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**«ENHANCING NATIONAL MECHANISMS FOR EFFECTIVE
IMPLEMENTATION OF THE EUROPEAN CONVENTION ON
HUMAN RIGHTS»**

**The Constitutional Court of the Russian Federation
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22 – 23 October 2015

LIST OF REPORTS

LIST OF REPORTS

prepared by the national rapporteurs on the basis of their experience in the area¹

GENERAL OVERVIEW OF THE MEMBER STATES' PRACTICES

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**Constitutional Court of the Russian Federation
22 – 23 October 2015**

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Executive summary

Following the Declaration adopted at the Brussels Conference in March 2015, it has become urgent to analyze the effectiveness of the national mechanisms States parties to the ECHR have adopted and experienced so far in conformity with Recommendation (2008)2 on efficient capacity for rapid execution of judgments of the European Court of Human Rights. During the last fifteen years academics have reflected on factors that account for differences in state compliance; they concur with the importance to be given to management capacity and infrastructure.

This report seeks to provide an updated overview of the national mechanisms and good practices with regard only to the implementation of general measures following a judgment of the European Court of Human Rights in the 38 state parties which had to be covered. It is based mostly on the replies provided by the government agents to a questionnaire prepared by the Council of Europe. The questionnaire covers a certain number of topics linked to the role played by various actors (notably the government agent, the executive, the legislative and the judiciary) with regard to the implementation of general measures and the degree of synergy. In order to offer a coherent picture, this report is divided into three main issues: the synergies around the government agent office, the interaction between the executive and the legislative for the adoption of general measures and the role played by national courts. It outlines ideas and options for discussion between governmental experts and concludes that further steps could be adopted on that preliminary basis. This author wishes to recall that the aim of this study is not to impose a one-size-fits-all model, but rather to open discussion on the need and the ways to reinforce domestic capacities in States with due respect for the principle of shared responsibility.

The principle of separation of powers and balance between the executive, the judiciary, the legislative and other stakeholders (civil society, Ombudsmen and National Human Rights institutions) has, with various degrees, been challenged by the requirements linked to the implementation of the judgments delivered by the European Court of Human Rights. Thus one of the conclusions we have come to is that these domestic structures show a predominance of the executive. The involvement of the legislative remains too limited whereas Tribunals seem to benefit from more discretion. With regard to general measures, surprisingly, the government agent does not always play a central role and many stakeholders are not sufficiently involved at the domestic level: not only parliamentarians, but also civil society, the Ombudsmen, national Human rights institutions. Some recent initiatives deserve to be disseminated as they may inspire other countries. The author of this report is fully aware of the vast variety of situations among Europe and some tools useful in some countries may be counterproductive in other States. This is why some more profound reflections need to be launched within the Council of Europe.

Besides the diversity of solutions, this report could help to reveal the failures of domestic capacities in too many States in order to implement general measures required by some of the judgments delivered by the European Court of Human Rights, may be overestimating the possibilities for the government agent and the executive to make rules change.

This Report has taken note of the Declaration of the Brussels Conference and the subsequent decisions adopted at the Ministerial Session on 19 May 2015 calling upon the Committee of Ministers “to take stock of the implementation of, and make an inventory of good practices relating to Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights and, if appropriate, provide for updating the Recommendation in the light of practices developed by the States Parties”. This work will be carried out in the next biennium by the Committee of Experts on the system of the European Convention on Human Rights¹ (DH-SYSC; subordinate body of the Steering Committee for Human Rights (CDDH)).

This report could provide preliminary elements to the work that will be carried out by this Committee. This being said, we interpret our role in our capacity as an independent expert to conclude this report with a precise recommendation. We thus consider that time has come not only for exchange of good practices but it has become important to go further Recommendation 2008(2) in order to draw up a more precise framework in order to give States the opportunity to enhance the domestic capacities to better implement the judgments delivered by the European Court of human rights. This could be made through amendments to the Recommendation or Appendix to it without infringing the principle of subsidiarity.

¹ See the Draft Terms of Reference of DH-SYSC, expected result iv); CDDH, Report of the 83rd meeting, 17 July 2015, doc. CDDH(2015)R83.



This is a condition for States to face the challenge of shared responsibility and an absolute necessity for the whole system to move forward as smoothly as possible.

