuania

The harmonization of national law with Lithuania's international obligations and their practical application is an on-going process. Essentially, three centres control this process: the Constitutional Court, the Supreme Court and the Lithuanian Supreme Administrative Court. Their decisions and judgments are binding for all common courts in Lithuania and together constitute an indication as to the uniform practice for the application of national law in the context of international standards. The publication of an overview of international and foreign laws and practices both in the *Lithuanian Supreme Administrative Court Bulletin* and the Supreme Court's bulletin entitled *Judicial practice* makes it easier for common courts to invoke and discuss international and European standards. Certainly, one of the most effective ways of making Lithuanian judges familiar with supranational and international law (although requiring significant time and efforts) are conferences and seminars as well as study visits to Luxembourg and Strasbourg. We must express the hope that the percentage of Lithuanian decisions consistent with European standards will grow.

At this point two basic challenges for judicial dialogue in Lithuania should be highlighted. Firstly, further efforts concerning bringing domestic legislation and interpretation in line with supranational and international law and jurisprudence must be undertaken. Secondly, domestic courts must develop a much deeper appreciation of the principles, standards and values of international law, the principles of customary law, and the concepts of international legal protection, including soft law.

¹²⁷ Third Opinion on Lithuania adopted on 28 November 2013, Advisory Committee on the Framework Convention for the Protection of National Minorities, ACFC/OP/III(2013)005 (Strasbourg, 10 October 2014), para. 87.

The context of the first mentioned challenge relates basically to a wider consideration of the case law (and applicable standards) of the Strasbourg and Luxembourg courts in the practice of Lithuanian courts. As an illustrative example, one can specify the application of Article 1 of the Protocol 1 to the ECHR (on the protection of property), particularly with regard to the restitution of nationalized property during the Soviet era. It should be mentioned that currently the vast majority of the complaints against Lithuania before the ECtHR contain allegations of infringement of the right to property. One such case under examination before the Strasbourg Court is *Monika Korkuć and Others v Lithuania* (App. no. 21920/10). It will be a critical judgement, potentially defining the responsibilities of States in the restitution of property taken over by communist regimes.¹²⁸

As for the second challenge, the need for a more comprehensive understanding of the international standards' system must be highlighted. Declarations and non-binding international legal instruments (soft law) may be used in order to clarify existing standards and used in the legal reasoning adopted in judgments. Lithuanian courts appear sometimes to be lacking an in-depth analysis and reflection on the subject of the values protected by a given international agreement. For example, the protection of national minorities, expressed mainly in the Framework Convention for the Protection of National Minorities (not of a strict hard law nature, and even less in domestic law, because of its framework nature), still has not found its rightful place in the judgments of Lithuanian courts. The Lithuanian analysis of the standards contained in this treaty remains limited to stating the primacy of the constitutional principle of equality over the provisions aimed at achieving substantive equality between minorities and majorities. Courts in Lithuania should pay more attention to the rules of interpretation and the recommendations formulated by the Advisory Committee and the Committee of Ministers with regard to this treaty, expressed in the observations of these two bodies on the rights of national minorities in Lithuania following the monitoring cycle once every four years.

¹²⁸ Brief statement of facts and legal issues involved: Regulation of the Government of Lithuania in 2002 expanded the concept of 'forests of national importance'. This has changed the mode of restitution of nationalized land – it banned the return of forested in the territories enclosed to Vilnius after 1995. According to the law forests in cities may belong only to the state/local government (protection of the public interest). Consequently, on the basis of proposals from the district prosecutor's offices, series of decisions on the restitution to the rightful owners of the nationalized land property adopted in 2001–2006 by the local administration have been canceled (more than 150 decisions). This invalidated the entire decision on restitution, not just a part concerning forested areas.

According to the applicants, the decision granting them the right to property were annulled without any compensation. Government of Lithuania argued that the applicants despite the annulled decisions, still retain the right to regain the nationalized property (according to the legislation it is possible to regain the land in other than the nationalized property place). The problem, however, lies in the fact that there is less and less grounds that could be returned and some plots are located in unattractive locations.

8. Conclusions

The practice of Lithuanian courts of recalling and referring to the standards and jurisprudence of international law in slightly more than twenty years must be assessed positively. The judicial dialogue in Lithuania has a clear legal basis, especially in the context of the constitutional obligations to respect and apply international law. Lithuania's membership in all major European and international organizations has transformed Lithuanian legal area into a space of international standards.

Firstly, it should be noted in general, that international standards and international court judgments affect the Lithuanian judiciary, Lithuanian law and its interpretation. EU law and Strasbourg standards have a special place in the judgments of Lithuanian courts. This is mainly due to the binding nature of the decisions of the courts in Luxembourg and Strasbourg. The judgments of the courts and tribunals of foreign countries do not have a direct role in the Lithuanian courts' grounds for judgments at the moment (even as an additional argument). There is also no widespread practice of relying on the international principles of customary law.

Secondly, Lithuanian courts, despite a relatively brief tradition of invoking international regulations and rulings, increasingly apply supranational and international law. The Supreme Court itself deviates from the practice of general noting the existence of an international standard and has adopted a broader and a deeper analysis of international law. A special place and a role of the principles of non-discrimination and proportionality should be noted, which, due to the jurisprudence of CJEU, has also reached Lithuanian case law.

Thirdly, international law is applicable both as a backup for the interpretation of national law, as well as a self-sustaining basis for adjudication. Examples of direct application of international standards are particularly visible in cases where the relevant national legislation was or has been missing.¹²⁹

There is a tendency in Lithuania to conclude that a violation of ECHR or EU law also violates a constitutional standard. It seems that this approach plays two roles: first, it indicates that the European standard is applied; secondly, it implies the compliance of the provisions of the Constitution with an international standard (especially in the light of the principle of the primacy of the Constitution in the national law system). In this context, the importance of the role of the Strasbourg

¹²⁹ Till 2010 Lithuanian Supreme Administrative Court when deciding was referring to the Aarhus Convention on access to information, participation in decision-making and access to justice in matters of environmental protection directly, as by that time there was no appropriate national legislation in this regard. A similar situation concerned European norms and standards in the field of intellectual property protection.

and Luxemburg standards as rules for the interpretation of the provisions of the Constitution must be noted.¹³⁰

It is also important that the Lithuanian Supreme Administrative Court and the Supreme Court invoke international standards and interpretations in order to maintain a uniform practice of their application in the domestic law system. At the same time, courts retain the interpretation presented by the international judicial bodies, without trying to challenge it against the interests of the state. In most cases the Lithuanian Supreme Administrative Court quotes external decisions in order to support its reasoning as well as to maintain a uniform approach consistent with an international law legal practice, especially in the context of European and Convention standards. In Lithuanian case law there is no tradition of invoking external decisions in order to criticize them or to engage in polemics.

Finally, it is impossible not to note the role of parties in proceedings (and their representatives) in the judicial dialogue in Lithuania. In order to support their arguments, they often raise both the EU and Convention standards, in a way forcing a national court to analyse international provisions in the matters under consideration.

¹³⁰ For example: Supreme Court's judgments of 22 December 2011, 21 December 2006, 15 May 2007, 27 February 2012.

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IX. Ukrainian Courts in Dialogue on International Law

Ivanna Kolisnyk*

1. Introduction

The focus of this study is the application of international law by Ukrainian courts. The aim of the article is to explore the role of domestic courts in protection of the rule of law through international law and to determine the trends in judicial dialogue; in other words, how often and in what situations national courts engage in dialogues with international courts. When doing so, the author attempted to highlight possible problems and practical challenges to dialogue, such as access to judgments, translations, commentaries, etc. Equally importantly, this paper also seeks to explore if and how judicial dialogue impacts international law, and whether it should do so at all. In order to aid in answering this final question factors such as personal attitudes of judges, the frequency with which courts consider international matters, procedural and regional differences are taken into account.

* PhD candidate, Institute of Law Studies of the Polish Academy of Sciences.

2. The Legal Basis for Application of International Law in a Domestic Legal System

There is no doubt that one can observe an increasing significance of the global legal order, which should ensure the security of States and their cooperation on the basis of international law and relevant legal systems. For Ukraine, an independent State since 24 August 1991, the global order is of particular importance inasmuch as it ensures the establishment and maintainance of diplomatic relations with other sovereign states, cooperation with international organizations, the promotion of Ukraine's national interests and the protection of the rights of its citizens and diaspora abroad. Ukraine's integration into the world community has always been the main factor determining the trend of further development of the national law.

2.1. The Status of International Law within the Ukrainian Constitutional Framework

In the light of the growing impact of international law on both domestic and international affairs, the search for an understanding of the relationship between international and national legal systems becomes essential in order to address many legal and political questions. First references to the relationship between international law and national law in Ukraine can be found in the Declaration on State Sovereignty of Ukraine adopted on 16 July 1990:¹

The Ukrainian SSR recognizes the pre-eminence of general human values over class values and the priority of generally accepted standards of international law over standards of internal state law.²

Only three decisions of the Constitutional Court of Ukraine referred to the 1990 Declaration on State Sovereignty of Ukraine. In two of them, the Declaration was mentioned in relation to events which had taken place before the adoption of the Constitution. In 2003 the Court refused to provide for interpretation of the Declaration, requested by members of the Parliament, because of the lack of competence.³ The Act of Declaration of the Independence of Ukraine of 24 August 1991

¹ Verkhovna Rada, The Declaration on State Sovereignty of Ukraine (Document No. 55–12) (16 July 1990), <<http://zakon1.rada.gov.ua/laws/show/55-12>> (access: 12 February 2016).

² Art. 10(3) of the Declaration on State Sovereignty of Ukraine.

³ Case 31-y/2003 (Constitutional Court, 8 May 2003) at para. 3: “Constitution of Ukraine establishes a list of types of acts, whose official interpretation is within the powers of the Constitutional Court of Ukraine. The Declaration referred to is not the act which according to Art. 150 of the Constitution of Ukraine can be a subject-matter of an official interpretation of the Constitutional Court of Ukraine”, <<http://zakon1.rada.gov.ua/laws/show/v031u710-03>> (access: 15 February 2016).

has not been referred to in the Constitutional Court of Ukraine jurisprudence to the moment.

The Constitution of Ukraine (adopted and in force since 28 June 1996) as a fundamental source of Ukrainian law does not determine directly the place of international law in the domestic legal order. However, the importance of its provisions on this issue cannot be ignored.

Article 18 of the Ukrainian Constitution establishes that:

The foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law.⁴

Although Art. 18 of the Constitution directly refers to the “generally recognized principles and norms of international law” used in the context of determination of the foundations of the Ukraine’s foreign policy, the Constitution of Ukraine does not have any references to the international customary law. As for international treaties, it is worthy to note that Ukraine is a country with a parliamentary-presidential (mixed) system of government where ratification of international agreements lies generally in the competence of the parliament and the right to sign the treaties is divided between the President and the government.⁵

According to the Constitution of Ukraine, the President of Ukraine “represents the state in international relations, administers the foreign political activity of the State,⁶ conducts negotiations and concludes international treaties of Ukraine.”⁷ The Verkhovna Rada of Ukraine (the national parliament) is responsible for approving of international treaties and has also the authority of denouncing international treaties:

The authority of Verkhovna Rada comprises: granting consent to the binding character of international treaties of Ukraine within the term established by law, and denouncing international treaties of Ukraine.⁸

⁴ Art. 18 of the Constitution of Ukraine, <http://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution_en.asp> (access: 15 February 2016).

⁵ О.І. Белова, ‘Міжнародний договір як правова основа зовнішньоекономічних відносин України’ (2009) 22 Ученые записки Таврического национального университета им. В.И. Вернадского, Серия “Юридические науки” 205.

⁶ Art. 18 of the Constitution of Ukraine (n. 4) determines that “the foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law.”

⁷ Art. 106(3) of the Constitution of Ukraine (n. 4).

⁸ Art. 85(32) of the Constitution of Ukraine (n. 4): “The authority of Verkhovna Rada comprises: granting consent to the binding character of international treaties of Ukraine, and denouncing international treaties of Ukraine.”

Once the Verkhovna Rada grants its consent, international treaties become part of the national legislation of Ukraine, binding the courts, the Government and private persons. The Law of Ukraine “On international treaties of Ukraine”⁹ dated 29 June 2004 describes the ratification process in detail. According to this procedure the Ministry of Foreign Affairs of Ukraine submits to the President the proposal of the ratification of an international agreement together with relevant documents.¹⁰ After consideration of such proposal, the President of Ukraine submits to Verkhovna Rada legislative proposal for the ratification law.¹¹ When Verkhovna Rada of Ukraine adopts such law, it is transferred then to the President of Ukraine who is obliged to sign it within 15 days. The law on ratification comes into force after its publication in the Official Gazette.¹² Simultaneously, the ratification documents have to be signed by the Chairman of the Verkhovna Rada of Ukraine and countersigned by the Minister of Foreign Affairs.¹³

The application of international law in the national legal system requires the determination of its place in the system of sources of law of Ukraine. It is worthy to note that the Constitution of Ukraine as well as most of the Ukrainian legislation does not use the term ‘source of law’ and does not have any references to it. As regards the hierarchy of international law *vis-à-vis* the norms of domestic law, the 1996 Ukrainian Constitution stipulates only that:

International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.¹⁴

Therefore, in accordance with the Ukrainian Constitution, only such international agreements that were duly ratified by the Verkhovna Rada can be considered as a part of the Ukrainian legal order. However, at the constitutional level Ukraine does not proclaim that international treaties take priority over contrary domestic legislation. The supremacy of certain international treaties over contrary Ukrainian legislation has been established only in the Law on international treaties of Ukraine.¹⁵ Article 19(2) of the Law on international treaties of Ukraine states that “if an international treaty of Ukraine that has entered into force establishes other rules than those provided in the legislation of Ukraine, then the rules of the

⁹ The Law of Ukraine No. 1906-IV on international treaties of Ukraine (29 June 2004), <<http://zakon1.rada.gov.ua/laws/show/1906-15>> (access: 15 January 2016).

¹⁰ *Ibidem*, Art. 9(5).

¹¹ *Ibidem*, Art. 9(6).

¹² *Ibidem*, Art. 21.

¹³ *Ibidem*, Art. 13.

¹⁴ Art. 9 of the Constitution of Ukraine (n. 4).

¹⁵ Law No. 1906-IV on international treaties of Ukraine (29 June 2004), <<http://zakon1.rada.gov.ua/laws/show/1906-15>> (access: 15 February 2016).

international treaty should be applied.”¹⁶ Pursuant to the Article 19(1) of the Law “on international treaties of Ukraine”, the international treaties that are in force, confirmed by the Verkhovna Rada of Ukraine are a part of the national legislation of Ukraine and should be applied in the order established for the national legislation standards.¹⁷ So within the hierarchy of sources of Ukrainian law the ratified international agreements occupy a layer below the Ukrainian Constitution¹⁸ and above Ukrainian statutory laws and acts of government. It means that even a duly ratified international agreement cannot overrule conflicting provisions of the Ukrainian Constitution but in case of conflict with statutory laws and acts of government relevant provisions of a duly ratified international agreement shall prevail.

Another important provision on this issue appears in Chapter XII of the Constitution of Ukraine determining the status of and rules for the “Constitutional Court of Ukraine” which in Article 151 determines:

The Constitutional Court of Ukraine, on the appeal of the President of Ukraine or the Cabinet of Ministers of Ukraine, provides opinions on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature.¹⁹

Taking into consideration the authority of the Constitutional Court of Ukraine to provide opinions on the conformity of international treaties that are in force as well as international treaties submitted to the Parliament with the Constitution of Ukraine, one can note that Ukrainian Constitutional Court has not only the preventive jurisdiction over the constitutionality of treaties, but it can also call a treaty unconstitutional after the ratification instrument has been provided on behalf of Ukraine.

Article 55 of the Constitution of Ukraine refers to the right of every Ukrainian citizen to appeal for the protection of his rights and freedoms to the international judicial institutions or to the bodies of international organisations:

After exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.²⁰

¹⁶ Ibidem, Art. 19(2).

¹⁷ Ibidem, Art. 19(1).

¹⁸ Art. 8 of the Constitution of Ukraine (n. 4) provides that: “The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it. The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed.”

¹⁹ Art. 151(1) of the Constitution of Ukraine (n. 4).

²⁰ Art. 55(4) of the Constitution of Ukraine (n. 4).

