

Contribution of the delegation of Poland

DH-SYSC Exchange of information on the implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms, and the execution of judgments of the European Court of Human Rights

- verification of the legislation

A. Mechanisms aimed at ensuring the compatibility of draft legislation (draft statutes or executive acts) with the Convention

1. Verification of draft legislation by the Government Agent

1. As of October 2012 the Government Agent regularly analyses governmental draft legislation (draft statutes or ordinances)) with regards to its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the case-law of the European Court of Human Rights ("the Court", "ECtHR").

On the same basis, the Government Agent analyses draft governmental opinions on draft legislation proposed by other bodies (e.g. Members of Parliament).

If any potential problems in draft legislation are identified by the Government Agent, on his/her initiative the Minister of Foreign Affairs may submit comments or proposals in the framework of inter-ministerial legislative consultations conducted by the Government.

The mechanism is systematic as it concerns – in principle – all draft legislation received by the Government Agent.

It is optional as it was introduced by decision of the Minister of Foreign Affairs¹ and is implemented as part of the responsibilities of the Minister of Foreign Affairs (as a member of the Government) in the framework of general inter-ministerial consultations. It is optional also in the sense that the opinions submitted by the Minister of Foreign Affairs on the compatibility of draft legislation with the Convention are not formally binding upon other ministers, including the author of the draft.

¹ To this effect, in 2012 the competences of the Government Agent's Office (formally called "Department of Proceedings before International Human Rights Protection Bodies") at the Ministry of Foreign Affairs of Poland were extended and include the following task:

"The Department (...) issues opinions on proposed statute guidelines and draft statutes, as well as other draft legal acts as to their compatibility with international human rights protection standards, including the Convention for the Protection of Human Rights and Fundamental Freedoms, and prepares in this respect the necessary analyses;"

2. Verification of draft legislation conducted by other bodies

2. Any authority is obliged to examine and ensure, at each stage of the legislative process, the compliance with the Constitution (thus also with constitutional rights and freedoms) of any legal act it drafts. As the Convention is an integral part of the generally binding law in Poland², and by virtue of the Constitution takes precedence over statutes if they cannot be reconciled with the Convention (Article 91(2) of the Constitution in conjunction with Article 241(1)), the authorities should also examine and ensure the compatibility of draft legal acts with the Convention.

3. In accordance with the *Legislative Drafting Rules*, it is required that an analysis of the current legal order (which should be prepared before a decision is adopted to draft a new statute) should also take into account international human rights conventions ratified by Poland:

"§ 1(1). The decision to draft a statute shall be preceded by, in particular: (...)

*2) an analysis of the current legal situation taking into account European Union law, international treaties that bind Poland, **including human rights protection treaties**, as well as the legislation of international organisations and organs that include Poland as a member;*

The *Legislative Drafting Rules* were adopted by the Prime Minister's ordinance and are binding upon the governmental administration (but not on e.g. parliamentary legislative initiatives).

4. Once a draft legal act is prepared and submitted by a relevant minister, its compliance with the Convention may be examined (and challenged, if necessary) in the general process of inter-ministerial consultations and in the framework of adopting opinions on draft legal acts which involves a wide range of bodies, including those from outside the governmental administration.

5. Notably, both the Legislative Council to the Prime Minister and the Government Legislation Centre pay special attention to the compatibility of the Government's draft legal acts with the Constitution and the Convention. The standards deriving from the well-established Court case-law are referred to by these bodies in their analyses and proposals, whenever relevant. In its annual reports submitted to the Council of Ministers, the Legislative Council also draws attention to the issues related to the application of the Convention. The Supreme Court, too, is tasked with preparing opinions on draft statutes and other normative acts that form the basis for the court proceedings and functioning (it also may issue opinions on other acts, if appropriate). When preparing such opinions, the compatibility with Convention and with the standards deriving from the Court case-law may be (and often is) analysed by the Supreme Court and its expert staff. This applies, in particular, to the acts governing court procedures and guarantees included in Article 6 of the Convention. Likewise, analyses of the compliance with the Constitution and ratified international agreements, including the Convention, are often prepared by the Public

² By virtue of Article 87(1) of the Polish Constitution, ratified international agreements constitute universally binding law of the Republic of Poland. In accordance with Article 91(1) of the Constitution, a ratified international agreement (after its promulgation in the Journal of Laws of the Republic of Poland) constitutes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute.