Introduction

Obviously, for many years, “the Convention system as a whole (...) has been weaker in building up the domestic capacity of states to ensure compliance”². The previous intergovernmental Conferences (Interlaken, Izmir, Brighton and notably Brussels) have emphasized the importance of shared responsibility and of improving domestic mechanisms in order to better implement the judgments of the European Court of Human Rights. Following the Declaration adopted at this latter Conference in March 2015³, it has become urgent to analyze the effectiveness of the national mechanisms States parties to the ECHR have adopted and experienced so far in conformity with Recommendation (2008)2 on efficient capacity for rapid execution of judgments of the European Court of Human Rights. A first compilation of information was made in view of preparing this Recommendation in 2007⁴, and two main other reports offered an overview of the domestic capacity to allow a smooth implementation of the judgments (the round table held in Tirana in 2011 and the round table on Actions plans and reports in 2014)⁵. Indeed the participants to the Round Table on Action Plans and Reports “considered that it would be useful to update the compilation of domestic mechanisms for the rapid implementation of the Court’s judgments which had been prepared in the context of the Tirana Round-Table (15-16 December 2011)”⁶.

During the last fifteen years academics have reflected on factors that account for differences in state compliance. Some studies have revealed that strong democracies tend to better implement judgments than other States⁷. “Yet there is now a broad consensus that the influence (...)” of the factor linked to the incorporation of the ECHR and its rank in the domestic legal order “is at best mixed and decisively mediated by other factors such as the (...) relationship between the judiciary and the government, among others”⁸. Academics agree that “successful state compliance with international and human rights law needs to rely both on political will and on management capacity and infrastructure”⁹. The influence of legal

² B. Cali, in Parliaments and the European Court of human rights, 12 May 2015, Senate, Warsaw, 15.

³ High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility”, 27th March 2015, http://justice.belgium.be/fr/binaries/Declaration_EN_tcm421-265137.pdf (12 September 2015).

⁴ DH-PR(2006)007rev Bil, 5 January 2007, CDDH (DH-PR), Information on execution of judgments of the European Court of human rights at the national level.

⁵ Round table on Recommendation 2008(2) of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, synthesis of the replies, 15-16th December 2011 (http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/HRTF/TR%2012.11/Overview_questionnaire.pdf) (13th September 2015).

⁶ “Round Table on Action Plans and Reports in the twin-track supervision procedure”, 13-14th October 2014, 2(http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Tables_rondes/TR_Strasbourg_13-14%20octobre%202014/TR_Strasbourg_Conclusions_EN.pdf) (13th September 2015).

⁷ A. von Staden, “Rational choice within normative constraints: compliance by liberal democracies with the judgments of the European Court of human rights”, online SSRN database, February 2012, 17ff.

⁸ D. Anagnostou, “Introduction, Untangling the domestic implementation of the European Court of Human Rights’ judgments”, in The European Court of human rights, Implementing Strasbourg’s Judgments on Domestic Policy, ed. D. Anagnostou, 11-12.

⁹ D. Anagnostou & A. Mungiu-Pippidi, “Domestic implementation of human rights judgments in Europe: legal infrastructure and government effectiveness matter”, EJIL 2014, 25(1), 205-227, 226.



and political infrastructure is essential. It seems obvious that “the execution of human rights judgments is more effective in states where sufficient resources and expertise are allocated to government and other state branches to deliver policy implementation and reform (...)”¹⁰. Authors have come to the conclusion that “besides the allocation of sufficient institutional and financial resources, expeditious compliance also requires diffused human rights awareness, expertise, and sustained commitment among a significant cross-section of executive, parliamentary, and administrative officials, independent of the will of the government of the day”¹¹. In an in-depth study using a database of nearly 1000 leading cases, the authors¹² have come to the conclusion that “the importance of bureaucratic capacity decreases strongly and significantly the longer a case remains pending and the greater the political opposition. By contrast, domestic political constraints initially slow down the implementation of judgments. Yet, as judgments are pending longer, executives with high legislative and judicial constraints are less able to resist pressures to comply than those with fewer constraints. In addition, while new democracies implement some cases more quickly, the problem cases that last longer are less likely to be resolved when they concern a new democracy or a non-democracy than when they involve a stable democracy”¹³. With regard to political willingness, “the personal commitment and influence of individuals in high-level positions within the administrative machinery” may be decisive¹⁴. Other factors, which are much more difficult to measure, are the political party interests and public attitudes which may influence the implementation in some countries.