2.2. Legislative Provisions Regarding the Implementation of International Law within the National Legal System

The actual status of international law in the Ukrainian legal system is determined not only by the constitutional provisions, but also by the willingness of domestic courts to rely on that body of law. The laws of Ukraine usually contain rules and procedures regarding application of international law within the Ukrainian legal system.

2.2.1. The Law on International Treaties of Ukraine

The Law on International Treaties of Ukraine²¹ that replaced the Laws of Ukraine “On Effect of International Treaties on the Territory of Ukraine” (1992) and “On International Treaties of Ukraine” (1994), lays down the general rules on the application of the international conventional obligations in Ukrainian legal order.

In Article 1 the Law provides (establishes) its scope of application:

This law shall apply to all international treaties of Ukraine governed by international law and concluded in accordance with the Constitution of Ukraine and the requirements of this Law.²²

In Article 2 the Law defines the term ‘international treaty of Ukraine’ following the definition of the ‘treaty’ of Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties:

[An international agreement] concluded in written form with foreign State or other subject of international law, which is governed by international law, whether the treaty is embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, agreement, convention, pact, protocol etc.).²³

Also the law classifies the international treaties of Ukraine depending on the state authority that concludes the treaty – the President (on behalf of Ukraine), the Cabinet of Ministers (on behalf of the Government of Ukraine), the ministries or other central executive authorities (interministerial treaties). This classification determines the procedure to be followed when the relevant international treaty is concluded.²⁴

The majority of the Law’s provisions concerns the procedures of the international agreements’ conclusion (Articles 4–14),²⁵ promulgation, registration and depositing (Articles 21–23), termination, and suspension (Articles 24–27).

²¹ The Law of Ukraine No. 1906-IV on international treaties of Ukraine (n. 9).

²² *Ibidem*, Art. 1.

²³ The Law of Ukraine No. 1906-IV on international treaties of Ukraine (n. 9), Art. 2(1).

²⁴ *Ibidem*, Art. 3.

²⁵ In this regard, the Presidential Decrees provide for endorsement by the President of Ukraine or the Ministry of Foreign Affairs of activities relating to negotiations

The Law distinguishes performance and application of international treaties. The first relates to their application by the State authorities with a view to ensure observance of Ukraine's treaty obligations as a subject of international law (Arts. 15–16) with the co-ordinating role of the Ministry of Foreign Affairs (Art. 17). The second concerns application of international treaties as source of the legal rules in the Ukrainian legal order:

1. International treaties of Ukraine that are in force, consent to which binding character was granted by the Verkhovna Rada of Ukraine, are part of the national legislation and shall apply in the manner provided for norms of the national legislation.
2. If the international treaty of Ukraine that has entered into force establishes other rules than those provided in the legislation of Ukraine, then the rules of the international treaty should be applied.

2.2.2. The procedural laws of Ukraine

The procedural laws of Ukraine establish rules of procedure for the relevant jurisdiction as well as for specific rules on application of international law by the relevant courts. Each procedural law provides for an autonomous complex of rules relating to application of international (and foreign) law and to implementation of international legal co-operation by the relevant courts.²⁶

Each procedural code contains similar provisions on judicial review of the judgements following the decision of the international judicial institution (in practice, the European Court of Human Rights) on violation by Ukraine of its international legal obligations. Such review is carried out by the Supreme Court of Ukraine on appeal from an applicant, in whose favour the international judicial institution took decision.

2.2.2.1. The Civil Procedural Code of Ukraine²⁷

Article 2 of the Civil Procedural Code of Ukraine states that civil justice in Ukraine is exercised in accordance with the Constitution of Ukraine, this Code and the Law of Ukraine "On International Private Law". Also, if an international

and conclusion of international agreements by the ministries and other central executive authorities (Decree No. 841/96 of 18 September 1996, <<http://zakon1.rada.gov.ua/laws/show/841/96>> (access: 15 July 2016)) and independent regulatory authorities (Decree No. 306/2012 of 8 May 2012, <<http://zakon1.rada.gov.ua/laws/show/306/2012>> (access: 20 February 2016)).

²⁶ Usually, these laws cover such issues as (1) application of various sources of international law to procedural matters and to merits, (2) the place of international law in the hierarchy of Ukrainian law sources, (3) the review of the judgements following the decision of the international judicial institution on violation by Ukraine of its international legal obligations, (4) international judicial and legal co-operation, (5) execution of judgements of foreign courts in Ukraine.

²⁷ Law of Ukraine No. 1618-IV Civil Procedural Code (18 March 2004), <<http://zakon1.rada.gov.ua/laws/show/1618-15>> (access: 15 July 2016) (Civil Procedural Code of Ukraine).

treaty, ratified by the Verkhovna Rada of Ukraine, provides for other rules than those laid down by this Code, the rules of an international treaty shall be applied:

1. Civil proceedings are carried out according to the Constitution of Ukraine, this Code and the Law of Ukraine “On International Private Law”.
2. If an international treaty, consent to which binding character was granted by the Verkhovna Rada of Ukraine, provides for rules other than those established by this Code, the rules of an international treaty shall apply.²⁸

Pursuant to the Article 8 of the Civil Procedural Code of Ukraine, the Court solves the cases according to the Constitution of Ukraine, the laws of Ukraine and international treaties, ratified by the Verkhovna Rada of Ukraine:

The court decides cases in accordance with the Constitution of Ukraine, laws of Ukraine and international treaties, the binding character of which was granted by the consent of the Verkhovna Rada of Ukraine.²⁹

Also the court may apply other legal acts adopted by the appropriate authority on the ground of within the authority and in a way established by the Constitution and the laws of Ukraine. If a legal act is not in conformity with the law of Ukraine or international agreement, ratified by the Verkhovna Rada of Ukraine, the court should apply the act of legislation, which has a higher legal force.

In case of incompatibility of the legal act with the law of Ukraine or the international treaty, consent to which binding character was granted by the Verkhovna Rada of Ukraine, the court shall apply the act of legislation, which has higher legal force.³⁰

If the Law of Ukraine is not in conformity with the international agreement ratified by the Verkhovna Rada of Ukraine, the court shall apply the international treaty: “In case of incompatibility of the Law of Ukraine with the international treaty, consent to which binding character was granted by the Verkhovna Rada of Ukraine, the court applies the international treaty.”³¹

The rules of law of other states are applied by the court in cases when it is established by the Law of Ukraine or International Agreements, ratified by the Verkhovna Rada of Ukraine:

The court applies legal rules of other States in case where it is established by the law of Ukraine or the international treaty, consent to which binding character was granted by the Verkhovna Rada of Ukraine.³²

²⁸ *Ibidem*, Art. 2(2).

²⁹ *Ibidem*, Art. 8(1).

³⁰ *Ibidem*, Art. 8(4).

³¹ *Ibidem*, Art. 8(5).

³² *Ibidem*.

2.2.2.2. The Criminal Procedural Code of Ukraine³³

The order of criminal proceedings in the territory of Ukraine is determined only by the criminal procedural legislation of Ukraine,³⁴ which consists of the relevant provisions of the Constitution of Ukraine, international treaties, the binding character of which was consented to by the Verkhovna Rada of Ukraine, this Code and other laws of Ukraine.³⁵

In criminal proceedings, the court, the investigating judge, the prosecutor, the head of the pretrial investigation authority, the investigator, other officials of public authorities are obliged to strictly abide by the requirements of the Constitution of Ukraine, of this Code, of the international treaties ratified by the Verkhovna Rada of Ukraine and by the requirements of other acts of legislation.³⁶

In case the provisions of the Criminal Procedural Code of Ukraine are contrary to the international treaty, which binding character was consented to by the Verkhovna Rada of Ukraine, the provisions of the relevant international treaty of Ukraine shall apply.³⁷

The criminal procedural legislation of Ukraine shall apply subject to practice of the European Court of Human Rights.³⁸

2.2.2.3. The Commercial Procedural Code of Ukraine³⁹

The commercial court resolves commercial disputes on the basis of the Constitution of Ukraine, this Code, other legislative acts of Ukraine, international treaties whose binding character was consented to by the Verkhovna Rada of Ukraine.⁴⁰

If in international treaties of Ukraine whose binding character was consented to by the Verkhovna Rada of Ukraine, other rules than those stipulated in the legislation of Ukraine are established, the rules of an international treaty shall apply.⁴¹ Commercial courts, in cases provided by the law or the international treaty, shall apply legal norms of other States.⁴²

In the absence of legislation governing contentious relationships with a foreign business entity, a commercial court may apply international commercial customs.⁴³

³³ Law of Ukraine No. 4651-VI The Criminal Procedural Code (13 April 2012), <<http://zakon1.rada.gov.ua/laws/show/4651-17>> (access: 22 February 2016) (The Criminal Procedural Code of Ukraine).

³⁴ *Ibidem*, Art. 1(1).

³⁵ *Ibidem*, Art. 1(2).

³⁶ *Ibidem*, Art. 9(1).

³⁷ *Ibidem*, Art. 9(4).

³⁸ *Ibidem*, Art. 9(5).

³⁹ Law of Ukraine No. 1798-XII Criminal Procedural Code (6 November 1991), <<http://zakon1.rada.gov.ua/laws/show/1798-12>> (access: 23 February 2016) (The Commercial Procedural Code of Ukraine).

⁴⁰ *Ibidem*, Art. 4(1).

⁴¹ *Ibidem*, Art. 4(3).

⁴² *Ibidem*, Art. 4(4).

⁴³ *Ibidem*, Art. 4(5).

2.2.2.4. The Code of Administrative Proceedings of Ukraine⁴⁴

Administrative proceedings shall be conducted in accordance with the Constitution of Ukraine, this Code and the international treaties whose binding character was consented to by the Verkhovna Rada of Ukraine.⁴⁵

The court in deciding the case shall be governed by the principle of legality, according to which:

- 1) the court shall decide the cases in accordance with the Constitution and laws of Ukraine, as well as the international treaties, consent to which binding character was granted by the Verkhovna Rada of Ukraine;
- 2) the court shall apply other legal normative acts, adopted by the appropriate authority on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine.⁴⁶

In case of incompatibility of a legal normative act with the Constitution of Ukraine, the Law of Ukraine, the international treaty whose binding character was consented to by the Verkhovna Rada of Ukraine, or other legal act, a court shall apply a legal act which has a higher legal force.⁴⁷

If the international treaty, whose binding character was consented to by the Verkhovna Rada of Ukraine, establishes other rules than those prescribed by the law, the rules of the international treaty shall apply.⁴⁸

It is easy to note that Ukrainian procedural codes contain quite similar provisions on the application of international treaties and international law. Therefore, Ukrainian courts are obliged to apply the international law by all these provisions and to give the priority to the ratified international treaties in case of conflict with national laws.

2.2.3. The Law of Ukraine on Execution of Decisions and Application of Practice of the European Court of Human Rights

The Law of Ukraine on execution of decisions and application of practice of the European Court of Human Rights⁴⁹ dated 23 February 2006 is of particular importance for application of international law. It is the first document of this type in the Council of Europe. Ukraine is also the first State party to the European Convention on Protection of Human Rights and Fundamental Freedoms,

⁴⁴ Law of Ukraine No. 2747-IV The Code of Administrative Proceedings (6 July 2005), <<http://zakon1.rada.gov.ua/laws/show/2747-15>> (access: 24 February 2016).

⁴⁵ *Ibidem*, Art. 5(1).

⁴⁶ *Ibidem*, Art. 9(1).

⁴⁷ *Ibidem*, Art. 9(4).

⁴⁸ *Ibidem*, Art. 9(6).

⁴⁹ Law of Ukraine No. 3477-IV on execution of decisions and application of practice of the European Court of Human Right (23 February 2006), <<http://zakon1.rada.gov.ua/laws/show/3477-15>> (access: 1 March 2016).

that has adopted special law on execution of the European Court's of Human Rights decisions.

This Law regulates conditions under which the State is to enforce judgments of the European Court of Human Rights in cases against Ukraine, the necessity to eliminate the causes of a violation by Ukraine of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, the need to implement European human-rights standards in the legal and administrative practice of Ukraine; and the necessity to create conditions to reduce the number of applications against Ukraine before the European Court of Human Rights.⁵⁰

Pursuant to Article 2 of the Law on execution of decisions and application of practice of the European Court of Human Rights, the ECHR's judgment are to be binding and enforceable for Ukraine in accordance with Article 46 of the Convention.⁵¹ The procedure for enforcement of the judgment is to be determined by this Law, the Enforcement Proceedings Law, and by other regulations, having regard to the specific provisions of the present Law.⁵²

In Article 17 the Law on execution of decisions and application of practice of the European Court of Human Rights contains provision on application of the Courts' case-law stating that "the courts in trying cases shall apply the Convention and the Court's case-law as source of law."⁵³ Article 18 provides for detailed rules on the usage of the Ukrainian translations and of the original texts of the Court's decisions.

In the light of these provisions, Ukrainian courts are directly bound by the the ECtHR case law by the mere fact of Ukraine's accession to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the Law on execution of the decisions and implementation of practice of the European Court of Human Rights. Nevertheless, in the process of law enforcement there can appear problems, especially if the position of the European Court on Human Rights differs from the one of the Ukrainian lawmaker in the context of certain kind of legal regulations.

⁵⁰ Ibidem, Preamble.

⁵¹ Pursuant to Art. 46 of the Convention, States Parties "undertake to abide by the final judgments of the Court in any case to which they are parties." Hence, at the national level, states must ensure implementation of ECHR judgments by taking action to change the unjust situation of those found to have been wronged, through paying 'just satisfaction', or in other words the compensation, to the victim, abolishing or amending wrong legislation, and/or changing illegal practices.

⁵² The Law of Ukraine No. 3477-IV (n. 52) Art. 2.

⁵³ It is worth to note that the Constitution of Ukraine and the legislation of Ukraine do not use the term 'source of law'.

3. The Practice of Application of International Law in the Ukrainian Legal Order

The Ukrainian judiciary has been frequently criticised for the reluctant application and the implementation of international agreements and international courts' decisions. This happens mainly due to the belief that international case law is not relevant to civil law systems⁵⁴ as well as lack (or non-availability) of translations of international case law and jurisprudence into Ukrainian to help judges adapt their rulings to the best European standards.

Ukrainian courts refer mainly to international agreements that are duly signed and ratified by the Verkhovna Rada of Ukraine and that are, as a result, a part of a national legislation of Ukraine. But even in these cases the correct application of international law is not guaranteed, since one of the most important impediment for application of international law by the Ukrainian judiciary is a lack of understanding of international conventions or foreign judgments by national judges. International organizations are aware of that problem and in period of the last ten years launched several projects for eliminating the incorrect application of international law.⁵⁵

The practical aspects (examples) of the application of international law by the Ukrainian judiciary in this paper have been analysed with the help of the Unified State Register of Court Decisions of Ukraine⁵⁶ which was designed in 2006 to provide public access to decisions of all Ukrainian courts of general jurisdiction.⁵⁷ According to the applicable legislation, personal information on individuals who are parties to the proceedings (i.e., their name, address, identification code, telephone number, vehicle state registration number, etc.), is not publicly available and are, therefore, denoted as 'persons'.

3.1. The Application of the ECtHR Case Law in Ukraine

The Ukraine's accession to the Council of Europe⁵⁸ as well as taking on obligations under the Convention for the Protection of Human Rights and Fundamen-

⁵⁴ Ukraine follows the Romano-Germanic, or, in other words, a civil law tradition.

⁵⁵ A good example of such support is the project jointly funded by the EU and Council of Europe "Transparency and Efficiency of the Judicial System of Ukraine" with a budget of 6 million euros which was elaborated in the period from 2008 to 2011.

⁵⁶ Unified State Register of Court Decisions of Ukraine (Єдиний державний реєстр судових рішень), <<http://www.reyestr.court.gov.ua>> (access: 4 January 2016).

⁵⁷ Only decisions rendered in 2006 or later can be found in the Unified State Register of Court Decisions of Ukraine.

⁵⁸ Ukraine's admission to the Council of Europe was approved by a parliamentary vote in October 1995 (Law of Ukraine No. 398/95 BP on Ukraine's accession to the Statute of the

tal Freedoms⁵⁹ was an important step in the development of the Ukrainian legal system. The European Convention on Human Rights gives the possibility for any individual and a legal entity whose rights and freedoms are allegedly violated to file an application to the European Court of Human Rights. Taking into account that the principal feature of this international body is that its decisions are binding, the ratification of the European Convention should be explicitly considered as the emergence of a number of serious guarantees of the rights and freedoms enshrined in the European Convention of Human Rights.