Prosecutor General and the National Public Prosecutor, who participate in the process of submitting opinions on draft legal acts. /The above information is of an illustrative nature as there are also many other subjects that may submit opinions on draft legal acts./

6. The compatibility of draft statutes (and those in force) with the Convention (among others) may be examined also by the Parliament, specifically by the relevant Sejm and Senate committees. The Sejm's Legislative Committee may be asked by the Speaker for an opinion in case of doubts as to the possible incompatibility of a draft statute with the law. The relevant organs of both chambers of the Parliament, or even individual Members of Parliament, may raise issues as to the compatibility with the Convention, among others. Expert opinions may be commissioned from the chancelleries of the Sejm and Senate. Independent expert advice may also be sought. Moreover, other authorities and civil society organisations may (and often do) contribute with their opinions and the Convention is often referred to during the legislative work of the Parliament.

3. Examples of actions taken in order to increase the effectiveness of the verification of the compatibility of draft legislation with the Convention

a) Training of legislators

7. In 2015, a new ordinance of the Prime Minister was adopted, governing the legislative training (the professional training of legislators organised by the Government Legislation Centre). The scope of the training was extended and it currently formally includes the impact of international obligations of Poland in the area of human rights on the law-making process.

8. Even earlier though, in the framework of the legislative training courses organised by the Government Legislation Centre in the 2013/2014 and 2014/2015 academic years, the topic of human rights protection in the legislative context was introduced and more than 60 legislative trainees participated in that training.

9. In addition, in 2012–2015 the Government Legislation Centre implemented the project *Improving legislative techniques in offices supporting public authority bodies*, with the participation of the Helsinki Foundation of Human Rights. In the framework of this project, training and workshops were organised for the management staff and other staff of the Government Legislation Centre, directors of legal and legislative departments of ministries and other central offices, as well as legislative trainees. The purpose of the training was to increase the awareness of the necessity to take the Convention standards and the role of the Court case-law into account in the framework of the legislative process. In total, 23 legislative workshops were organised for 237 persons.

b) Awareness-raising of the need to take the Convention into account

10. In March 2013, the Undersecretary of State at the Ministry of Foreign Affairs and the President of the Government Legislation Centre took a joint initiative to send a letter to undersecretaries of state of all the other ministries, drawing their attention to the need to take the provisions of the Convention and its Protocols into account when drafting new legislation.

11. Various authorities consulted by the Government Agent informed that they took initiatives aimed at raising their staff's awareness of the Convention and the Court case-law standards (such as training, publishing information on the Convention and the relevant ECtHR judgments on their websites, appointing persons to follow the Court case law etc.). In

some ministries the relevant departments and their staff were asked to follow the Court case-law on a regular basis. For instance, the tasks of the Department of International Cooperation and Human Rights of the Ministry of Justice include the monitoring and analysing of the Court case-law and its impact on legal acts falling within the competence of the Minister of Justice. The Department is consulted in the preparation process of the Ministry of Justice's draft legal acts and of the Minister's opinions on the draft legislation prepared by other authorities.

c) Increasing access to the Court case-law and information thereon

12. In 2014 an agreement was signed between the Ministry of Justice, the Ministry of Foreign Affairs, the Constitutional Tribunal and the Supreme Administrative Court on translation and dissemination of the Court rulings adopted in respect of other State Parties. In 2015, the Prosecutor General acceded to the agreement. On the basis of the overviews prepared by the Government Agent, the signatories jointly select the Court judgments or decisions to be translated by them and they mutually share the translations prepared. So far, over 90 ECtHR judgments or decisions concerning other State Parties have been translated and published by the parties to the agreement.

13. The Government Agent prepared two overviews of the leading 2014 and 2015 ECtHR judgments and decisions concerning other State Parties (*i.e.* leading cases selected by the Court's Bureau). Those overviews were annexed to the 2014 and 2015 annual reports on the state of the execution of the Court judgments by Poland, subsequently adopted by the Government.

14. It is also worth noticing that the obligation placed on the competent ministers to translate judgments finding a violation of the Convention in respect of Poland is also explicitly envisaged by the *Order of the Prime Minister Establishing the Committee for Matters of the European Court of Human Rights*. All translations (more than 560 texts) are collected in an on-line database run by the Ministry of Justice. The latter also prepares and disseminates numerous publications containing analyses and comments concerning various aspects of the Convention. In addition, the Ministry of Justice distributes newsletters concerning the Court case-law in respect of Poland to a wide range of contact persons from other ministries and institutions.

/more information on the awareness-raising activities – see the reports submitted by Poland on the implementation of the Brighton and Brussels Declarations/.