This report seeks to provide an updated overview of the national mechanisms and good practices with regard only to the implementation of general measures following a judgment of the European Court of Human Rights in the 38 state parties under scrutiny. It is based mostly on the replies provided by the government agents to a questionnaire prepared by the Council of Europe¹⁵. The questionnaire was composed of seven groups of questions and an additional opened question. Indeed the Conference in Brussels called upon States parties to “foster the exchange of information and best practices with other States Parties, particularly for the implementation of general measures”¹⁶. Moreover this report drew upon my previous expertise and publications on the issue of the implementation of the judgments of the European Court of Human Rights, on relevant documentation from the Council of Europe and previous publications on this topic, notably the seminar held in 2008 on government agents¹⁷ and the round table on Recommendation 2008(2) held in Tirana in 2011¹⁸.

The author of this report wishes to warmly thank the government agents and/or legal experts sitting at the CDDH who kindly contributed to the preparation of this report (by sending

¹⁰ D. Anagnostou & A. Mungiu-Pippidi, “Domestic implementation (...)”, 221.

¹¹ D. Anagnostou & A. Mungiu-Pippidi, “Domestic implementation (...)”, 226.

¹² S. Grewal & E. Voeten, “The politics of implementing European Court of human rights judgments”, SSRN Electronic Journal, jan. 2012.

¹³ S. Grewal & E. Voeten, “The politics (...)”, 35.

¹⁴ D. Anagnostou, “Introduction, Untangling (...)”, 18.

¹⁵ See Appendix 1.

¹⁶ Point B.2.E.

¹⁷ The role of government agents in ensuring effective human rights protection, Seminar organised under the Slovak chairmanship of the Committee of Ministers of the Council of Europe, 3-4 April 2008, Proceedings, Council of Europe, 2008.

¹⁸ Round-table on Recommendation 2008(2) of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, “Synthesis of the replies by member States to the questionnaire on the domestic mechanisms for rapid execution of the Court’s judgments”, prepared by the Secretariat, 15-16 December 2011.



replies by written and/or by oral¹⁹) but, at the same time, regrets that information could not be obtained for some countries or that some replies were too brief or abstract so that they could not be exploited in this analysis. I conducted four interviews in Strasbourg (with the government agents for Albania, Andorra, Moldova and Poland) and had phone conversations with the government agents of Belgium and Monaco. All these direct exchanges proved to be much more instructive and detailed so it helped me to identify new concerns. Through the exchanges I had, I noticed a real curiosity to know what could be done to improve the process. Some recent changes occurred in a few countries (notably Poland and Moldova²⁰) and in other countries some current reflections are being conducted in order to consider the best way to enhance the efficiency of national mechanisms (Norway, Belgium, Luxembourg).

The questionnaire covers a certain number of topics linked to the role played by various actors (the government agent, the executive, the legislative and the judiciary) with regard to the implementation of general measures and the degree of synergy. In order to offer a coherent picture, this report is divided into three main issues: the synergies around the government agent office, the interaction between the executive and the legislative for the adoption of general measures and the role played by national courts. It outlines ideas and options for discussion between governmental experts and concludes that further steps could be adopted on that preliminary basis. This author wishes to recall that the aim of this study is not to impose a one-size-fits-all model for the mere reason that such a unique model can't exist because of the diversity in Europe²¹, but rather to open discussion on the need and the ways to reinforce domestic capacities in States with due respect for the principle of shared responsibility.

I/ The role of the government agent with regard to general measures

The Conference held in Brussels called upon the States to “develop and deploy sufficient resources at national level with a view to the full and effective execution of all judgments, and afford appropriate means and authority to the government agents or other officials responsible for coordinating the execution of judgments”. States have set up government agents with a wide array of models it is important to recall as it has an impact on the procedure for the adoption of general measures (A). A more puzzled and less rigorous picture appears as to the synergy mechanisms surrounding the government office, such synergies being fundamental for the effectiveness of the general measures to be drafted (B).

A/ The institutional set-up of the Government Agent's Office

Following Recommendation 2008(2), the government agents have all been entrusted with the role of general coordination (as “an agent is often best placed to initiate and co-ordinate

¹⁹ 29 of the 38 States concerned sent replies; despite several reminders, it was not possible to get information for the others. It happened that additional information was asked after receiving the first reply, this is why I may refer to the 2nd reply sent by government agents in this report.

²⁰ The English translations of the very recently approved legislations are in Appendix 2 and 3. I wish to thank the government agents who provided an unofficial translation.