Although the States Parties to the ECHR should “undertake to abide by the final judgments of the Court in any case to which they are parties”,⁶⁰ not all states ensure implementation of the ECtHR judgments in their domestic legal system. According to the eighth report on the implementation of judgments of the European Court of Human Rights established by the Committee on Legal Affairs and Human Rights, Ukraine takes fourth place among the countries with the highest number of non-implemented judgments of the Court.⁶¹ Ukraine also has been among the leading countries as to the number of applications of the citizens of Ukraine to the European Court of Human Rights (19.5%).⁶²

In case of Ukraine, the problem of non-enforcement of the domestic judgments is a kind of a ‘national tradition’⁶³ or a feature of the Ukrainian legal system. The former Human Rights Ombudsman of Ukraine, Nina Karpachova, stated in her 2011 annual report that over 60 percent of all domestic court decisions and 93 percent of the decisions of the European Court of Human Rights against Ukraine had not been enforced.⁶⁴ In the annual reports of the next following years

Council of Europe), <<http://zakon2.rada.gov.ua/laws/show/398/95-%D0%B2%D1%80>> (access: 17 April 2016).

59 Ukraine ratified the European Convention on Human Rights and Fundamental Freedoms in 1997.

60 Art. 46(1) of the European Convention on Human Rights and Fundamental Freedoms.

61 Council of Europe, ‘Implementation of judgments of the European Court of Human Rights: 8th report’, <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileId=22005#>> (access: 15 April 2016).

62 Council of Europe, ‘Annual Report 2014 of the European Court of Human Rights’, <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileId=22005#>> (access: 15 April 2016).

63 ‘Правозахисники: невиконання рішень судів в Україні стало національною традицією’, <<http://helsinki.org.ua/articles/pravozahysnyku-neykonannya-rishen-sudiv-v-ukrajini-stalo-natsionalnoyu-tradytsijeyu/>> (access: 15 April 2016).

64 The Ukrainian Ombudsman, ‘2011 report’, <<http://zakon3.rada.gov.ua/laws/show/n0001715-11>> (access: 15 July 2016). The original text: “Хронічним є невиконання судових рішень. Фактично виконується лише кожне третє рішення національних судів. А стосовно рішень Євросуду, то цей показник становить лише 9%”, Виступ Уповноваженого Верховної Ради України з прав людини Ніни Карпачової під час представлення у Верховній Раді України Щорічної доповіді про стан дотримання та захисту прав і свобод людини в Україні.

the Ukrainian Ombudsman only emphasizes the continuing and systemic non-enforcement of the judicial decisions in Ukraine.⁶⁵

In June of 2007 the Department for Enforcement of Judgments of the European Court of Human Rights at the Committee of Ministers prepared the memorandum on “Non-enforcement of domestic judicial decisions in Ukraine: general measures to comply with the European Court’s judgments”,⁶⁶ which, among other things, identified the reasons for the failure to enforce the domestic court decisions in Ukraine and proposed a number of measures to “increase the efficiency of the state enforcement service and improve the procedure for compulsory enforcement.”⁶⁷

In the eighth report on the implementation of judgments of the European Court of Human Rights established by the Committee on Legal Affairs and Human Rights the conclusions on the enforcement of the ECHR judgements in Ukraine were the following:

Almost no progress has been noted regarding Ukraine, which could be partly explained by the recent turmoil in this country, the annexation of Crimea by the Russian Federation and the violent conflict in eastern Ukraine, which recently prompted Ukraine to derogate from certain articles of the Convention under Article 15. Ukraine is nevertheless legally obliged to implement the Court’s judgments and the Council of Europe is ready to assist it in accomplishing this task.⁶⁸

As regards the execution of ECtHR judgments by Ukraine, case *Bochan v Ukraine (2)*⁶⁹ very clearly shows the misrepresentation of the European Court’s findings in the Supreme Court’s of Ukraine judgments. Ms. Bochan was involved in the longstanding but ultimately unsuccessful litigation over the title to land in Ukrainian courts. In 2001 she lodged an application with the European Court complaining about unfairness in the domestic proceedings. At that time in the *Bochan v Ukraine (1)* judgment delivered on 3 May 2007⁷⁰ the Court found a violation of Article 6(1) of the Convention on the grounds that the domestic courts’ decisions had been reached in proceedings which failed to respect

⁶⁵ The Ukrainian Ombudsman, ‘Щорічна доповідь про стан дотримання та захисту прав і свобод людини в Україні’, <<http://www.ombudsman.gov.ua/ua/all-news/pr/5515-qv-schorichna-dopovid-upovnovazhenogo-pro-stan-doderzhannya-ta-zaxistu-pr/>> (access: 15 April 2016).

⁶⁶ Department for Enforcement of Judgments of the European Court of Human Rights at the Committee of Ministers ‘Memorandum on non-enforcement of domestic judicial decisions in Ukraine: general measures to comply with the European Court’s judgments’ (June 2007), <https://wcd.coe.int/ViewDoc.jsp?id=1150185&Site=COE#P535_53329> (access: 15 July 2016).

⁶⁷ *Ibidem*, 5.

⁶⁸ Council of Europe, ‘Implementation of judgments of the European Court of Human Rights: 8th report’ (n. 64) 9.

⁶⁹ *Bochan v Ukraine (2)*, App. no. 22251/08 (ECtHR, 5 February 2015).

⁷⁰ *Bochan v Ukraine (1)*, App. no. 7577/02 (ECtHR, 3 May 2007).

the Article 6(1) fair-hearing guarantees of independence and impartiality, legal certainty and the requirement to give sufficient reasons. It awarded the applicant EUR 2,000 as a means for compensation for the non-pecuniary damage. Relying on the European Court's judgment, Ms. Bochan then lodged an "appeal in the light of exceptional circumstances" in which she asked the Ukrainian Supreme Court to quash the domestic courts' decisions in her case and to allow her claims in full. On 14 March 2008 the Supreme Court dismissed her appeal after finding that, in line with the ECtHR's judgment (sic!), the domestic decisions were correct, lawful and well-founded.⁷¹ In June 2008 it declared a further exceptional appeal lodged by the applicant inadmissible. Bochan filed another application to the ECtHR. This time her case was considered by the Grand Chamber and the decision was again adopted in favour of the applicant. But the judges of the ECtHR quite specifically accused their Ukrainian colleagues from the Supreme Court of distorting the findings of the ECtHR and of disregard for the right to a fair trial. Literally, the European Court's judgment states that "by its judgment as of March 14, 2008, the Supreme Court grossly misrepresented the findings of the Court stated in its decision as of May 3, 2007." The problem posed in this case is extremely relevant, since the Supreme Court often tries to interpret in its own way the ECtHR judgments and this leads to situations when so many judgements in Ukrainian cases are not executed. This case is very demonstrative, because it shows the attitude of Ukraine to the execution of the ECtHR judgments. It is also important that the decision in this case was made by the Grand Chamber of the European Court of Human Rights, which is another 'reminder' for the Ukrainian authorities to fulfill its international obligations.

Another problematic issue is that of reopening of court proceedings after an ECtHR judgement. In such cases the Ukrainian Supreme Court usually dismisses cases, which should have been reopened on the basis of a Strasburg judgement or the procedure is treated as a pure formality (as in *Yaremenko v Ukraine*).⁷² As the result of the pseudo-formal review of the case by the Supreme Court of Ukraine, the applicant's forced confession, which had been central to the case, was excluded from the case file and, yet, the sentence remained the same. Given the State's

⁷¹ Case 6-11319сво07 (The Supreme Court of Ukraine, 14 March 2008). Original text: "Європейський суд з прав людини у своєму рішенні також зазначив, що заявниця (ОСОБА 1), стверджуючи, що її було піддано дискримінації щодо реалізації її права власності, усупереч ст. 14 Конвенції про захист прав людини і основоположних свобод у поєднанні зі ст. 1 Першого протоколу, за результатами цивільного провадження, не надала достатніх доказів щодо цих тверджень, і дійшов висновку про те, що скарги заявниці відповідно до ст. 14 Конвенції в поєднанні зі ст. 1 Першого протоколу до Конвенції повинні бути відхилені як явно необґрунтовані відповідно до пп. 3, 4 ст. 35 Конвенції. Тобто і Європейський суд з прав людини дійшов висновку про законність і обґрунтованість судових рішень і стягнув грошову компенсацію в розмірі 2 тис. євро лише за порушення судами України 'розумних строків' розгляду справи."

⁷² *Yaremenko v Ukraine*, App. no. 32092/02 (ECtHR, 12 June 2008).

ongoing non-compliance with its obligations, the case was yet again reviewed by the ECtHR and *Yaremenko v Ukraine (2)* judgment was issued where the Court again found a violation of the Convention.⁷³

As to the usage of the ECtHR case law by Ukrainian courts, according to the results of the research, in 2015 the references to the ECtHR judgments could be seen most often in the court's rulings of Dnipropetrovsk region, where judges used 15 ECtHR judgements in their rulings. In total, they considered 626 cases among which there were 35 references to the *Kharchenko v Ukraine* case and 58 references to the ECtHR judgment in *Letellier v France*. In Kiev region only 124 court's rulings had references to ECHR judgments (74 administrative cases, 34 penal cases, 14 – civil cases and 2 cases that were considered by the commercial courts).

For example, in the criminal case 185/9093/15 Pavlogradski Court of the Dnipropetrovsk region decided to apply the pre-trial detention for a period of seven days as a preventive measure because of the re-committing of a criminal offense by a person.⁷⁴ The Court took into account the legal positions set out in paragraph 35 of the ECtHR judgment in case *Letellier v France* regarding the reasonableness of the length of the pre-trial detention of an accused person⁷⁵ and ruled that none of the softer preventive measures can prevent risks under Art. 177 of the Criminal Code of Ukraine as there was a danger of the accused's absconding and also it was necessary to prevent him from pressuring witnesses.

In lots of other criminal cases regarding the extension of detention⁷⁶ Kamyanets-Podolsky Court of the Khmelnytsky region was guided by Ukrainian laws and ECtHR judgments. Continuation of detention can be justified only if there is a particular public interest, which despite the presumption of innocence prevails over the principle of respect for freedom of an individual.⁷⁷ In both cases Ukrainian courts used the ECHR case-law correctly.

⁷³ *Yaremenko v Ukraine*, App. no. 66338/09 (ECtHR, 30 April 2015).

⁷⁴ Case 185/9093/15 (Pavlogradski Court of the Dnipropetrovsk region, 22 April 2015), <<http://www.reyestr.court.gov.ua/Review/56917570>> (access: 15 April 2016).

⁷⁵ *Letellier v France*, App. no. 12369/86 (ECtHR, 26 June 1991), para. 35: "It falls in the first place to the national judicial authorities to ensure that, [...] the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release."

⁷⁶ One of them was case 676/583/15-к (Kamyanets-Podolsky Court of the Khmelnytsky Region, 20 March 2015), <<http://www.reyestr.court.gov.ua/Review/43264390>> (access: 15 April 2016).

⁷⁷ *Kharchenko v Ukraine*, App. no. 34119/07 (ECtHR, 10 February 2011), para. 79.

3.2. References to the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963

In general, since 2006 there have been issued around 170 judgments with references to the 1961 Vienna Convention on Diplomatic Relations and only 11 that were related to the 1963 Vienna Convention on Consular Relations. Most cases refer to crimes or offenses committed by diplomatic representatives on the territory of Ukraine.

In case 757/1147/13⁷⁸ the employee of the Lebanese Embassy in Ukraine has committed an administrative offense: he was driving while being intoxicated. The court took into account article 31 of the 1961 Vienna Convention on Diplomatic Relations which states that diplomatic agent enjoys immunity from the criminal jurisdiction of the receiving State, as well as immunity from the civil and administrative ones. Pursuant to the court order, all administrative material on bringing to administrative responsibility for committing an administrative offense shall be returned to the Department of Traffic Police in Kyiv.

Another case referred to the compensation of damages because residents of the apartment that belonged to the Canadian Embassy in Ukraine flooded the apartment located downstairs.⁷⁹ The court refused to open proceedings following the provisions of the Vienna Convention on Diplomatic Relations.

References to the 1963 Vienna Convention of Consular Relations are more infrequent. For instance, one of the cases⁸⁰ regarded the possibility of entrance to the part of the consular premises and granting temporary access to some documents that are in possession of the Consulate General of Poland in the city of Lviv. The request was related to an investigation of a violation of public order near the premises of the Consulate General of Poland. The court found that the petition cannot be granted satisfaction given the principle of inviolability of consular premises guaranteed by Article 31 of the 1963 Vienna Convention of Consular Relations.

⁷⁸ Case 757/1147/13 (Pechersky District Court of Kyiv, 22 February 2013), <<http://www.reyestr.court.gov.ua/Review/53581638>> (access: 18 May 2016).

⁷⁹ Case 761/17721/14-ц (Shevchenkivsky District Court of Kyiv, 20 June 2014), <<http://www.reyestr.court.gov.ua/Review/39385931>> (access: 8 May 2016).

⁸⁰ Case 461/10593/15 (Galytski District Court of Lviv, 16 October 2015), <<http://www.reyestr.court.gov.ua/Review/52455235>> (access: 8 May 2016).

3.3. The importance of ‘Namibia exception’ in Judgments Regarding the Temporarily Occupied Territories of Ukraine (ICJ Advisory Opinion on Namibia of 21 June 1971)

Probably one of the best examples of the proper application of the international law by Ukrainian courts in their judgments is the usage of the principles articulated in the ICJ Advisory Opinion on Namibia of June 21, 1971 (the so-called ‘Namibia exception’) that is especially important in the times of recent dramatic events in the Eastern Ukraine. Currently, around 6 million Ukrainian citizens live on the temporarily occupied territories and in order to ensure their rights Ukrainian courts have to uphold the rights of the individual, enforce the criminal law and resolve civil disputes amongst citizens.

It is important to note that the Law of Ukraine on guaranteeing the rights and freedoms of citizens and legal regime on the temporarily occupied territory of Ukraine, that came into force on May 9, 2014 additionally ensures the rights of citizens residing on the temporarily occupied territory or persons resettled from it and determines the order of entry of persons to the temporarily occupied territory and departure from it. In the Law the Ukrainian Parliament confirms that the territory of the Autonomous Republic of Crimea and the City of Sevastopol is an integral part of the territory of Ukraine and defines the ‘temporarily occupied territory’:

Article 1. Legal status of the temporary occupied territory of Ukraine

The temporarily occupied territory of Ukraine (hereinafter – the temporarily occupied territory) is an integral part of Ukraine, which is covered by the Constitution and laws of Ukraine.

Article 3. Temporarily occupied territory

1. For the purposes of this Law temporarily occupied territory is defined as:
 - 1) the land territory of the Autonomous Republic of Crimea and the city of Sevastopol, inland waters of Ukraine of these areas;
 - 2) internal sea waters and territorial sea of Ukraine around the Crimean Peninsula, the area of the exclusive (maritime) economic zone of Ukraine along the coast of the Crimean Peninsula and adjacent to the coast of the continental shelf of Ukraine that are within the jurisdiction of the government of Ukraine in accordance with international law, the Constitution and the laws of Ukraine;
 - 3) the airspace over the territories referred to in paragraphs 1 and 2 of this part.⁸¹

⁸¹ The Law of Ukraine on guaranteeing the rights and freedoms of citizens and legal regime on the temporarily occupied territory of Ukraine (Закон України від 15 квітня 2014 року № 1207-VII Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України), <<http://zakon5.rada.gov.ua/laws/show/1207-18/page>> (access: 15 May 2016).

In March 2015, the Ukrainian Parliament adopted Resolution No. 254-VIII on the recognition of individual regions, cities, towns, and villages of the Donetsk and Luhansk regions as temporarily occupied territories.⁸²

Ukrainian courts have started to use Namibia exception in their judgments from August of 2015 (around 190 cases were considered mostly by the courts in the Eastern part of Ukraine outside of the temporarily occupied territories).