B. Mechanisms aimed at ensuring the compatibility of the binding law (statutes and executive acts) with the Convention

1. Competences of the Constitutional Tribunal

a) verification of the compatibility of the legislation with the Convention upon applications of the relevant authorities

15. *Ex post* verification of the compatibility of Polish law with the Convention is conducted by the Constitutional Tribunal upon applications of the competent authorities, including

courts³. According to Article 188 of the Polish Constitution, the Constitutional Tribunal's competences encompass adjudicating *inter alia* regarding:

- the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
- the conformity of legal provisions issued by central state organs to the Constitution, ratified international agreements and statutes;

Consequently, the Constitutional Tribunal may adjudicate on the conformity of both statutes and other legal acts not only to the Polish Constitution, but also, among others, the Convention, and may declare a given legal act to be incompatible with the latter – as a result of which the relevant provisions would lose their binding force.

- b) verification of compatibility of legislation with human rights upon an individual constitutional complaint

16. In accordance with Article 79(1) of the Polish Constitution, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act, upon which basis a court or an organ of public administration has made a final decision with respect to his freedoms or rights, or his obligations specified in the Constitution.

Formally, the verification by the Constitutional Tribunal in such cases is performed according to the Constitution only. Nevertheless, bearing in mind the convergence between constitutional and conventional rights and freedoms as well as the fact that the Constitutional Tribunal often relies on the Convention and the Court case-law in the reasoning of its judgments, constitutional complaints in practice often serve to eliminate provisions which are incompatible with the Convention from the legal order.

**

17. The above mechanisms result in the legal provisions, found by the Constitutional Tribunal to be incompatible with *e.g.* the Convention, being removed from the legal system (together with their legal effects). A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or

³ The President of the Republic, the Marshal [Speaker] of the Sejm, the Marshal [Speaker] of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights [Ombudsman] may make applications to the Constitutional Tribunal to adjudicate the conformity of all legal acts. An application may be also submitted by the National Council of the Judiciary regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges. Also some other bodies (the constitutive organs of units of local government, the national organs of trade unions, as well as the national authorities of employers' organizations and occupational organizations, as well as churches and religious organisations) may submit such applications if the normative act relates to matters relevant to the scope of their activity (Article 191 of the Polish Constitution).

Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court (Article 193 of the Polish Constitution).

settlement of other matters was issued, is a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to such proceedings (Article 190(4) of the Polish Constitution).

18. A special consultation procedure is also envisaged by the *Work Rules of the Council of Ministers*. The Government Legislation Centre, which prepares the position of the Government in the proceedings before the Constitutional Tribunal, consults the Minister of Foreign Affairs if it is justified by the subject of the case pending before the Constitutional Tribunal, e.g. when it relates to the compatibility of a normative act with international regulations concerning human rights, in particular the Convention (the latter is specifically mentioned in the *Work Rules*).

“§ 156a. The Council of Ministers or the Prime Minister shall present a position on the case examined by the Constitutional Tribunal, hereinafter referred to as the “position”, after the delivery of notification that an application, legal question or a constitutional complaint has been lodged with the Constitutional Tribunal.

§ 156b(1). The draft position shall be prepared by the Government Legislation Centre. (...)

3. If warranted by the subject matter examined by the Constitutional Tribunal, in preparing a draft position, the Government Legislation Centre shall seek the opinion of: (...)

2) the Minister of Foreign Affairs in respect of the compatibility of provisions of a legal act with international human rights regulations, in particular with the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (...).”.

This procedure made it possible for the Government Agent to signal to the Government Legislation Centre, and thus to the Constitutional Court, for instance, some legislation which had been found problematic by the ECtHR in the case of *Kędzior v. Poland*. The position presented by the Government Legislation Centre in the proceedings before the Constitutional Tribunal reflected the position of the Government Agent and the Constitutional Court adopted a judgment declaring the legal provisions at stake to be incompatible with the Polish Constitution.

2. Competences of the courts

19. If a statute contains provisions that cannot be reconciled with the Convention, the Convention takes precedence in accordance with the Polish Constitution (on the basis of its Article 91(2) in conjunction with Article 241(1)). In consequence, if the courts encounter such a situation in the context of court cases examined by them and the incompatibility of a statute with the Conventions is of such nature that it may not be removed, by e.g. interpretation, they may not rely on such provisions when delivering their decisions. In such event, the courts may address a question of law to the Constitutional Tribunal (see footnote no. 3 above). In turn, in case of under-statutory (executive) regulations, such as ordinances, the courts themselves also may assess the compatibility thereof with supreme acts (among them the Convention) and may omit incompatible acts when adjudicating cases pending before them.