²¹ An opinion shared by NGOs : see the Joint NGO Statement on the Draft Brussels Declaration on the « Implementation of the ECHR, Our shared responsibility », 6 March 2015.



the adoption of the various measures required at national level for executing a judgment”²²) and in nearly all the national systems covered by this study a role of defining and triggering the general measures to be adopted.

However two major models exist as to the status of the government agent: either he/she works under the auspices of a particular Minister (Ministry of Justice - this is the case for a majority of States-, Ministry of Foreign Affairs and Ministry of Finance), either he/she has a separate office (being situated in a more generalized department under, for instance, the auspices of the Prime Minister). Each model has drawbacks and advantages depending on the legal and political culture of the State.

- As already mentioned in 2011 (and some government agents reiterated this same benefit: **Belgium, Moldova and Monaco**), “the fact that the Ministry of Justice will normally have expertise as regards the requirements of the Convention and is usually involved in the drafting of all legislation may be of benefit for the execution process. In addition, in some States it generally has direct contacts with the judiciary”²³. *It is instructive to note that in Monaco, following the Order n° 4.025 on 9 November 2012, the Human Rights Body was removed from the Department of external relations to the Department of legal affairs. This change has facilitated the contacts between the government agent with the two other bodies within the Department of legal affairs, that is the contentious body and the body in charge of drafting legislation. The change was made for practical reasons: it was realized that regular cooperation with the lawyers working for the Ministry of Justice was required and that this reform would be useful in order to speed up the procedure and to improve the responsiveness from other bodies. According to the government agent, this change really improved the synergy between stakeholders for a better implementation of the general measures*²⁴. *It would be helpful to consider how this rewarding testimony could help other delegations.*
- The fact that the government agent works within the Ministry of Foreign Affairs may have an impact on the political willingness to implement cases depending on the States²⁵. Yet if the government agent works under the Ministry of Foreign affairs, it is fundamental to ensure a very good cooperation with the Ministry of Justice.
- In the framework of the second model, the government agent may benefit from more respect and so “be at a higher political level”. States who have favored this second model seem to recognize more powers to the government agent and the responsiveness of other public actors can be reinforced. *In Greece, the government agent is the President of the State Legal Council, a quasi-judiciary body placed under the auspices of the Minister of Finance. The members of this Council give legal advices to all public actors and are fully respected. In Spain, “it is also of great help that the Agent of Spain is a member of the Office of the State Attorney General”²⁶, under the auspices of the Ministry*

²² P. Boillat, Concluding remarks, in *The role of government agents in ensuring (...)*, 115.

²³ Synthesis of the replies, p.3.

²⁴ E-mail dated 11th September 2015.

²⁵ E. Mottershaw & R. Murray, « National Responses to Human Rights judgments : the need for government co-ordination and implementation », 2012 EHRLR 6, 639 & F., 649: “one advantage in locating a co-ordinating role with the Government Agent in the Ministry of Foreign Affairs, which has both the role of implementing judgments as well as liaising with Strasbourg rather than relying on the key affected department, is the likelihood of stronger will to see the case implemented”. D. Anagnostou & A. Mungiu-Pippidi, “Domestic implementation (...)”, 223: the remark that “staffed by small numbers of diplomats, administrative officials, and legal experts, the MFA-dominated implementation structures lack the political weight to influence the law- and policy-making processes in parliament and in the government” was made with regard to the Greek and Romanian models.

²⁶ 2nd Reply to the questionnaire, E-mail dated 20th March 2015: “The Office (...) has horizontal functions that span to all the Ministries, being in close contact with the high officials of all of them”. So no contact persons would be required.



of Justice but with the rank of Under-Secretary of State. **In Cyprus**, since 2004 the Attorney-General with his/her Law Office (and a Human Rights Sector Registry being in personal contact with people in Ministries and at the Department for the execution of judgments in Strasbourg) is a highly respected institution independent from other powers who gives advices to Ministries of Justice and Foreign Affairs and prepares legislation. Even more interestingly, a major change occurred in 2012 **in Croatia**: the government agent office was transferred from the Ministry of Justice to a separate entity under the auspices of the Prime Minister. "This further allowed for development of specific mechanisms aimed at improving the means by which the execution of European Court's judgments is conducted within the domestic system »²⁷. However, in **Azerbaijan**, the fact that the government agent is appointed by the President of Azerbaijan, and that the Office is "a structural body of the Human rights Defence Section under the Department on Relations with Law Enforcement Agencies of the Presidential Administration"²⁸, which is quite unique in the European landscape, may lead to more dependence and to over-politicize the issue of the implementation of the judgments.