The obligation of non-recognition prevents state from giving validity to acts of the illegal regime. However, the Namibia exception allows exceptional recognition of acts of the illegal regime when that is required in order to prevent the deterioration of the situation of inhabitants of the territory. Thus, in the *Namibia Advisory Opinion* called the “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)”,⁸³ the ICJ stated that:

In general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

In case 423/1048/16-c Popasnyansky regional court judicially established the fact of a birth of a person born on 22 February 2016 in the city of Luhansk, which is considered to be a temporarily occupied territory.⁸⁴ Pursuant to Art. 256(1) of the Civil Procedural Code of Ukraine, the court considers the case on a birth of a person in case of impossibility to issue a birth registration by a local office of state registration of acts of civil status.⁸⁵ The court observed that birth registration is a fundamental right, recognized by Art. 24(2) of the International Covenant on Civil and Political Rights and Art. 7 of the Convention on

⁸² Verkhovna Rada of Ukraine, Resolution No. 254-VIII on the recognition of individual regions, cities, towns, and villages of the Donetsk and Luhansk regions as temporarily occupied territories (Постанова Верховної Ради України від 17 березня 2015 року. № 254-VIII Про визнання окремих районів, міст, селищ і сіл Донецької та Луганської областей тимчасово окупованими територіями), <<http://zakon3.rada.gov.ua/laws/show/254-19>> (access: 15 May 2016).

⁸³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (South West Africa), (Advisory Opinion) (1971) ICJ Rep 16, para. 125.

⁸⁴ Case 423/1048/16-c, decision 56827104 (Popasnyansky regional court, 31 March 2016), <<http://www.reyestr.court.gov.ua/Review/56827104/>> (access: 15 July 2016).

⁸⁵ Art. 256(1) of the Civil Procedural Code of Ukraine. The original text: “Стаття 256 ЦПК України. Справи про встановлення фактів, що мають юридичне значення. Суд розглядає справи про встановлення факту народження особи в певний час у разі неможливості реєстрації органом державної реєстрації актів цивільного стану факту народження.”

the Rights of the Child. The fulfillment of the right to be registered upon birth is closely linked to the realization of many other rights. It establishes the existence of a person under law, and lays the foundation for safeguarding civil, political, economic, social and cultural rights. As such, it is a fundamental means of protecting the human rights of the individual. The court also took into account the Namibia exception under which the documents issued by the occupation authorities, such as, the registration of births, deaths and marriages should be recognized if invalidity of such documents leads to a serious violation or limitation of rights of the citizens.

In case 225/2173/16-c⁸⁶ the applicant appealed to the court with the request to establish the fact that his mother died on 7 March 2016 in Gorlivka. After his mother's death the applicant received medical death certificate and certificate on cause of death issued by the relevant authorities of the occupied territory. Since every act issued by the temporarily uncontrolled territory of Ukraine is invalid and does not create legal consequences, only a court decision establishing the fact of death can be the legal base for registration of death. In essence, one can register the death of his mother only through the court. The Court considered that in the case of establishing the fact that has legal significance (birth or death of a person), the court might apply the general principles ('Namibia exceptions') formulated in the decisions of the International Court of Justice if registration of birth or death of a person shall be issued by institutions at the occupied territory. Therefore, Court decided to satisfy the application to establish the fact of death.

The Namibia exception cannot be employed in order to validate acts that are contrary to the general principles of international law and it does not extend for example to the making of laws or establishing institutions that effect fundamental changes to the public order of that territory and which are designed to consolidate the control of the authorities over the area in which they apply. This principle is also reflected in the law governing belligerent occupation. Pursuant to Art. 43 of the 1907 Hague Regulations⁸⁷ and Art. 64 of the Fourth Geneva Convention, the occupying authorities are bound to respect the law of the occupied territory and the tribunals of the occupied territory shall continue to function. As regards the doctrine of non-recognition that covers different legal aspects of the actual application of the law of non-recognition of the regimes⁸⁸ the *Namibia* approach remains the most accurate exposition of the doctrine.

⁸⁶ Case 225/2173/16-ц, decision 57379998 (Dzerzhinsk Regional Court, 12 April 2016), <<http://www.reyestr.court.gov.ua/Review/57379998>> (access: 20 April 2016).

⁸⁷ The Hague Convention Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (The Fourth Hague Convention).

⁸⁸ See: E. Milano, 'The doctrine(s) of non-recognition: Theoretical underpinnings and policy implications in dealing with de facto regimes', European Society of International Law, <http://www.esil-sedi.eu/fichiers/en/Agora_Milano_060.pdf> (access: 20 May 2016).

The *Namibia* advisory opinion is often used in the ECtHR case law in cases regarding occupied territories e.g. on the Turkish Republic of Northern Cyprus⁸⁹ or Transdniestria in Moldova.⁹⁰

Importantly, on 2 February 2015 Verkhovna Rada of Ukraine adopted the Resolution no 145-VIII, under which the Ukrainian parliament approves the statement on recognition on the part of Ukraine the jurisdiction of the International Criminal Court in regard to committing crimes against humanity and military crimes by higher-ranking officials of the Russian Federation and leaders of terrorist organizations of DPR and LPR that led to particularly serious consequences and mass killings of Ukrainian citizens.⁹¹ This Resolution instructed the Cabinet of Ministers of Ukraine and the Prosecutor General of Ukraine to gather the necessary materials and proper evidence base to appeal to the International Criminal Court in accordance with the Article 12(3) of the Rome Statute of the International Criminal Court on crimes against humanity and war crimes that have led to especially grave consequences and mass murder of Ukrainian citizens.

In the period from 2006 to 2016 there were 15 references to the Rome Statute of the International Criminal Court, mostly all of them were related to the dramatic events in the Eastern Ukraine.

In case 755/4705/16 which was considered by the Dniprovski District Court in Kyiv,⁹² the applicant requests to establish the fact that his forced resettlement from the temporarily occupied territory (from the city of Donetsk) in November of 2014 was the result of aggression of the Russian Federation. The establishment of this legal fact is necessary for the applicant for the determination of his right to a fair compensation from the Russian Federation. The Court cited Art. 5 of the Rome Statute in its judgment regarding the jurisdiction of the ICC that is limited to the most serious crimes of concern to the international community as a whole. These are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.⁹³ In the present case the Court concluded that establishment of the fact that applicant's forced resettlement in November of 2014 from the temporarily occupied territory of Donetsk was the result of the aggression of the Russian Federation is not the subject to judicial review, which is a ground for refusal in the initiation of civil proceedings.

⁸⁹ *Cyprus v Turkey*, App. no. 25781/94 (ECtHR, 10 May 2001).

⁹⁰ *Ilascu and others v Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004).

⁹¹ The Resolution of Verkhovna Rada of Ukraine of 2 February 2015 No. 145-VIII on the statement on recognition on the part of Ukraine jurisdiction of the International Criminal Court in regard to committing crimes against humanity and military crimes by higher-ranking officials of the Russian Federation and leaders of terrorist organizations of DPR and LPR that led to particularly serious consequences and mass killings of Ukrainian citizens, <<http://zakon3.rada.gov.ua/laws/show/145-19>> (access: 15 May 2016).

⁹² Case 755/4705/16 (Dniprovski District Court, 25 March 2016) available at: <<http://www.reyestr.court.gov.ua/Review/56686775>> (access: 15 May 2016).

⁹³ The Rome Statute of the International Criminal Court.

In case 263/8898/15 Zhovtnevy regional court of Mariupol sentenced a citizen of Ukraine to 5 years of imprisonment for his espionage activities and performance of other tasks of leaders of the DPR and LPR on the occupied territory of Mariupol.⁹⁴ The Court cited Art. 7 of the Rome Statute of the ICC emphasizing that the activity of DPR and LPR can be considered as crimes against humanity.

4. Conclusions

It can be stated that Ukrainian courts apply international law mostly if they have to or they want to decorate their reasoning with it, but this practice is a far echo of a constructive judicial dialogue. Ukrainian courts pay attention to the activities of international courts, because they refer to their decisions when applying international law, but rarely do they answer, i.e. revise their former practice. Even the judgments of the ECtHR do not have a strong position. Ukrainian courts do not often refer to them and there are frequent problems with their execution. In addition, Ukraine's court system is widely regarded as corrupt.⁹⁵ Still, Ukraine is a relatively young state and it has been going through multiple upheavals. It is on its way towards European integration surpassing challenges and dangers and carrying out comprehensive reforms. The society faces the future with hope and expects the authorities to make decisive steps to prove themselves competent and responsible to introduce rapid positive changes in all spheres of life, including that of the judicial system.

⁹⁴ Case 263/8898/15 (Zhovtnevy regional court of Mariupol, 13 August 2015).

⁹⁵ Ukraine remains the most corrupt country in Europe. See: Transparency International, <<http://en.interfax.com.ua/news/economic/237633.html>> (access: 10 May 2016).

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X. Problems with Application of International Law in Ukraine: Theoretical and Practical Issues

Taras Tsymbriivskyi*

1. The Lack of Proper Definition of the Status of International Law in the Law of Ukraine

The first legislative acts related to the application of international law were adopted in Ukraine in the mid-1990s. Amongst others the 1990 Declaration of State Sovereignty of Ukraine¹ belongs to the group of acts (non-obligatory by their nature) to initially define the relationship between national law and international law. Provisions of the Declaration, in particular its Chapter X “International relations”, accept the supremacy of generally recognized principles of international law:² “The Ukrainian Soviet Socialist Republic recognizes the prevalence of gener-

* Dr iur., Associate Professor, Chair of Theory of Law and Human Rights, Ukrainian Catholic University, Lviv, Ukraine.

1 О. Барабаш, *Декларація про державний суверенітет України. Історія прийняття, документи, свідчення* (Рута 2010) [Barabash O., *Declaration of state sovereignty of Ukraine. History of adoption, documents, testimonies* (Ruta 2010)].

2 О. Буткевич, ‘Конституційна реформа та проблеми міжнародної договірної практики України’ (2014) 3 Український часопис міжнародного права, р. 42 [O. Butkevych, ‘Constitutional reform and problems of Ukraine’s treaty practice’ (2014) 3 Ukrainian Journal of International Law 42].

al human values over class values and the priority of generally accepted standards of international law over the standards of the domestic law.”³ Implicitly this pledge pertains also to the sphere of foreign policy (thus omitting domestic policy).

The Declaration of State Sovereignty of Ukraine served as a foundation for the elaboration and adoption of further legal rules, including the relevant provisions of the Constitution.⁴ The 1991 concept for the new Ukrainian constitution adopted by the Parliament, reflected the similar approach towards international law. It implied Ukraine’s prioritizing international law (through its generally recognized principles) within the process of inter-State relations and communication. Its concept was embodied by the parliament’s decision of 1993 “The main directions of foreign policy of Ukraine”,⁵ which emphasized that Ukraine’s foreign policy is governed by international law norms which are superior to national law.

The extensive formalization of the rules of application of international law in the domestic legal system commenced with the adoption in 1991 of a Special law on the application of international treaties on the territory of Ukraine.⁶ Its provisions, for the first time in Ukrainian legal history, expressly determined the relation between international and national law recognizing that in order to ensure inviolability of human rights and freedoms “international agreements concluded and ratified by Ukraine constitute an integral part of national legislation.” Thus the law foresees commitment to apply international law in the domestic legal system of Ukraine.

The analogous clauses may be found in the 1993 Law on international treaties of Ukraine,⁷ and concretely in its Art. 17(1). However, the latter bears a resemblance to the 1991 Law on the application of International Treaties on the territory of Ukraine. At the same time, it had a more comprehensive effect on the application of international law in the Ukrainian legal order. Pursuant to Art. 17(2) of the 1993 Law on international treaties, norms of the ratified treaty are applicable in case it foresees other rules than national legislation. Generally, such law provisions clearly refer only to the international treaties, which were consented to

³ Declaration on State Sovereignty of Ukraine, <<http://zakon2.rada.gov.ua/laws/show/55-12>> (access: 24 July 2016).

⁴ Regrettably the 1991 Declaration of independence of Ukraine, in essence, encompasses solely clauses with reference to the validity of the constitution and laws within the territory of Ukraine and disregards utterly applicability of international law. Although the 1991 Law on succession of Ukraine emphasizes Ukraine’s commitment to international obligations stemming from the treaties concluded by Ukrainian Soviet Socialist Republic (USSR) before its proclamation of independence and consequently declares itself as a successor of international rights and duties of USSR which do not contradict the constitution of Ukraine.

⁵ The decision lost its force in 2010 due to the adoption of the Law on principles of internal and foreign policy of Ukraine (2010).

⁶ The Law lost its force in 2004 upon the entry into force of the Law on International treaties of Ukraine (2004).

⁷ The Law lost its force in 2004 upon the entry into force of the Law on International treaties of Ukraine (2004).

by the parliament. The subsequent 2014 Law on international treaties of Ukraine followed the same pattern. Art. 19(2) reads: “international treaty of Ukraine, consented by the parliament, provided it sets out other rules than national legislation, ought to be applied.”

As it was previously noted, the domestic law before the adoption of the Constitution in 1996 distinguished the application of international law in foreign and internal policies. From this point of view, the 1996 Constitution of Ukraine did not bring about any breakthrough, since it just reiterated and strengthened preceding law provisions. In this context, two cornerstone provisions of the Constitution referring to international law are worth mentioning.

Under Art. 9 international treaties in force, consented to by the parliament, are recognized as a part of Ukraine’s national legislation. “International treaties in force, consented by the Verkhovna Rada of Ukraine as binding shall be an integral part of the national legislation of Ukraine. Conclusion of international treaties, contravening the Constitution of Ukraine, shall be possible only after introducing relevant amendments to the Constitution of Ukraine.”

According to Art. 9, the Constitution of Ukraine enjoys some extent of supremacy over international law, for it is targeted at the maintenance of the international treaties conformity with the Constitution. Consequently, Art. 9 forbids the conclusion of international treaties contradicting the Constitution, which is permissible only upon relevant amendments to the Constitution. Understanding of international law as subordinate to the Constitution belongs to the less controversial points and has been thus accepted.⁸ Even the Constitutional Court of Ukraine in its recent practice rejected the overall supremacy of international treaties in national legal order. A separate opinion delivered in 2004 concerning the constitutionality of the Law on higher education indicates that the constitution of Ukraine establishes neither general supremacy of international law, nor the superiority of international treaties over national law.⁹ The court is rather in a position to recognize treaties as subordinate to the Constitution’s provisions.

A similar position was taken by the Supreme Court of Ukraine. In its guidelines of 1996 for the lower courts ‘Application of constitution of Ukraine during justice

⁸ К. Савчук, ‘Шляхи вдосконалення конституційно-правового регулювання застосування норм міжнародного права у внутрішньому правопорядку України’ (2014) 3 Український часопис міжнародного права 70 [K. Savchuk, ‘Means of improvement of Constitution’s regulation on application of international law in domestic law’ (2014) 3 Ukrainian Journal of International Law 70]. В. Скоромоха, ‘Окремі питання імплементації норм міжнародного права і конституційна юрисдикція України’ (2002) 1 Український часопис міжнародного права 6 [V. Skoromoha, ‘Specific issues of international law implementation and Ukraine’s constitutional jurisdiction’ (2002) 1 Ukrainian Journal of International Law 6].

⁹ Case 14-рп (Constitutional Court, 7 July 2004). Є. Зверев, *Тлумачення міжнародних договорів національними судами: європейський досвід та українська практика*, Дис. на здобуття наук ступ. канд. юрид. наук. – 12.00.01 – теорія та історія держави і права; історія політичних і правових вчень. – К., 2015 [Y. Zveriev, ‘Interpretation of treaties by national courts: European and Ukrainian practice’ (DPhil thesis, Kyiv-Mohyla Academy 2015)].

administration, the court just reaffirmed the subordination of international treaties to the Constitution and also highlighted the supremacy of international treaties, consented by the parliament, over national laws.

Commonly, Art. 18 of Ukraine's Constitution refers to foreign policy. The very core of the article is built around the compliance with the generally recognized principles and norms of international law in Ukraine's foreign policy. The provision reads: "The foreign political activity of Ukraine shall be aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community in compliance with the generally acknowledged principles and norms of international law."

Both articles are objects of domestic academic scrutiny, foremostly, the scope of Art. 9 and its relation to international law. Even though the majority of modern constitutions bluntly deal with the relation with international treaties, generally, the position of other sources of international law isn't precisely determined and safeguarded by constitutional provisions. Some of the Constitutions refer to other sources of international law as such: the Constitution of Italy, as well as the Constitution of the Russian Federation (to generally recognized principles of international law – Art. 10¹⁰ and Art. 15¹¹ respectively); the Constitution of the Netherlands (to binding resolutions of international institutions – Arts. 93, 94¹²); Basic Law for the Federal Republic of Germany (general rules of international law – Art. 25¹³); the Constitution of the Federal Republic of Austria (generally recognized rules of international law – Art. 9¹⁴).