20. It would be useful to highlight also the following practical mechanism helping the law-maker to adjust the legislation. In accordance with Article 5 of the *Act on the Supreme Court*, the First President of the Supreme Court submits to the competent authorities his/her comments concerning shortcomings or gaps in the binding law that must be removed in order to ensure the coherence of the Polish legal system. For example, in the information

submitted in 2015, the First President of the Supreme Court pointed to a gap in the *Act on Proceedings in Cases Concerning Minors*. This gap had resulted in the inappropriate application of the law by the authorities (the same problem was identified by the ECtHR in the case of *Grabowski v Poland*).

3. Verification of the legislation in the process of the execution of the Court judgments

21. A provision concerning specifically the execution of the ECtHR judgments that require legislative changes is included in the *Order of the Minister of Justice of 10 September 2015 on Legislative Work in the Ministry of Justice*. It reads:

"§ 4(1). The Legislative Department shall institute legislative works: (...)

3) upon its own initiative, especially if it is necessary to implement a statutory authorisation, a ruling of the Constitutional Tribunal, the Court of Justice of the European Union, the European Court of Human Rights, to implement European Union legislation or an international treaty, to fulfil the submission by the Prosecutor General, the Human Rights Defender, the Commissioner for Children's Rights, the Codification Commission or by an organisational unit subordinate to, or supervised by the Minister of Justice, or to implement a decision of a relevant committee of the Council of Ministers or a decision of the Council of Ministers."

22. In annual reports on the execution of the ECtHR judgments by Poland, adopted by the Government, there is a separate annex with information on the outstanding legislative work which is necessary in order to ensure the execution of ECtHR judgments pending before the Council of Europe's Committee of Ministers in respect of Poland.

23. On 23 April 2015, a comprehensive amendment to the *Order of the Prime Minister Establishing the Committee for Matters of the European Court of Human Rights* came into force. It improves the process of the execution of the Court judgments, including, where relevant, the adoption of the necessary legislative reforms.

The 2015 amendment sets out obligations and introduces a detailed schedule for the submission of action plans and action reports by the relevant ministers. It also provides deadlines for the translation of judgments, as well as the for dissemination of the Court judgments and decisions among the relevant stakeholders. The amendment is based on the Committee of Ministers' regulations regarding the deadlines and definitions of general and individual measures as well as requirements concerning action plans/reports.

The 2015 amendment increases the transparency of the tasks incumbent on individual ministers in the process of the execution of judgments. Thus, it also increases their accountability for the timely introduction of the necessary legislative and other reforms and contributes to the timely submission of the required documents to the Committee of Ministers. It has already accelerated the execution process, including the adoption of amendments to the law which are necessary to conform to the Convention.

C. Mechanisms aimed at ensuring the compatibility of the administrative practice with the Convention

24. In so far the administrative practice is formally regulated (in executive acts such as ordinances or orders adopted by the Government, individual ministers or other competent authorities) the mechanisms of the verification as described in Chapter A and B apply.

25. In so far the administrative practice takes the form of administrative decisions in individual cases, it is primarily the role of administrative courts to ensure the compatibility of administrative decisions with the law, including the Convention – and it is performed on the basis of complaints and cassation appeals introduced by the applicants in the relevant court procedures.

26. Among the tools, which may contribute to ensuring the compatibility of practice with the Convention, one could also point that some statutes adopted in Poland refer to the Convention directly. For instance, a direct reference to the Convention was added, as of 6 January 2017, to the *Act on Complaint about Breach of the Party's Right to Have a Case Examined in an Investigation Conducted or Supervised by a Prosecutor and in Judicial Proceedings without Undue Delay* of 17 June 2004:

"Article 1(3). Provisions of the Act shall be applied in accordance with the standards arising from the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome this 4th day of November 1950 (...)."

Also the statutes that govern proceedings concerning foreigners include direct references to the Convention and thus the latter should be taken into account by the relevant border and immigration authorities.

27. In 2015, the Prime Minister obligated all ministers to disseminate the Court judgments (and also decisions approving friendly settlement or unilateral declarations) concerning the violations of the Convention in the areas falling within their competence. Thus, they are obliged to disseminate the Court rulings among all the authorities concerned by the violation found by the Court. The obligation derives from new § 4a of the *Order of the Prime Minister Establishing the Committee for Matters of the European Court of Human Rights*, which reads:

"§ 4a(1). The Committee shall perform the task ... with respect to the monitoring of the execution of judgments of the Court on the basis, in particular, of documents and information submitted by the minister competent with respect to the substance of the violation found by the Court: (...)