It seems to us that the following issues deserve further reflections:

- (a) The quality of relationship between the government agent and the Permanent Representation on the one hand, the Ministry of Foreign Affairs on the other hand when the government agent office does not act under the auspices of this latter;
- (b) Whether specific measures have been adopted in order to facilitate contacts and cooperation between the government agent, the Permanent Representation in Strasbourg and the Ministries of Justice and Foreign Affairs. It appears that direct correspondence between the Department for the implementation of the judgments in Strasbourg and the government agent could accelerate the procedure;
- (c) When the government agent office does not operate under the ministry of Foreign Affairs, the communication with Strasbourg through this latter Ministry may raise difficulties.
- (d) Each State should engage a reflection on whether the model adopted is the best suited to the domestic situation, notably whether this Department to which the government agent office is attached, is "able to link across the spectrum"²⁹. In some countries, where there is reluctance to give more authority to one Department/Ministry, it could be helpful to enact a Memorandum of Understanding in order to clarify the relationship between the various stakeholders³⁰. *Mixed models are also feasible: Moldova has a sort of mixed status; according to the law recently approved, the government agent working at the Ministry of Justice, would be subordinated both to the Prime Minister and the Ministry of Justice*³¹. **Austria** offers also a mixed model as detailed below.
- (e) We got the evidence through the replies and interviews that some government agents are middle or low ranking civil servants, and do not have the authority required in order to overcome domestic differences and so allow a smoothly and quick implementation. This concern certainly deserves further reflection.

²⁷ Replies to the questionnaire, 4th March 2015.

²⁸ Execution of judgments of the European Court of human rights in Azerbaijan, Status Quo upon Azerbaijan's chairmanship of the Committee of ministers of the Council of Europe, Free Expression Observatory, MRI, May 2014, 13, 14: "(...) the office is largely dependent on the position of the Presidential Administration".

²⁹ E. Mottershaw & R. Murray, « National Responses (...) », 652.

³⁰ This suggestion was made by E. Mottershaw & R. Murray, « National Responses (...) », 652. For these authors, "implementation could be considerably enhanced by clarity on particular aspects –responsibility for disseminating information, responsibility for devising the substantive components of the government response and responsibility for ensuring compliance with the procedural requirements of the CoM".

³¹ Chapt.2, Art.3(3).



- (f) Another concern which seems to still exist in some countries (like **Azerbaijan**³²) is linked to the dual mission allocated to the government agent, representing the State before the European Court of human rights and being in charge of supervising the implementation of the judgments when the Court has concluded to a violation of the ECHR. More reflection should be carried out in order to see what further steps could be taken in order to overcome this difficulty.
- (g) Government agents or members of his/her office would greatly benefit from the attendance at the DH meetings of the Committee of Ministers in Strasbourg. As noted by G. Meyer, “to a large extent, experience shows that their attendance at the human rights meetings contributes to effective execution”³³. It obviously helps to clarify what is expected for each specific case³⁴ and would be an opportunity to exchange with other government agents (round tables on a specific issue could be organized in parallel with each DH meeting) and with the Department for the implementation of the judgments. In 2008 several government agents considered it very useful to organize regular meetings with the Department for the implementation of the judgments³⁵. It could also facilitate communication with the Permanent Representation in Strasbourg. The question whether we should come to impose an obligation for the government agents (or a civil servant of the government agent’s office) to attend DH meetings of the Committee of Ministers deserves to be raised today. The current practice of exchange of information between government agents is helpful³⁶. *The expert for Armenia mentioned the fact that “the Armenian authorities are considering the possibility of launching the official website of the Government Agent before the European Court of Human Rights which will also contribute to the wide dissemination and publication of the materials relevant to the activities and practice of the Court, as well as to the transparency of the process of execution of Court’s judgments and decisions »*³⁷.
- (h) One of the issues which need to be raised is the lack of (human) resources of such bodies. Unfortunately no specific question had been formulated on this aspect. *This concern emerged during the interview we had with the Belgium expert who mentioned the fact that the government agent is currently assisted by three co-agents, which is largely insufficient. Agents’ offices may be overloaded with preparing responses to the Court*³⁸. In **Poland** the government agent body has been reinforced in the last ten years (in particular a Government Co-Agent was appointed by the Minister of Foreign Affairs of Poland), which explains, among other factors, why more and more Polish cases could be closed before the Committee of Ministers³⁹. In 2008 the **Ukrainian** government agent deplored the fact that his office comprised “just nine staff” and that lawyers do not have a good knowledge of the ECHR so that the power (recognized in the 2006 provisions) to regularly check the compatibility of existing legislation with the ECHR and then refer to the Cabinet for reforms got paralyzed⁴⁰. The need to reinforce such bodies has been emphasized in the past⁴¹. “A powerful