Firstly, the sources of international obligations, as it is widely known, are diverse. Their catalogue goes beyond those mentioned in Art. 38 of the Statute of the International Court of Justice of 1945 and includes general principles of international law, binding decisions of international organizations, unilateral acts of States etc. Albeit Art. 9 focuses strictly on international treaties consented to by the Parliament, at the same time it overlooks a great variety of other sources of international obligations.¹⁵

¹⁰ Constitution of Italy, <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> (access: 24 July 2016).

¹¹ Constitution of the Russian Federation, <<http://www.constitution.ru/en/10003000-01.htm>> (access: 24 July 2016).

¹² Constitution of the Netherlands, <<https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>> (access: 24 July 2016).

¹³ Basic Law for the Federal Republic of Germany, <https://www.bundestag.de/blob/284870/ce0d03414872b427e57fcb703634dcd/basic_law-data.pdf> (access: 24 July 2016).

¹⁴ Constitution of the Federal Republic of Austria, <http://www.legislationline.org/download/action/download/id/6052/file/AUSTRIA_Const_2014_en.pdf> (access: 24 July 2016).

¹⁵ О. Задорожній, 'Проекти реформування Конституції України і міжнародне право' (2014) 3 Український часопис міжнародного права 29 [O. Zadorozhniy, 'Drafts of Ukraine's constitution and international law' (2014) 3 Ukrainian Journal of International Law 29]; О. Буткевич (п. 3), р. 47; К. Савчук (п. 9), р. 73; В. Денисов, А. Мельник, 'Розвиток правових засад та механізмів верховенства міжнародного прав у внутрішньому праві України' За ред.

Still some crucial laws, which exist beyond Art. 9, should be taken into consideration. In several instances specific international instruments, other than mentioned in Art. 9, are envisaged in laws. Namely the 1990 Law on police¹⁶ emphasizes that the 1948 Universal Declaration of Human Rights among others is the legal basis for police action; the 2001 Criminal code of Ukraine, the 2004 Code of civil procedure refer to the generally recognized principles and norms of international law,¹⁷ along with the 2010 Law on the principles of internal and foreign policy, which in line with its Art. 2 is founded, among others, on generally recognized norms and principles of international law.

Moreover, Art. 9 is confined only to treaties ratified by the parliament,¹⁸ hence separating them from a large group of treaties concluded by Ukraine without the consent of the parliament. Art. 9 is also mute as to their position in the hierarchy of legal acts in Ukraine. Furthermore, Art. 9 of the Constitution is equally mute about the determination which of laws applies in case of a collision: the international or a national law.¹⁹ Article 9 is thus characterized by obvious shortcomings, which seemingly are brought about by the neglectful consideration of the 1995 draft of Ukraine's constitution that put forward the concept of the supremacy of international treaties.²⁰

The unsatisfactory regulation of the application and effect of international obligations under the provisions of the Constitution is commonly criticized by scholars.²¹ The critique applies at large also to Art. 18, by virtue of which State is bound to comply with generally recognized principles and norms

В. Денисова, *Взаємодія міжнародного права з внутрішнім правом України* (Юстиніан 2006) [V. Denysov, A. Melnyk, 'Development of legal foundations and mechanisms of rule of international law in domestic law', [in:] V. Denysov (ed.), *Interrelation between international law and domestic law of Ukraine* (Yustynian 2006)].

¹⁶ The law lost its binding force in 2015.

¹⁷ В. Денисов, А. Мельник (п. 16), pp. 22–23.

¹⁸ О. Мережко, *Право міжнародних договорів: сучасні проблеми теорії та практики* (Таксон 2002) [O. Merezko, *Law of Treaties: Contemporary problems of theory and practice* (Takson 2002)]; Н. Галецька, *Форми імплементації міжнародних договорів європейськими державами: порівняльно-правове дослідження*, Спеціальність 12.00.01 – історія та теорія держави і права; історія політичних та правових вчень, Львів 2016 [N. Haletska, 'Types of treaties implementation in European states: Comparative-law research' (DPhil thesis, Lviv National University named after Ivan Franko 2016)]; О. Задорожній (п. 16), p. 32.

¹⁹ О. Мережко (п. 19), pp. 298–299; Д. Третьяков, 'Деякі питання застосування норм міжнародних договорів в Україні' (2002) *З Український часопис міжнародного права* 38 [D. Tretiyakov, 'Specific issues of application of treaties in Ukraine' (2002) *Ukrainian Journal of International Law* 38]; Є. Зверев (п. 10), p. 32; О. Задорожній (п. 1), pp. 32–33.

²⁰ Є. Зверев (п. 10), p. 31.

²¹ В. Буткевич, 'Конституція України: проблеми вироблення нового проекту' (2014) *З Український часопис міжнародного права* 12 [V. Butkevych, 'Constitution of Ukraine: Problems of elaboration of new draft' (2014) *Ukrainian Journal of International Law* 12].

of international law when carrying out its foreign policy.²² Probably, the distinction into internal and external State policy, as far as international law is concerned, is currently unjustified.

Another issue discussed by academia is the notion of 'national legislation of Ukraine' endorsed in Art. 9 of the Constitution. Although in 2006 the Court was requested to give official interpretation of Art. 9, including clarification of the status of treaties, ratified by the parliament, it suspended its legal proceedings on the ground of the termination of the 1993 Law on the international treaties of Ukraine. Still separate opinion to the decision urged to carry on proceedings on account of validity of the constitution's Art. 9.²³ Concurrent divergence of opinions on the substance of Art. 9 hampered the possibility of its integrated interpretation. One group of scholars argued for the narrow perception of Art. 9 as referring only to treaties consented by the parliament.²⁴ Some scholars considered inadmissible the notion of 'legislation' in the formula: "international treaties as a part of national legislation", since treaties could be regarded solely as source of law in Ukraine but by no means as legislative act.²⁵ They drew attention to Art. 17 of the 2006 Law on the execution of decisions and application of practice of the European Court of Human Rights, which considers ECHR and ECtHR case law as a source of law.²⁶ Correspondingly this paves way to the advancing of similar amendments to Art. 9 of the Constitution by substituting 'national legislation' for 'sources of law'.²⁷

Meanwhile, the others suggested understanding Art. 9 as encompassing all categories of treaties concluded by the president or the government. It is maintained that all treaties concluded by Ukraine unconditionally belong to the sources of Ukrainian law, as well as form a part of Ukrainian legislation in spite of Constitution's vague clauses.²⁸ This standing was confirmed by the 1994 Law on the procedure of conclusion, execution and denunciation of interagency agreements

²² О. Буткевич, 'Конституційна реформа та проблеми міжнародної договірної практики України' (п. 3), р. 47.

²³ Є. Зверев (п. 10), р. 44.

²⁴ Д. Терлецький, *Конституційно-правове регулювання дії міжнародних договорів в Україні* (Фенікс 2009) [D. Terletsyy, 'Constitutional regulation of international treaties in Ukraine' (Feniks 2009)].

²⁵ В. Косович, 'Міжнародне право як засіб вдосконалення нормативно-правових актів України' (2011) 54 Вісник Львівського університету 21 [V. Kosovych, 'International law as a medium of improvement of normative acts in Ukraine' (2011) 54 Bulletin of Lviv University 21]; О. Мережко (п. 19), р. 298.

²⁶ В. Косович, *Загальнотеоретичні аспекти удосконалення нормативно-правових актів України*, Дис. на здоб. доктора юридичних наук, Спеціальність 12.00.01 – теорія та історія держави і права; історія політичних та правових учень, Львів 2015 [V. Kosovych, *Theoretical aspects of improvement of normative acts of Ukraine* (DPhil thesis, Lviv national University named after Ivan Franko 2015)].

²⁷ Ibidem.

²⁸ І. Забокрийський, 'Проблеми правового статусу міжнародних договорів України у системі джерел конституційного права України' (2015) 825 Вісник національного університету «Львівська політехніка» 69 [I. Zabokrytsky, 'Problems of legal status of Ukraine's treaties

of Ukraine, which requests for the registration of all the treaties by the Ministry of Justice in an unitary registry of normative acts and the 2001 Order of administration and use of unitary State registry of normative acts refers to all treaties of Ukraine without any distinction.

It was expected that the Constitutional Court would elaborate a solution in this respect.²⁹ In 1998 its interpretation of the term ‘national legislation’, however, adhered to the literal wording of Art. 9 maintaining that treaties in force, ratified by the parliament, are a part of national legislation.³⁰

At the same time complexity of the existing terminology at any rate is affected by the Ukraine’s obligations under the 1969 Vienna Convention on the Law of the Treaties (VCLT). Since Art. 26 (principle *pacta sunt servanda*) prescribes the performance in good faith in respect towards every treaty in force, which is binding upon the parties, the interpretation of Art. 9 of the Constitution (international treaties ratified by parliament vs. other international instruments) seems to be of minor importance. Art. 26 in conjunction with Art. 27 of the VCLT (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”) should prevail over any statements towards the so-called limited scope of recognition of international law in national legal order.

Another topical issue of major concern connected with the notion of ‘legislation’, in general, and Art. 9, in particular, is the lack of rules delineating the hierarchy between national and international law, particularly in the specification of priority of application.³¹ Between 2008 and 2010 a number of draft laws were consistently elaborated to clarify this issue, however, none of them has been enforced. Interestingly enough, at least several of them distinguished the order of application of international law in national legal order. Clauses provided by draft law No. 1343–1 of 2008³² and No. 7409 of 2010 suggested superiority of international treaties (regardless of their type and form of consent) over national legislation, apart from the Constitution. Existing foundations of the legislation in this field are aimed at the establishment of basic elements of hierarchy between norms of international and national law. By means of Law on State registration of normative acts adopted by ministries and other executive bodies (1992) a limited

in the system of constitutional sources of Ukraine’ (2015) 825 Bulletin of national University Lviv Politechnic 69].

²⁹ Case 12-рп/98 (Constitutional Court, 9 July 1998).

³⁰ В. Косович (п. 27), pp. 331–332.

³¹ Н. Галецька, *Форми імплементації міжнародних договорів європейськими державами: порівняльно-правове дослідження*, Спеціальність 12.00.01 – історія та теорія держави і права; історія політичних та правових вчень, Львів 2016 [Н. Haletska, ‘Types of treaties implementation in European states: Comparative-law research’ (DPhil thesis, Lviv National University named after Ivan Franko 2016)].

³² К. Кармазіна, ‘Закон «про систему джерел права України»: актуальність та перспективи’ (2008) 9 Вісник Одеського національного університету 101 [К. Karmazina, ‘Law on system of sources of law in Ukraine: Actuality and perspectives’ (2008) 9 Bulletin of Odessa National University 101].

scope of subordination of domestic law to international law is secured. In terms of the law normative acts (decisions, orders, regulations etc.) are not subjected to State registration, if they contravene international treaties of Ukraine ratified by the parliament. Corresponding supervision is carried out by the Ukrainian Ministry of Justice.

Hence, the national legislation of Ukraine reflecting the approaches towards international law is quite ambiguous and vague, which results in perplexity concerning the interpretation of respective clauses within legal regulations. The existing constitutional provisions scarcely encompass State's treatment of international law, sustaining no explicit foundation for interrelation between national and international law. An unreserved recognition of international treaties, ratified by the Parliament, as well as generally recognized principles and norms of international law are insufficient legislative solutions offered by the current Constitution. Moreover, legislation in general doesn't provide for a proper enumeration of implementation of Ukraine's international obligations other than ratified treaties. Altogether, the enacted laws are of controversial character, frequently contravening each other and thus not shaping a uniform pattern. Consequently, legislative amendments are foremost required to ensure coherent ties between laws covering issues of international law. Only on these grounds may the courts afterwards provide appropriate application and interpretation of such laws.

2. The Application of International Law by the Constitutional Court

The currently existing intricacy of legislative regulation on the place of international law in Ukrainian law is reflected in the process of its application by domestic courts.

The Constitutional Court abundantly relies on international law. It suffices to mention that within its activities during the period 1997–2014 the court in the majority of cases (82 decisions) referred to the ECHR as well as to the ECtHR and its case law.

Much less frequently did the Court refer to other international instruments, including soft-law resolutions of international organizations³³ which are not actually

³³ М. Гультай, І. Кияниця, 'Норми міжнародного права у практиці конституційного суду України' (2014) 6 Вісник конституційного суду України 82 [M. Hultay, I. Kyjanytsia, 'International law in the Constitutional Court of Ukraine practice' (2014) 6 Bulletin of Constitutional Court of Ukraine 82]; А. Красникова, *Имплементация международно-правовых норм в национальное законодательство государств*, учебное пособие (Олди-Плюс 2014) [A. Krasnikova, 'Implementation of international law in national law' (Oldi-Plus 2014)].

at least on the official level viewed as a part of national legislation. For example, in the case concerning judicial independence³⁴ the Court reaffirmed the latter as an integral part of legal status of judges by referring to the 1985 UN General Assembly Basic principles of judiciary, the 1989 UN Economic and Social Council Procedures of effective realization of key principles of judiciary independence. Such soft-law resolutions likely served as a source of inspiration for the Court in order to enhance authority of its judgments.

In the overall practice of the Constitutional Court on international law one can distinguish the following approaches:

Firstly, the Court invokes certain European and international standards dealing with the merits of the relevant case. In the case on freedom of expression³⁵ the Court relied on Art. 10 ECHR stating that its application shows that the boundaries of disposable information regarding State officials might be broader than in case of ordinary citizens.

In the death penalty case the Court uncovered the unconstitutionality of Criminal Code provisions on death penalty on the ground of their non-conformity with Art. 3 ECHR and the practice of the ECtHR.³⁶ In addition, the Court tackled the issue of the right to life. The wording 'arbitrary deprivation of life', in line with the Court's reasoning, should be understood in terms of inherent right to life, provided for by Art. 6 of the International Covenant on Civil and Political Rights.³⁷

In some other cases, concerning, for example, the right to a fair trial case,³⁸ the Court in support of its position drew attention both to the ECHR as well as the ECtHR's case law. Taking into consideration the essence of a right to a fair trial, envisaged in Art. 6 ECHR, and developed by the ECtHR, as the court observed, the right to execution of court's decision is a part of the right to a fair trial.

Secondly, the Court grounds its decisions on specific provisions of international treaties, which serve as a supplementary reasoning.³⁹ For instance, in the case about adversarial proceedings⁴⁰ the Court stressed that equality and non-discrimination amount to principles of Ukraine's Constitution as well as of the International Covenant on Civil and Political Rights of 1966 (Arts. 14 and 26), the Universal Declaration on Human Rights (Arts. 1, 2, and 7), and the ECHR (Art. 14).

³⁴ Case 19-пн/2004 (Constitutional Court, 1 December 2004).

³⁵ Case 8-пн/2003 (Constitutional Court, 10 April 2003).

³⁶ Case 11-пн/1999 (Constitutional Court, 29 December 1999).

³⁷ International Covenant on Civil and Political Rights, <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> (access: 24 July 2016).

³⁸ Case 11-пн/2012 (Constitutional Court, 25 April 2012).

³⁹ Є. Зверев (n. 10), p. 155.

⁴⁰ Case 9-пн/2012 (Constitutional Court, 12 April 2012).

Thirdly, the Court addresses and interprets generally recognized principles and norms of international law. This happens arguably less frequently than with reference to other subject matters described in this study.

In the case concerning constitutionality of a local referendum in the Autonomous Republic of Crimea⁴¹ the Court pointed out that the decision on referendum contradicted not only the relevant provisions of the Constitution but also fundamental principles of sovereignty and territorial integrity, enshrined in international instruments (the UN Charter of 1945, the Helsinki Final Act of 1975). Likewise, in the case concerning the constitutionality of the Declaration of Independence of the Autonomous Republic of Crimea⁴² the Court reaffirmed that the principle of self-determination, according to the UN Charter provisions, excludes any activities aimed at violation of territorial integrity or political unity of sovereign and independent States. Furthermore, population of the Crimea is not entitled to self-determination as it does not constitute a nation in the sense of Constitution's preamble and Art. 1 of the UN Charter.

Another piece of the Court's interpretation worth mentioning relates to customary international law. The Court in its decision (*Distribution of products case, 2001*)⁴³ indicated that State's immunity consists in exemption from foreign jurisdiction, except situations dealing with voluntary waiver of such immunity.