2) information on the actions aimed at disseminating a judgment among the entities to whose actions or omissions the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms found by the Court applies or may apply;"

"§ 4a(2). The Committee shall perform the task [...] with respect to the monitoring of the execution of decisions of the Court on the basis, in particular, of information provided by the minister competent with respect to the subject of the decision on disseminating information about the substance of a friendly settlement or unilateral declaration together with information on the applicable Convention standard as determined in the case-law of the Court among the authorities whose action or omission was the subject of the application to the Court."

28. The presidents of common courts are also now required to disseminate the Court rulings among judges and other court staff. Depending on the nature of the case, the president familiarises either those persons who had adjudicated a case in which a violation of the Convention was found, or all the judges, assessors and court referendaries of a given sector with the Court ruling. This obligation derives from the *Rules and Regulations of Common Court Operation*⁴:

"§ 34(4). Once information is received about a ruling of the European Court of Human Rights or other international body finding a violation of the Convention for the Protection of Human Rights and

⁴ Ordinance of the Minister of Justice of 23 December 2015 – *Rules and Regulations of Common Court Operation*.

Fundamental Freedoms or other international treaty, or about a ruling of the Court of Justice of the European Union in Luxembourg delivered in the case examined on the basis of a preliminary question from a Polish court, a court president shall acquaint himself or herself with the ruling and shall order that judges, court assessors and referendaries who had adjudicated the case in which a violation was found should acquaint themselves with the relevant ruling, and if the ruling concerns a legal question where the case-law was not uniform, the court president shall order all judges, court assessors and referendaries in a given sector to acquaint themselves with such ruling.”.

The Ministry of Justice notifies every unit of the administration of justice whose action or omission led to the Court finding a violation of the Convention, as well as the authorities that supervise them.

29. Actions undertaken by the Public Prosecution are also worth mentioning here as an example of other forms of ensuring the compatibility of practice with the Convention. In order to ensure that the manner of conducting preparatory proceedings complies with the obligations of the effective investigation deriving from the Convention, the proceedings in cases related to the alleged human rights violations (such as *e.g.* cases of the alleged abuse of force or extortion of testimonies by the Police officers or other public officials, or in cases concerning hate crimes) were subject of the Public Prosecutor-General's interventions and guidelines addressed to the prosecution units. The guidelines determine the rules of conducting the proceedings in such types of cases and aim at eliminating the shortcomings. Public prosecutors are obligated to obey. Furthermore, the National Public Prosecutor's Office and regional prosecution units monitor the proceedings concerning such types of crimes on a permanent basis. Examinations of the case-files are conducted at regular intervals in order to verify if the proceedings are conducted properly. The conclusions deriving from these analyses are sent to all subordinate prosecution units and also serve for the training purposes. Also the Court rulings concerning the applications against Poland raising complaints about the actions of the Public Prosecution are distributed by the National Public Prosecutor's Office to the relevant prosecution units.

30. In both the Police and the Border Guard, plenipotentiaries for human rights were appointed both at the central level and in the respective field units. Their tasks contribute to ensuring the conformity of action of the Police and Border Guard officials with the Convention. The work of the Committee evaluating the implementation of the European Union *acquis* falling within the competence of the Border Guard, which operates pursuant to the Border Guard Commander in Chief's decision, is also worth mentioning here. It assesses Polish law and the Border Guard's internal regulations from the perspective of EU law and the case-law of the Court of Justice of the EU but it also takes into account the Convention and the ECtHR case-law in its analyses. As a result of the Committee's work, many legal acts dealing with the Border Guard were amended to ensure their conformity with human rights.

D. Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

31. The process of the execution of the ECtHR judgments adopted in respect of Poland by the relevant ministers is monitored by the above-mentioned Inter-ministerial Committee for Matters of the ECtHR chaired by the Government Agent. The necessary legislative work is regularly discussed at the plenary meetings of the Committee as well as in the framework of bilateral contacts between the Government Agent (the Committee's Chair) and the relevant ministries.

32. Moreover, annual reports on the execution of the ECtHR judgments by Poland include an annex with detailed information on the types of measures required to implement the respective judgments of the Court (changes to the law or to the practice of its application). This may serve as a basis for the possible evaluation of the progress made.

33. The Government Agent regularly analyses the case-law of the Court in order to identify the main reasons behind the Court judgments finding a violation of the Convention by Poland. It may be concluded therefrom that the vast majority of the violations found in respect of Poland derived from the inappropriate application of the law by courts or administrative authorities, rather than from the legal provisions as such. In those cases, where the violation was related to the binding law, it was mostly because of its insufficient character rather than its direct contradiction to the Convention.