³² Execution of judgments of the European Court of human rights in Azerbaijan, (...), 14.

³³ G. Meyer, Theme III, in The role of government agents in ensuring (...), p.92.

³⁴ M. Pirosova, Theme III, in The role of government agents in ensuring (...), p.92.

³⁵ P. Boillat, Concluding remarks, in The role of government agents in ensuring (...), 115.

³⁶ Interview with the government agent from Andorra (2nd February 2015).

³⁷ Reply to the questionnaire, 26th February 2015.

³⁸ E. Mottershaw & R. Murray, « National Responses (...), 645.

³⁹ “Compared to 2011 when 58 cases were closed, in 2012 this number increased to 164 cases, going up to 278 cases in 2013 and reaching 352 closed cases in 2014. Since April 2012, Poland has submitted more than 90 action plans and action reports to the Committee of Ministers”. (Reply to the questionnaire, 16th February 2015).

⁴⁰ Y. Zaytsev, Theme II, in The role of government agents in ensuring (...), 46-47.

⁴¹ GT-DH-PR A (2006) 003, Strasbourg 12 December 2006, Ensuring the existence of effective means at domestic level for the speedy execution of the European Court’s judgments, *Avenues for reflection proposed by the Department for the Execution of Judgments of the Court*.



and resource-endowed centralized coordinating structure is especially important if we consider that domestic institutions can, and often do, have divergent preferences and priorities regarding human rights, which may constrain or delay the implementation of different Strasbourg Court rulings⁴². It was noted in the past that some government agent offices lack resources⁴³ and that the efforts spent on the issue of the implementation of the judgments can't be given at the detriment of the time to be spent on the preparation of the State's defense before the Court⁴⁴.

B/ The networks surrounding the Government Agent's Office and the concern of dissemination and synergies

In a certain number of States there seems to exist a legal framework or basis explaining the involvement of the respective bodies (Ministry of Justice and Ministry of foreign affairs, and other stakeholders). In others like **Azerbaijan** the process seems to rely on "the prerogative of the Office of the Government Agent, which decides on their involvement on a case-by-case basis"⁴⁵.

It is fundamental that government agents "liaise regularly with all relevant domestic authorities, including the judiciary, to acquire information on the general measures taken/envisaged to execute the Court's judgments"⁴⁶. Undoubtedly "the flow of timely and detailed information between stakeholders within the country is an important component of implementation"⁴⁷. "A central coordinating point has the potential to improve gathering and disseminating information"⁴⁸. In Brussels in March 2015, the Conference called upon State parties to "establish "contact points", wherever appropriate, for human rights matters within the relevant executive, judicial and legislative authorities, and create networks between them through meetings, information exchange, hearings or the transmission of annual or thematic reports and Newsletters »⁴⁹. Both these aspects may be dependent on the status recognized to the government agent.

*Contact persons have been appointed within other bodies in order to facilitate dissemination and cooperation. In **Luxembourg**, a contact person has been appointed at the Ministry of Justice because many cases have involved this Ministry; also the Attorney general got involved (with a personal follow-up) when judicial issues were at stake. "If other Ministries are concerned, contact persons from their services are nominated depending on the violation found by the court, always at the highest possible level within the competent Ministry concerned"⁵⁰. States having a federal structure have been obliged*

⁴² D. Anagnostou & A. Mungiu-Pippidi, "Domestic implementation (...)", 222.

⁴³ Bulgaria, Romania, Russia: M. Suchkova, "An analysis of the institutional arrangements within the Council of Europe and within certain Member States for securing the enforcement of judgments", EHRLR 2011, 4, 448-463, 455 and fn58.

⁴⁴ M. Mijic (Bosnia-Herzegovina), Theme III, in The role of government agents in ensuring (...), p.95.