When evaluating the congruence of international treaty with constitutional provisions (*Rome Statute of the International Criminal Court case, 2001*)⁴⁴ the Court made reference to Art. 18 of Ukraine's Constitution disclosing the content of generally recognized principles and norms of international law. Consequently, *pacta sunt servanda* principle, war crimes, crimes against humanity, crime of aggression, genocide, in view of the court, represent customary law which is obligatory irrespective of State's intention of acceding to a given international treaty. Similarly, the Court dealt with the issue of ratification of the treaties through the adoption of laws, which, according to court, do not differ by nature from other laws of Ukraine.⁴⁵ Supplementary to the decision, the Separate Opinion confirmed the supremacy of the Constitution, stipulated by Art. 9.

Another decision of the Court (*Ratification of the European Charter for regional or minority languages case, 2000*)⁴⁶ had a collateral connection with international law application. Firstly, the case dealt with the procedure of ratification of international treaties under national law provisions. In this respect, the Court identified a contradiction between the Law on international treaties of Ukraine

41 Case 2-рп/2014 (Constitutional Court, 14 March 2014).

42 Case 3-рп/2014 (Constitutional Court, 20 March 2014).

43 Case 17-рп/2001 (Constitutional Court, 6 December 2001).

44 Case 1-35/2001 (Constitutional Court, 11 July 2001).

45 А.А. Стрижак, *Конституція України в актах Конституційного Суду України (аналітичний огляд та коментарі)* (Ін Юре 2010) [A. Stryzhak, *Ukraine's Constitution in the Constitutional Court of Ukraine practice' (analytical review and commentaries)* (In Yure 2010)].

46 Case 9-рп/2000 (Constitutional Court, 12 July 2000).

(1993) and provisions of the Constitution relating to the powers of the head of the Parliament and the head of the State to promulgate laws.⁴⁷

Unlike the Ukrainian Constitutional Court, the courts of general jurisdiction, including the Supreme Court, administrative and commercial courts, are inclined to apply international law in a more limited manner. These courts use international law specifically by referring to international treaties ratified by the parliament that is in line with the terms of Art. 9 of the Constitution.⁴⁸ Nevertheless, some important developments took place recently in this field.

The Supreme Specialized Court of Ukraine in Civil and Criminal Matters endorsed guidelines for lower courts on “Application of international treaties of Ukraine during administering justice by courts” (2014). Even if of soft law character, the document was aimed at harmonization of the application of international law by the courts of general jurisdiction. It underlined concrete aspects of legislation in force. In particular, all international treaties of Ukraine notwithstanding the form of the granted consent are to be considered by courts as a part of domestic law. This immensely contributed to the overriding of existing confinements of Art. 9 of the Constitution. Furthermore, the courts may refer to the resolutions and decisions of international organizations, specialized bodies etc. The Guidelines also referred to the merits of direct application of international treaties, explicitly focusing on human rights international instruments. In line with paragraph 14 of the Guidelines, the Treaties envisaging human rights and fundamental freedoms are subject to application by courts as provisions bearing a direct effect.

3. Conclusions

Thus, the practice of international law application by Ukrainian domestic courts is far from consistent. The Constitutional Court acting in the interpretative authority visibly plays the principal role in the process. Its reasoning is firmly rooted in international law, which is often regarded as a pillar for proper reasoning. Yet, the practice of other courts is less inspiring on account of their jurisdictional limit of ratified treaties only. Slight signals of probable progress in this area emerged recently (Supreme Specialized Court of Ukraine guidelines), yet its prospective still remains unclear, particularly in the light of unstable legal environment.

⁴⁷ Г. Галущенко, *Питання міжнародного приватного права у міжнародних договорах України про правову допомогу* (Юстиніан, 2005) [H. Halushchenko, ‘Issues of international private law in Ukraine’s treaties on legal assistance’ (Yustynian 2005)].

⁴⁸ Д. Терлецький (п. 25), p. 185.

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XI. Who is to Give Effects to the ECtHR Decisions? The *Vajnai* Saga

Erzsébet Csatlós*

1. Introduction

International law in the Hungarian domestic legal system can reach its objectives only if it is properly implemented. Such ‘proper implementation’ requires that two conditions are met. First, the legislator must effectively introduce international norms into the domestic legal order. In other words, international instruments must be more than isolated, marginalised legal texts without any effective connection to domestic norms. The necessary legal environment needs to be created for the effective enforcement of international legal norms: the existing domestic law should be modified to be in harmony with the newly undertaken obligations, and if it is necessary, new domestic legal regulations need to be issued for the execution of these obligations. One should expect that international law is given a priority over conflicting domestic laws and serves as guidance for the subsequent domestic legislation. Second, the law enforcement organs of a State should have a good knowledge of international legal obligations and apply them in the absence of the respective national rules.

* Dr iur., Senior Lecturer, Department of Administrative Law and Financial Law. Faculty of Law and Political Sciences, University of Szeged, Hungary.

The application of law and its enforcement mainly belongs to organs of the executive and the judiciary. In a vast majority of cases the application of international law takes place at the administrative level as public authorities are primarily responsible for implementation of state duties. Many cases before courts have also administrative background which means that decisions of administrative organs are often reviewed judicially. If one wishes to examine the enforcement of international legal norms, the research needs to start at the level of administrative organs.¹ The 2005 XC Act introduced the obligation for courts to make available only anonymised versions of all judgments and orders issued in the period starting on 1 July 2007 via an internet database,² so court decisions from that time and onwards can be easily accessed and examined.³ The Act did not cover administrative decisions; therefore the content of an administrative decision can only be derived in the course of the judicial review procedure from relevant judicial decisions. Therefore, due to the lack of access to administrative decisions, general statements concerning application of international norms of administrative authorities cannot be made.

In fact, from the point of view of applicability of decisions of the European Court of Human Rights (ECtHR) one case, in particular, may draw a very vivid picture.⁴ The case law born following Attila Vajnai's totalitarian symbol affair revealed many legal aspects of the application of ECtHR judgements by public administrative authorities. The paper aims to present and examine the background and the aftermath of the ECtHR judgement against Hungary (*Vajnai v Hungary*) with a special regard to the effective implementation of its argumentations and statements. Notably, it focuses on the legal consequences of an ECtHR judgement for the lowest level of law enforcement: the public administrative authorities (the police) who are in charge of enforcement of law in general against those who have allegedly breached it. But, in fact, who it is that breaches the law? The paper aims to reveal the answer to this question.

1 The Fundamental Law of Hungary, 25 April 2011 (FL). Art. XXVI (7) reads: "Everyone shall have the right to seek legal remedy against decisions of the courts, public administration or other authorities which infringe their rights or legitimate interests." The Fundamental Law of Hungary replaced the former Constitution of 1949 from 1 January 2012.

2 Act XC on freedom of electronic information 2005, Art. 3(1). This act is not in force anymore; its provisions were incorporated to Act CXII on informational self-determination and freedom of information 2011.

3 See: *Bírószági Határozatok Gyűjteménye* (Collection of Judicial Decisions), <<http://www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>> (access: 11 March 2016). The website has no English version.

4 In Hungary, the ECHR entered into force on 5 November 1992. See: Status of the Convention for the Protection of Human Rights and Fundamental Freedoms, <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>> (access: 19 November 2014).

2. The Background of the *Vajnai* Saga

On 21 February 2003 Attila Vajnai, the Vice-President of the Workers' Party, a registered left-wing political party, held a speech at a lawful demonstration. It took place in Budapest at the former location of a statue of Karl Marx, which had been removed by the authorities. Vajnai wore a five-pointed red star ('the red star') on his jacket as a symbol of the international workers' movement. A policeman, evoking Article 269/B (1)⁵ of the Criminal Code in force at the time, called on Vajnai to remove the star, which the latter denied. His identity was examined, his clothes were searched and he was taken to a police station. Subsequently, criminal proceedings were instigated against him for having worn a totalitarian symbol in public.⁶

On 11 March 2004, the Pest Central District Court⁷ convicted Vajnai for the offence of using a totalitarian symbol. It refrained from imposing a sanction for a probationary period of one year. Vajnai appealed to the Budapest Metropolitan Court stating that the restriction on the usage of red star as a symbol of workers violates freedom of expression. In his view, drawing an equality sign between the red star as a symbol of totalitarian regimes and that of the workers and the establishment of a total ban on its use is discriminative. As the principle of non-discrimination is also a basic value of the EU (at that time, the European Community), the *Vajnai* case was among the first Hungarian cases, which were submitted to the Court of Justice of the European Union (CJEU) on the basis of fundamental

⁵ Act IV Criminal Code 1998, Art. 269/B reads: "The use of totalitarian symbols (1) A person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the sickle and hammer or a *red star*, or a symbol depicting any of them, commits a misdemeanour – unless a more serious crime is committed – and shall be sentenced to a criminal fine. (2) The conduct proscribed under paragraph (1) is not punishable, if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events. (3) Paragraphs (1) and (2) do not apply to the insignia of States which are in force."

⁶ Unfortunately, the Court's decisions of that time are not available to the public, therefore, the legal statements are to be inferred from the judgment: *Vajnai v Hungary*, App. no. 33629/06 (ECHR, 8 July 2008).

⁷ Levels of the Hungarian judicial system before the entry into force of the Fundamental FL (1 January 2012): 1) local courts together with administrative and labour courts; 2) county courts (19) and Budapest Metropolitan Court (it is also a court of first instance for the territory of the capital); 3) Appellate courts (4) and Budapest-Capital Appellate Court; 4) The Supreme Court. After the entry into force of the FL the names of the levels changed: 1) district courts together with administrative and labour courts (117); 2) tribunals (19) and Metropolitan Tribunal of Budapest; 3) the Appellate Courts (4) and Budapest-Capital Appellate Court; 4) The Curia.

rights infringement.⁸ On 6 October 2005 the CJEU declared that it had no jurisdiction to answer the question referred by the Budapest Metropolitan Court as the national provisions fell outside the scope of Community law and “the subject-matter of the dispute is not connected in any way with any of the situations contemplated by the Founding Treaties”⁹ Notably, the CJEU denied that there exists the relationship between the situation at stake with EU law, and so excluded the case from its jurisdiction. During the time of the proceedings before the CJEU, the domestic procedure was suspended. As the CJEU shortly delivered its decision, the domestic Court could continue without any useful indications from the European forum. Therefore, on 16 November 2005 the Budapest Metropolitan Court upheld the conviction. Vajnai alleged that the Hungarian judicial response to his humble act of wearing the red star was too much and constituted an unjustified interference with his right to freedom of expression, in breach of Article 10 ECHR.¹⁰ Therefore, he initiated proceedings against Hungary before the ECtHR. The ECtHR was to give the final ruling on the following matters: (1) whether a restriction embodied in Hungarian criminal law is reconcilable with freedom of expression as protected by Article 10 ECHR; (2) whether the domestic legal interference was relevant and sufficient to protect higher principles than the one

⁸ In its order for reference the Budapest Metropolitan Court observed that in several Member States the symbol of left-wing parties is the red star or the hammer and sickle, whereas the Hungarian Criminal Code prohibits the use of those symbols. Therefore, the question arises whether a provision in one Member State prohibiting the use of symbols of the international labour movement on pain of criminal prosecution is discriminatory, whereas the display of those symbols on the territory of another Member State does not give rise to any sanction. The Budapest Metropolitan Court referred the following preliminary question to the CJEU: “Is Article 269/B, first paragraph, of the Hungarian Criminal Code, which provides that a person who uses or displays in public the symbol consisting of a five-point red star commits a minor offence, compatible with the fundamental Community law principle of non-discrimination?”, case 328/04 *Criminal proceedings against Attila Vajnai* (CJEU, 6 October 2015), paras 7–8.

⁹ *Ibidem*, paras 12–14.

¹⁰ The Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention on Human Rights, the ECHR) Art. 10 reads:

“Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

expressed by Article 10(1) and (3) whether the measure taken were proportionate to the legitimate aims pursued.¹¹

In line with its standing case law, the ECtHR held that the Hungarian regulation in force was not proportionate to the aim of protecting the interests of the society to which the red star symbolized the terror of the communist regime.¹² The symbol was not a real and present danger that needed to be interrupted by interference in the freedom of expression of an individual.¹³ Therefore, the relevant regulation of the Criminal Code violated Article 10 ECHR.

¹¹ *Vajnai v Hungary* (n. 7), para. 45.

¹² The Government of Hungary argued that “in 1945 Hungary and other countries of the former Eastern bloc had been liberated from Nazi rule by Soviet soldiers wearing the red star. For many people in these countries, the red star was associated with the idea of anti-fascism and freedom from right-wing totalitarianism. It is before the transition to democracy in Central and Eastern Europe, serious crimes had been committed by the security forces of totalitarian regimes, whose official symbols included the red star.” *Vajnai v Hungary* (n. 7), paras 36–37. The government even invoked the decision of the Hungarian Constitutional Court on the same subject, which had been delivered several years before the case in question. It fortified the government’s argumentation, as it justified the legality of the ban on the use of the red star by the same historical background of the State. See: cases 14/2000 (V. 12.) ABH (Constitutional Court, decision, 2000) 92–101, available in English at <http://www.alkotmanybirosag.hu/letoltesek/en_0014_2000.pdf> (access: 9 July 2014). According to the reasoning of the ECtHR “two decades have elapsed from Hungary’s transition to pluralism and the country has proved to be a stable democracy. [...] Moreover, there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship. The Government have not shown the existence of such a threat prior to the enactment of the ban in question.” *Vajnai v Hungary* (n. 7), para. 49.

¹³ Cf. The case concerning the Árpád-striped flag, a fascist symbol in Hungary. On 9 May 2007 the Hungarian Socialist Party (MSZP) held a demonstration in Budapest to protest against racism and hatred. Simultaneously, members of Jobbik, a legally registered right-wing political party assembled in an adjacent area to express their disagreement. Fáber was silently holding a so-called Árpád-striped flag in the company of some other people, was observed by police as he stood nearby, at the steps leading to the Danube embankment (the location where in 1944/45, during the Arrow Cross regime, Jews were exterminated in large numbers). His position was close to the MSZP event and a few metres away from the lawn of the square where the Jobbik demonstration was being held. The police supervising the scene called on Fáber either to remove the banner or leave. He refused to do so, pointing out that this flag was a historical symbol and that no law forbade its display. Subsequently he was committed to the Budapest Gyorskocsi Police Holding Facility, where he was held in custody and under interrogation for six hours. After he had been released, the Budapest 5th District Police Department fined him the regulatory offence of disobeying police instructions. After unsuccessful judicial appeals the case was submitted to the ECtHR which condemned Hungary again arguing the same as several years ago in the *Vajnai* case. *Fáber v Hungary*, App. no. 40721/08 (ECHR, 24 July 2012), para. 5 and paras 54–57. On comparative analyses of “where memory and law intersect” see: A. Fijalkowski, ‘The criminalisation of symbols of the past: Expression, law and memory’ (2014) 10 *International Journal of Law in Context* 3 295.

One would think that the story ended with the necessary modification of the Hungarian criminal law, but it took another turn. Before going into depth in the analysis of the case, it is important to see how the relationship between international and domestic law in Hungary is regulated.

3. A Brief Introduction to the Status of International Legal Sources in the Hungarian Legal System

Since 2012, Hungary has had a new constitution called the Fundamental Law (FL). The content of rules regulating the relationship between international law and the domestic law correspond to the respective rules of the former Constitution (Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989–90, in force until 31 December 2011 – ‘the Constitution’).¹⁴ For this reason the present analysis will evoke the provisions of the two constitutive documents for the Hungarian State.

In line with Article 7(1) of the Constitution (currently Article Q¹⁵ FL), which provides for the relationship between domestic law and international law,

¹⁴ N. Chronowski, E. Csatlós, ‘Judicial Dialogue or National Monologue? The International Law and Hungarian Courts’ (2013) 1 ELTE Law Journal 7. On the relation of international law and Hungarian law (before FL), see: N. Chronowski, T. Drinóczi, I. Ernszt, ‘Hungary’, [in:] Shelton D. (ed.), *International Law and Domestic Legal Systems – Incorporation, Transformation, and Persuasion* (OUP 2011) 261.

¹⁵ Art. Q FL reads:

- “(1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.
- (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.
- (3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations.”

the Constitutional Court¹⁶ found that international norms in the Hungarian legal system can be classified into three categories:¹⁷

- (1) The 'generally recognised rules of international law', that is the customary international law, *jus cogens* and general principles of law recognised by civilised nations,¹⁸ have at least constitutional rank in the Hungarian hierarchy of legal norms, because they can be regarded as a part of the Constitution, they formulate the part of it. Moreover, *jus cogens* norms have even a priority over it. Following the monistic approach, no further act is necessary to give these norms effects in domestic legal system.¹⁹
- (2) As regards the so-called 'other sources' the FL does not declare their priority over the domestic law and requires their transformation evoking the dualistic doctrine into domestic legal norms. International norms must be transposed with the use of Hungarian legislative acts.²⁰ This rule is applicable to treaties, mandatory decisions of international organs and certain judgements of international courts.

¹⁶ The Constitutional Court is the principal organ for the protection of the Fundamental Law in Hungary; it is an independent organ. Although, according to the name it is a court, it is not a part of the judicial system. The Court has an important role in protecting democratic State governed by the rule of law, constitutional order and the rights guaranteed in the Fundamental Law and in safeguarding the inner coherence of the legal system. It has the monopoly of interpretation of fundamental law and to determine upon the coherence of legal norms in the legal system, notably, it has the right to declare the non-conformity of international obligations with domestic legal norms and it calls the legislator on the necessary modification of domestic norms. On the other hand, the Curia which is the highest instance court in the judicial system can also render uniformity decisions in cases of theoretical importance in order to ensure the uniform application of law within the Hungarian judiciary. Such decisions are binding on all Hungarian lower instance courts. The difference between the two courts is that while the Constitutional Court is responsible for the unity of legal system, it interprets legal norms in the view of the Fundamental law, and it has the monopoly of invalidation of legal norms that are not in conformity with the FL, the Curia helps legal practice by interpreting legal norms in context with each other by highlighting important judicial decisions that contain significant declarations (Author's comment).

¹⁷ It has to be noted that in the Hungarian legal system EU law is not treated as international law *sensu stricto*. It is a *sui generis* legal system regulated as such in the FL. See FL (n. 2) Art. E [it was Art. 2/A in the Constitution], Case 143/2010 (VII. 14.) (Constitutional Court, 14 July 2010), available in English: <http://www.alkotmanybirosag.hu/letoltesek/en_0143_2010.pdf> (access: 9 July 2014).

¹⁸ The category of 'generally recognised rules of international law' is explained and explored by the practice of the Constitutional Court. Case 53/1993 (X. 13.) (Constitutional Court, 13 October 1993), only the summary is available in English: <[http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-3-015?fn=document-frameset.htm&f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-3-015?fn=document-frameset.htm&f=templates$3.0)> (access: 9 July 2014) and case 30/1998 (VI. 25.) (Constitutional Court, 25 June 1998), available in English: <http://www.alkotmanybirosag.hu/letoltesek/en_0030_1998.pdf> (access: 9 July 2014).

¹⁹ T. Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (Dialóg Campus, Budapest-Pécs 2013) 65.

²⁰ Act L on the procedure related to international agreements 2005, Art. 9(1).

Decisions of the ECtHR are not considered as direct sources of international law. Instead, they are treated as acts interpreting the law. However, it is not always the case. The judgments of the ECtHR are granted a different treatment when the State was a party to the dispute in which a judgment was delivered. In 2003 the Constitutional Court declared that the decision of the International Court of Justice given in a dispute between Hungary and Slovakia (*Gabcikovo–Nagyymaros case*)²¹ can be treated neither as a norm of international law nor a treaty but it definitely obliges Hungary, as it is a *sui generis* category of international obligations under the current status of domestic law. In 2005, however, the new act on the procedure regarding treaties was adopted stating clearly that the international courts' decisions in cases the Hungary is a party to are binding and shall be executed in Hungary. In such cases the decision of the international court shall be promulgated in the Official Gazette.²² This rule does not apply, however, to decisions in the proceedings involving individuals, like before the ECtHR.²³ Such decisions, instead, have to be taken into account in the course of interpretation of the treaty they are based on.²⁴ The ECtHR's decisions are not binding. Ultimately, they are only indirect sources of law, and can provide a significant guidance for the interpretation of the treaty-based obligations.²⁵ The Constitutional Court had put this approach forward already a year earlier when it had stated in the decision No. 18/2004 (V. 25.) that the jurisprudence of the ECtHR shapes the Hungarian legal practice and the Hungarian courts and other state organs are obliged to interpret the ECHR in line with the case law of the ECtHR.²⁶ Under such circumstances, effective implementation and enforcement of judgements involve a plurality of actors such as the government, the legislator, the judiciary, and local authorities.²⁷

- (3) The third category of international norms in the Hungarian legal system is international soft law (e.g. recommendations, declarations, final acts), which is not mentioned by the FL or other acts. These norms are not considered to be legal provisions but moral ones that are complementing the obligation of cooperation with the community of nations. The obligation itself is enshrined in the Constitution.²⁸

²¹ *Gabcikovo–Nagyymaros Project (Hungary v Slovakia)* (1997) ICJ Rep 7.

²² Act on the procedure related to international agreements L 2005, Art. 13.

²³ T. Molnár (n. 20), p. 184.

²⁴ L Act on the procedure related to international agreements 2005, Art. 13(1).

²⁵ See: case 24.K.35.639/2006/25 (Budapest Metropolitan Court, 7 April 2009), [in:] N. Chronowski, E. Csatlós (n. 15) 27.

²⁶ L. Blutman, 'A nemzetközi jog használata az Alkotmány értelmezésénél' (2009) 64 *Jogtudományi Közlöny* 7-8 301.

²⁷ H. Keller, C. Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2015) 26 *EJIL* 4 829.

²⁸ FL (n. 2), Art. Q(1). E. Csatlós, 'Alkotmánybírószági határozatok: a nemzetközi jog mint értelmezési tampon', [in:] L. Blutman (ed.), *A nemzetközi jog hatása a magyar joggyakorlatra* (HVG-ORAC 2014) 442 and E. Csatlós, 'A Kúria (Legfelsőbb Bíróság) gyakorlata és a nemzetközi jog',

4. The History Repeats Itself: the Administrative Authority versus Application of International Law

4.1. The Facts

Eight years after his initial conviction in the original *Vajnai* dispute, on 21 December 2008, Vajnai participated in a demonstration, held a speech again and handed out flyers decorated by five pointed red stars. The flyers were clearly directed against the capitalism when the Police intervened again, for the same reason as years before. The incident occurred six months after the proclamation of the ECtHR's judgment on *Vajnai v Hungary*. Vajnai was accused again of the offence of using a prohibited symbol of totalitarianism. The same police procedure was carried out again.²⁹

Vajnai submitted a complaint to the Independent Police Complaints Board (IPCB) against the police action arguing that the police violated his fundamental rights and in particular his freedom of expression. The IPCB is an independent body; it can proceed and investigate certain police measures or acts, examine them in a fundamental right protective perspective and decide on whether the rule of law was breached.³⁰ Upon the examination of Vajnai's complaint, the IPCB declared the consistency of the police action with the fundamental rights.³¹

Vajnai appealed for the judicial review of this administrative decision arguing that the police action based on the Criminal Code violated his fundamental rights as it ignored the statements of the ECtHR's *Vajnai v Hungary* judgment. Contrary to the strict provisions of the Criminal Code, the ECtHR judgment definitely declared that the Hungarian regulation on total ban on the usage of red star is excessive and violates the freedom of expression.

The court of first instance held that the police action was consistent with the law as the policemen acting on site had a reasonable suspicion to consider Vajnai's behaviour illegal. In the view of the Metropolitan Court of Budapest Vajnai violated the ban on the usage of totalitarian symbols, which is provided for by the law in force, which has not been amended 2004.

As regards the freedom of expression guaranteed by Article 10(1) ECHR and the judgement of 8 July 2008 in the case of *Vajnai v Hungary*, the Metropolitan Court

[in:] L. Blutman (ed.), *A nemzetközi jog hatása a magyar joggyakorlatra* (HVG-ORAC 2014), p. 479.

²⁹ See: case Kfv.VI.38.071/2010/4 (Supreme Court, 5 September 2011), not available in English.

³⁰ Act XXXIV on the Police 1998, Art. 92.

³¹ Budapest Police Headquarters, VI. District Police 146–105/12/1/2009.P. not available, cited and referred to in case Kfv.VI.38.071/2010/4 (Supreme Court, 5 September 2011), Act IV on Criminal Code 1998 Art. 3, Arts. 7–8, Arts. 16–20 and Art. 21(2); Act CLXI on the organisation and administration of courts 2011, Arts. 163–133.

of Budapest acknowledged that the Hungarian regulation is contrary to the international standards and the ban on the usage of the red star is not proportional to the aim the norm seeks to attain.³² However, the policemen were not obliged to verify the personal thoughts and beliefs concerning the meaning and symbol of the red star when they performed their duties in line with the provisions of the Police Act.³³ The reasonable suspicion of an offence was the base of their procedure. They were obliged to follow the legislation in force and they were not entitled to take the inconsistency of the legislation in force with the ECHR into account.³⁴

Vajnai appealed against the decision of the Metropolitan Court of Budapest and asked for the revision of the judgment before the Supreme Court of Hungary. Vajnai argued that the circumstances made it unambiguous that the usage of the red star was meant to imply his party's leftist leanings. He submitted that his behaviour had not endangered in any way the society thus the act he committed was neither a crime nor an offence. The policemen working on the site of the demonstration or at least for the IPCB, which supervised their action, should have been acquainted with the reasoning of the judgment of *Vajnai v Hungary*.

The Supreme Court of Hungary upheld the judgment of the court of first instance. The Supreme Court emphasized that the handing of flyers with a banned totalitarian symbol can be considered as a sufficient reason for the policemen to act. In the view of the Court, the policemen did not have the duty to verify whether the behaviour of demonstrators and of Vajnai, in particular, created a danger to the society. The examination of the circumstances of the alleged crime or offence is the task of the future criminal proceedings; thus, the policemen should not be impeached for not knowing the *Vajnai v Hungary* judgment. In short, it is not their obligation to resolve the conflict between domestic law and international obligations. The ECtHR indeed expressed its opinion on the conformity of Hungarian criminal regulation concerning the red star with its standards. Yet, the judgment is addressed to the legislator thus it is the duty of the legislator to introduce the necessary amendments to the domestic law.

Subsequently, the statements of the judgment were taken into consideration during the criminal proceedings, as Vajnai was not condemned.³⁵ He tried to prove in vain that the policemen at site had made a mistake and initiated several proceedings to have the administrative decision annulled and so this way to gain jus-

³² On totalitarian symbol as a threat to the society and the reasoning of the judgment see: A. Koltay, 'A Vajnai-ügy. Az Emberi Jogok Európai Bíróságának ítélete a vörös csillag viselésének büntethetőségéről' (2010) 1 JeMa 77.

³³ Act XXXIV on the Police 1998.

³⁴ Case 27.K.30.848/2010/3 (Budapest Metropolitan Court, 29 June 2010), revised in case Kfv. VI.38.071/2010/4 (Supreme Court, 5 September 2011).

³⁵ Case Kfv.VI.38.071/2010/4 (Supreme Court, 5 September 2011).

tice. Vajnai never succeeded. The administrative organs neither in first, nor in the second instance accepted to apply the findings of the ECtHR in relation to domestic criminal law provisions.³⁶

4.2. The Police and the ECtHR judgment

In the Hungarian legal system, the law enforcement authorities such as the police belong to the executive power, and their structure is a part of the administration of the State.³⁷ Decisions elaborated by administrative organs are subject to an internal remedy within the administrative system provided by the body supervisory to the organ elaborating decision. In addition, the judicial remedy is also guaranteed by the FL, which states that “everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.”³⁸ The revision of administrative decisions is a task of twenty administrative and labour courts placed in each of Hungary’s counties.

The administrative proceedings instigated by Vajnai would have been unnecessary if the administrative authorities (the police) would have been more flexible and move away from their duties expressed in the Police Act in favour of the relevant and obligatory statements of the judgment *Vajnai v Hungary*. In fact, the judgment obliges the State to modify its domestic law, it has no direct effect, but the findings incorporated in judgments should be given a respectful consideration. They interpret and clarify the Treaty-based obligations and due to this fact, they shall be applied when such obligations are to be enforced.³⁹ But how is it done in practice?

4.3. Doctrinal Background: the Non-harmonisation of Domestic Law with International Law as a Key Issue

After the 2008 ECtHR judgment of *Vajnai v Hungary*, the Hungarian Government refused the modification of the Criminal Code to deregulate the total ban on the usage of the red star. It declared that, in contrast with the reasoning of the ECtHR, the vividness of historical memories and experiences still requires this kind of a radical regulation. The Hungarian Government maintained its stance, even when on 3 November 2011 the ECtHR passed the second judgment on the same

³⁶ See: case Kfv.II.38.073/2010/4 (Supreme Court, 22 June 2011), case Kfv.III.38.074/2010/4 (Supreme Court, 27 June 2011), and case Kfv.III.38.075/2010/4 (Supreme Court, 8 June 2011), case Kfv.II.37.798/2013/4 (Curia, 12 February 2014), case Kfv.II.37.814/2013/3 (Curia, 12 March 2014), case Kfv.II.37.800/2013/3 (26 February 2014), case Kfv.II.37.806/2013/3 (26 February 2014).

³⁷ Act XLIII on central state organs and the status of the members of the Government and that of the state secretaries 2010, Art. 1(5)a).

³⁸ FL (n. 2), Art. XXVIII(7).

³⁹ C. Dominicé, ‘The International Responsibility of States for Breach of International Obligations’ (1999) 10 EJIL 2, p. 353; A.M. Slaughter, W. Burke-White, ‘The Future of International Law is Domestic (or, The European Way of Law)’ (2006) 47 Harvard International Law Journal 2 327.

issue in *Fratanoló v Hungary*.⁴⁰ The situation changed with the submission of Vajnai to the Constitutional Court to re-examine the ban on the red star in the view of the two ECtHR judgments. At the beginning of 2013 the Constitutional Court analysed Article 10 ECHR and the judicial practice on the freedom of expression in the view of the Strasbourg standards and subsequently reformulated its approach to the red star and its possible threat to society agreeing that it is the unreasonable restriction to the freedom of expression. Finally, it held that the prohibition of using the five-point red star is unconstitutional. It argued that the current regulation defines criminal conducts too widely as the use of the symbols is punished in general; however, the consideration of the purpose, the method or the result of the use for each symbol might be indispensable. Therefore, the provision of the Criminal Code prohibiting the use of symbols associated with totalitarian regimes was declared to be in violation with the requirement of legal certainty and, in Vajnai's case, the freedom of expression.⁴¹ The Constitutional Court annulled the alleged provision of the Criminal Code (Article 269/B) with the effect as of 30 April 2013.⁴²

4.4. Which Standard to Apply in the Lack of State's Implementation of the ECtHR Judgment?

Almost the same story happened to Fratanoló on 1 May 2004 in Pécs. He wore a red star on his jacket at a legitimate labour demonstration. He was condemned for the offence of usage of a banned totalitarian symbol.⁴³ He appealed and here

⁴⁰ The Hungarian Parliament declared the compliance of the regulation of totalitarian symbols with the social needs and refused its modification. See: The Parliament, Report no. J/6853 on the issues related to the execution of obligations deriving from the *Fratanoló v Hungary* judgment of the ECtHR (Parliament, 2 July 2012), <<http://www.parlament.hu/irom39/06853/06853.pdf>> (access: 31 July 2013) and Decision 58/2012. On the acceptance of the report on the issues related to the execution of obligations deriving from the *Fratanoló v Hungary* judgment of the ECtHR (Parliament 2012): T. Molnár, 'Két kevésbé ismert nemzetközi jogforrás helye a belső jogban: a nemzetközi bíróságok döntései, valamint az egyoldalú állami aktusok esete a Magyar jogrendszerrel' (2012) 3 *Közjogi Szemle* 1, 3. K. Bárd, 'The Legal Order of Hungary and the European Convention on Human Rights', [in:] I. Motoc, I. Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (CUP 2016) 186; P. Bárd, S. Carrera, E. Guild, D. Kochenov, 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights' (2016) 91 *CEPS Papers in Liberty and Security in Europe* 81.

⁴¹ Case 4/2013 (II. 21.) (Constitutional Court, 21 February 2013) 142, summary is available in English: <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> (access: 14 July 2014).

⁴² *Ibidem*, 148. On the motifs of annulment see: J.Z. Tóth, 'Az önkényuralmi jelképek használata mint a véleménynyilvánítási szabadság korlátja? (A 4/2013 (II. 21.) AB határozat előzményei, indokai és következményei, valamint az új Btk.-szabályozás pozitívumai és fogyatékoságai)' (2013) 2 *JESZ* 1, <<http://jesz.ajk.elte.hu/tothj54.pdf>> (access: 29 February 2016) 18.

⁴³ Case 12. B. 1482/2007/10 (Pécs Municipal Court, 2007) not available, it is cited and referred to in case 121/2008/5 (Baranya County Court, 23 September 2008).

came the turning point: the court of second instance acquitted him in the judgment of 23 September 2008 establishing that no crime was committed.⁴⁴ The court of second instance examined the possible danger of the symbol to the society and came to the same conclusion as the ECtHR in *Vajnai v Hungary*. Moreover, it referred to Article 3(b) of Protocol 9 to the ECHR according to which Hungary is obliged to acknowledge and accept the competence of the ECtHR to interpret ECHR and its protocols. The Court also declared *expressis verbis* the lack of danger to the society, so the wearing of the red star was neither a crime nor an offence. It also confirmed this reasoning in the *Vajnai v Hungary* case and put an emphasis on the fact that the international standard of interpretation is contrary to that of the Constitutional Court's one expressed in its decision of 2000.⁴⁵ The court of second instance applied international law in contrast to domestic legal provisions of the Criminal Code. In order to be able to issue a judgment which satisfies the international legal requirements of a democratic State that respects human rights at the level of the ECtHR, the court of second instance had to put aside domestic law to give effect to international legal provisions. This kind of legal practice is in harmony with the FL. International law is superior to domestic law and only by following this rule the effect of international obligations can be ensured. At the same time, the Court sustained that the harmonization of international legal obligations and domestic legal norms is primarily the task of the legislator. If the duty is not fulfilled, then the Constitutional Court is obliged to take action to restore the order in the legal system. In fact, before an international obligation is transformed into the domestic legal system and the process of ratification is concluded, the legislator should lay ground for the adjustment of the normative environment and introduce the necessary modifications of domestic law.

In fact, in Hungary the 'transformation' is the procedure of proclaiming international norms in the form of an act or decree. Nevertheless, if grain of sand slips into the machine or the legislator does not act in conformity with the international obligations by adopting necessary changes in legal norms, those entities, which apply law are confused as to which norms to apply. Those who do it law might face the problem of having two different norms applicable to the same situation: one, which expresses international obligations and another which is domestic in origins. Law enforcement authorities are not entitled to derogate norms in the name of the principle of priority of international law; that is the task of the Constitutional Court. Can they ignore and put aside the domestic originated norms in the favour of international ones? They should. Are all the forms of international law in the Hungarian legal system behaving the same in such situations? What about those norms, which are not transformed into the legal system such as ECtHR judgments but are significant sources for the ECHR interpretation? And what about

⁴⁴ Case 121/2008/5 (Baranya County Court, 23 September 2008).

⁴⁵ *Ibidem*.

the judgment especially delivered in Hungary's case condemning a Hungarian legal norm, which is to be applied in a given case?⁴⁶

Such questions were posed during the procedure of the Pécs Court of Appeals, which in 2010 altered the judgment of the second instance and held that Fratanoló was guilty of usage of a totalitarian symbol. Due to this inconsistency of judicial practice, Fratanoló opened a procedure before the ECtHR, therefore, the ruling of the *Vajnai v Hungary* was reinforced by the ECtHR in its judgment of 3 November 2011.⁴⁷ The Hungarian Government was called upon again to derogate its legislation on the total ban on the usage of the red star.⁴⁸

The Supreme Court, or as it is called since 2011, the Curia, pursued a supervision procedure in the view of the ECtHR judgement in *Fratanoló v Hungary*, and acquitted Fratanoló declaring the lack of crime or offence. It declared that wearing of the red star in the way Fratanoló did was neither a crime belonging to the sphere of criminal law, nor an offence meaning an act, which is less harmful for the society and thus belongs to the administrative power represented by the police. It held that Fratanoló expressed his political opinion while wearing the red star at a lawful demonstration of the labour party thus this act is protected by the freedom of expression guaranteed by Article 10(1) ECHR. His behaviour was not a threat to the society as it could not be associated with any motivation to restore the communist dictatorship. Moreover, the Curia drew the attention to the fact that the Hungarian State was not entitled to maintain such restriction to the freedom of expression.⁴⁹

4.5. Which Organ is Obligated to Take International Obligations into Consideration?

On 29 July 2012, the *Vajnai* situation has repeated: the police action was conducted against a person wearing the red star and handling flyers with the red star at a lawful demonstration had to go through the same police action. This person submitted a complaint to the *Independent Police Complaints Board* (ICPB). In its decision the ICPB changed the reasoning, expanded its competences and stated that the provision of the criminal Code concerning the red star violates the Fundamental Law as well as the ECHR but the legal qualification of this fact is beyond the scope of the police action.⁵⁰ The National Police Headquarters, the supervisory body to the ICPD, refused the complaint arguing that it is not the task of the police to verify the circumstances, their duty is to act in the case of a reasoned suspi-

⁴⁶ J. Laffranque, 'Who Has the Last Word on the Protection of Human Rights in Europe?' (2012) *Juridica International* XIX 119. Cf. Dudás D.V., 'Az Emberi Jogok Európai Bírósága és a hazai közigazgatási bíróságok közötti kölcsönhatás' (2014) *Fundamentum* 1–2 106.

⁴⁷ *Fratanoló v Hungary*, App. no. 29459/10 (ECHR, 3 November 2011), para. 26.

⁴⁸ *Ibidem*, paras 20–28.

⁴⁹ Case Bfv.III.570/2012/2 (Curia, 10 July 2012).

⁵⁰ Case 70/2013 (III. 13.) (Independent Police Complaints Board, 9 September 2014).

cion of a crime and that was the case when they realized the usage of a banned totalitarian symbol.⁵¹

However, this time, the judicial review of the administrative decision annulled the decision and ordered the administrative authority to open a new procedure.⁵² The Court declared that the policemen in charge should have known that the act, namely the usage of the red star is not always a crime or offence.

What was different in this case? First, the Pécs Municipal Administrative and Labour Court declared that all the state organs, including the police, all other entities who apply law, are obliged to do it in conformity with the FL and the ECHR. The application of law in the view of international obligations can only reach the aim of elaborating decisions, which are in conformity with international obligations of Hungary, if the one who enforces law does it in a way, which ensures the respect for such norms. The main dispute between the parties in the *Vajnai* case, in the Court's point of view, whether the relevant provision of the Police Act can be the object of interpretation or not, because if it can be interpreted, then the international norms can prevail. The Court held that the provisions of the Police Act can be subject to interpretation.

The police decision stated that the acts of the police were grounded on the fact that they are obliged to intervene if someone is caught during the commitment of an intentional crime. In the discussed case, the organizer of a labour demonstration primarily notified the possibility of the use of banned symbols due to the nature of the movement and he assumed the criminal consequences. In this case, the police was aware of the potential use of the red star and the nature of the event, thus the inoffensive use of the banned symbol. This way, the checking of identity, screening of clothes and arresting people was absolutely disproportionate to the acts of the demonstrators. The police acts might have been lawful but under the above-mentioned circumstances they were not proportional. All these acts have as their objective the identification of perpetrators and ensuring their presence during the criminal procedure, but in this case, it was not necessary. The Court cited the *Vajnai v Hungary* and *Fratanoló v Hungary* judgments to highlight that the legal instruments to limit the freedom of expression should be well grounded and proportional to the aim of preventing harm to the society. It even referred to the recent decision of the Constitutional Court that finally abolished the provision of the Criminal Code in question, which entered into force on 30 April 2013.⁵³

In the other similar case, the applicant wearing a red star badge participated in a demonstration on 1 May 2012. He was arrested by the police and held at

⁵¹ Case 29000-105/376-1/2013.RP (National Police Headquarters, 2013) not available, cited and referred to in case 17.K.31.995/2013/2 (Budapest Metropolitan Administration and Labour Court, 9 October 2013).

⁵² Case 17.K.31.995/2013/2 (Budapest Metropolitan Administration and Labour Court, 9 October 2013).

⁵³ Case 17.K.31.995/2013/2 (Budapest Metropolitan Administration and Labour Court, 9 October 2013).

the police station for hours. No criminal procedure was opened because of the lack of crime, but the applicant submitted a complaint to the ICPB because of the hardship he experienced. The complaint was refused, as well as his appeal to the National Police Headquarters.⁵⁴ Therefore, he appealed for a judicial remedy following the administrative decision of the police.

The court of first instance referred to the fact that the annulment decision of the Constitutional Court which deregulates the ban on red star entered into force only on 30 April 2013, thus the authorities acted in conformity with the law in force at the time of the demonstration. The Court emphasized that the policeman at site was not in that position to examine the intentions of wearing the red star. Furthermore, the fact that no criminal procedure was opened against the plaintiff is not a ground for the revision of the police action taken against him at site and at the police station. It was the normal way of administrating his behaviour as he wore a banned totalitarian symbol. The Court evoked the ECtHR case law and emphasized that it is addressed to the legislator. The policeman is not a legislator therefore he was not entitled to resolve the conflict between international obligations and domestic legal provisions.⁵⁵

The applicant appealed against this judgment. He argued that the police act was unlawful as the policemen at site did not examine the intentions of wearing the red star. In his point of view, it is not enough to prove that a behaviour formally violates the criminal law, the reasoned suspicion is not enough to arrest a person and keep him at the police station for an undetermined period especially when both of the ECtHR judgments against Hungary on the use of the red star and its relationship to the freedom of expression were well known at that time. Therefore, the policemen at site, or at least, the supreme administrative authority, the National Police Headquarter should have known that the applicant's behaviour is not in every case a danger to the society. The action of the police is unlawful not only because of this fact. If a criminal is captured, placing him in detention is to ensure that he does not abscond from participation in a criminal procedure. In the present case, the applicant did not want to impede the police procedure thus it was not necessary to hold him in custody.

The subsequent decision of the Curia reinforced the findings that had already been articulated in former decisions: it is not the duty of the policemen at site to verify neither the regulations of international conventions nor the Criminal Code; their duty was to arrest the one who is caught in the act of an intentional crime. Therefore, the police and its officers did not violate any legal provisions, including the ECtHR case law; they just respected and obeyed the rules, which referred to

⁵⁴ Case 29000/105/547-56/2012.P (National Police Headquarters, 2012) not available, cited and referred to in case 17.K.31.995/2013/2 (Budapest Metropolitan Administration and Labour Court, 9 October 2013).

⁵⁵ Case 20.K.31.328/2013/3 (Budapest Metropolitan Administration and Labour Court, 9 October 2013).

their activity.⁵⁶ They do it so faithfully, that Vajnai and his companion suffered the same whole procedure, which ended up before the ECtHR again where Hungary was condemned for the same.⁵⁷

5. Problems Revealed by the *Vajnai* Saga

The domestic application of international law is challenging. The transformation of international legal provisions into domestic ones is regulated by constitutional provisions. In this vein, the Constitutional Court held that international law is not to be adjusted to the conditions of domestic law, but rather domestic law should be adjusted to comply with international law.⁵⁸

However, conflicts of norms can always emerge in practice and it is even more problematic when the entity applying a given provision is not aware of the fact that the area in question is highly affected by international legal sources, which shall overwrite domestic ones in case of conflict. It derives from the primacy of international law, although in legal practice the international judicial interpretation of treaty based obligations cause problems. The application of a self-executing treaty causes fewer problems but as the direct effect of ECtHR judgments is not *expressis verbis* acknowledged, the effect of their content is challenged.

Since the entry into force of the modification of the law on the procedure relating to international treaties, the following provision is in force from 1 January 2012: the decisions of the organ having jurisdiction over the disputes in relation to a treaty or convention shall be obligatory in the course of interpreting it.⁵⁹ The Constitutional Court's decision 18/2004 (V. 25.) states that the jurisprudence of the ECtHR shapes and carries obligations for the Hungarian legal practice. This kind of obligation refers to the interpretation of the different provisions of the Convention, the findings of a judgment and not to the ruling of it.⁶⁰ However, there seems to be a little contradiction when the Constitutional Court stated almost ten years later, in 2013, that the judgment of the ECtHR is declarative, it does not change legal concepts. At the same time, it declares that these judgments help the interpretation and exploration of the content of fundamental rights. The content of the conventional rights is, in fact, embodied in the case law of the ECtHR, therefore they contribute to the uniform interpretation and application of the Convention

⁵⁶ Case Kfv.II.37.807/2013/4 (Curia, 12 February 2014).

⁵⁷ See: *Horváth and Vajnai v Hungary*, App. nos 55795/11 and 55798/11 (ECtHR, 23 September 2014).

⁵⁸ Case 53/1993 (X. 13.) (Constitutional Court, 13 October 1993), p. 323.

⁵⁹ Act L on the procedure related to international agreements 2005, Art. 13(1).

⁶⁰ L. Blutman (n. 27), pp. 304, 310.

itself. The Strasbourg practice defines the minimum level of fundamental right protection, but it does not impede domestic law from applying at a higher level.⁶¹ In the same decision, the Constitutional Court states that the Hungarian courts shall apply the domestic law in force even if the case before them is practically the same that has already been resolved by the ECtHR.⁶² The judgement of the ECtHR condemning Hungarian legal provisions and demanding modifications can only be taken into account by the Curia while it opens an extraordinary supervisory procedure to modify a previous judgement whose object was submitted to the ECtHR. The problem emerges when the domestic judicial remedies system is exhausted and then the applicants turn to the ECtHR, which decides in favour of an applicant against Hungary. In such cases an applicant has the right to submit a claim to the Curia to open a supervisory procedure and to reinterpret the case in the view of the ECtHR judgment.⁶³ Invoking international obligations by judicial organs is significant not only because it helps to enforce them and interpret domestic legal norms in a way that they should correspond to the assumed international obligations but on the other hand, in a more conceptual way, such kind of behaviour of national courts contributes to the practice of States as an evidence to the existence of customary international law.⁶⁴

The Hungarian law enforcement authorities are not to put aside domestic regulations in order to give effect to contrary international legal norms. The party to the dispute must follow the system of judicial remedies up to the Curia to which is the organ that is entitled to order to repeat the judicial procedure at first instance in the view of the insights of the ECtHR, as it happened to the case of *Fratanoló*.⁶⁵ According to the procedural law in force, formally this is the way of gaining justice if the ECHR guarantees a better protection of one's fundamental rights than the State regulations, whenever domestic law is not in conformity with the ECHR.

Even if remedies are available in specific and individual cases of Hungarian citizens decided at the ECtHR levels, analogous cases not taken to the Strasbourg court remain problematic. In these cases, it is up to the discretion of the judges whether they intend to pick the ECtHR standards over a contrary domestic regulation or not.

As the presented cases show, the administrative authorities and the police, do not even consider the fact that fundamental right issues might have not only domestic but international law sources that might help to explore and apply the law. However, as it is seen from the practice and the Constitutional Court statements, courts are not required at all to take into consideration ECtHR judgements even if it is clearly contrary to domestic law. The ECtHR judgments cannot have

⁶¹ Case 4/2013 (II. 21.) (Constitutional Court, 21 February 2013), para. 133.

⁶² *Ibidem*, para. 147.

⁶³ Act XIX on criminal proceedings 1998, Art. 416(g).

⁶⁴ A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57.

⁶⁵ Case Bfv.III.570/2012/2 (Curia, 10 July 2012).

direct effect and the long and costly way of gaining justice needs to be treaded even in those cases when the legal procedure was obviously superfluous and it could have been settled at the police level in the competence of administrative organs, instead of stepping to the ground of the judicial remedies.

Considering the present case of a totalitarian symbol, the new Criminal Code that entered into force on 1 July 2013 limited the ban on the use of totalitarian symbols and restricted its regulation. Now, only that activity can be qualified as crime, which is capable of disturbing public peace in a way that can hurt human dignity or memory of those who were victims of the regime represented by the symbol in question.⁶⁶ However, the list of banned symbols stayed the same and the argumentation concerning the effect of the totalitarian symbol on victims “seems to have been an additional, rather than the core, reason in the argumentation”⁶⁷ of the ECtHR judgment of *Vajnai*. Several ECtHR judgments since then stand as evidence that some Hungarian criminal courts refuse to alter their practice to bring it in line with the ECtHR case law.⁶⁸ It seems that in Hungary the complete transition to democracy is yet to come along with the proper enforcement of international obligation.

⁶⁶ Act C of 2012 on Criminal Code, Art. 335.

⁶⁷ A. Buyse, M. Hamilton, *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (CUP 2011), p. 137.

⁶⁸ R. Uitz, ‘The Illusion of a Constitution in Europe: The Hungarian Constitution Court after the Fifth Amendment of the fundamental Law’, [in:] J. Bell, M.-L. Paris (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing 2016), p. 403.

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