⁴⁵ Execution of judgments of the European Court of human rights in Azerbaidjan, (...), 14.

⁴⁶ Synthesis of the replies, 5. See also: Reso. 1516(2006) demanded States "to ensure immediate transmission of information and involvement of all domestic decision makers concerned in the implementation process" (Reso. 1516(2006), 2.10.2006, para.19), and Rec.1764(2006) adopted the same day (2.10.2006) required "co-ordinated action of all national actors concerned and with the necessary support at the highest political level" (Rec.1764(2006), 2.10.2006, 1.4).

⁴⁷ E. Mottershaw & R. Murray, « National Responses (...)», 646.

⁴⁸ E. Mottershaw & R. Murray, « National Responses (...)», 646.

⁴⁹ B.2.i.

⁵⁰ Reply to the questionnaire, 11th February 2015.



to decentralize the actors and to pay more attention to the question of dissemination and synergies. Thus, for instance, in **Austria**, the government agent acts under the auspices of the Ministry for foreign affairs along with the Deputy government agent who is under the auspices of the Prime Minister; then the judgment is sent to the federal (or land) government accountable for the violation; twice a year judgments against Austria are sent to the Human Rights coordinators⁵¹ established in the federal ministries and in the Länder, to the highest Courts and the Austrian Ombudsman. Regular meetings occur with Human Rights coordinators (about 35 civil servants) with the Ministry of foreign affairs and the Federal Chancellery Constitutional service, where the latest jurisprudence is discussed.

As many judgments have implications for various public actors, some States have also set up provisional or permanent inter-institutional networks, or at least working groups in order to facilitate synergies⁵². In all these models it is the executive which has taken the lead and it appears difficult to imagine another setup⁵³. These bodies must have power and influence as implementation also depends on political will, notably for sensitive cases⁵⁴.

The **Polish** case needs to be developed as it seems to be the most achieved one to this date. Poland decided to create an inter-ministerial Committee for matters of the European Court of Human Rights on 19 July 2007 under the auspices of the Prime Minister and “upon the initiative of the Government Agent”. “The Committee is composed of experts from all ministries (in most cases – permanent experts cooperating with the Government Agent for years), the General Solicitor of the State Treasury and the Government Plenipotentiary for Equal Treatment. It is chaired by the Government Agent. The chair of the Committee may invite other persons to participate in the works of the Committee, in particular, the representatives of the governmental and self-governmental administration or representatives of other institutions. Currently, representatives of the Ombudsman’s Office, the judiciary (Supreme Court, Supreme Administrative Court, Constitutional Court, National Council of Judiciary), the Prosecutor General’s Office, the Police, Prison Service, as well as the Sejm’s and Senate’s Offices also participate in the works of the Committee”⁵⁵. All the Committee meetings are open to the participation of inter alia the Ombudsman, representatives of the Parliament and the judiciary. The December plenary session is also opened to the civil society and civil society may be invited to attend other meetings. On 8 March 2013 the mandate of the Inter-ministerial Committee for matters of the European Court of Human Rights was extended by the Ordinance of the Prime Minister. “With a view to streamlining the execution process, on 23 January 2015 the Prime Minister signed, a comprehensive amendment to the above-mentioned Ordinance of the Prime Minister on the Establishment of the Inter-ministerial Committee. It introduced a detailed schedule for the submission of action plans and action reports by the relevant ministers. It also provides for deadlines for the translation of judgments and their dissemination among the relevant stakeholders. The amendment is based on the Committee of Ministers’ regulations regarding the deadlines and definitions of general and individual measures. It goes further than the existing obligations stemming from the Convention in that it tasks the Inter-ministerial Committee with monitoring the execution of the Court’s decisions, including those related to unilateral declarations (...). Moreover, the amendment specifies the roles of the permanent members of the Committee and the procedure for preparing annual reports on the execution of judgments”. The amendment entered into force on 23 April 2015. “The invitation concerns

⁵¹ About full-time 35 civil servants since 1998 « working on the initiative and under the coordination of the Constitutional Service of the Federal Chancellery and the *Völkerrechtsbüro* on a cooperative basis, without any additional resources. Against this background the network has proven highly flexible and effective, last but not least fueled by peer pressure” (2nd Reply to the questionnaire, 6th March 2015). “The permanent dialogue in a small group of specialized civil servants with the common goal of implementing human rights has proven to be very effective” (1st Reply to the questionnaire, 23rd February 2015).

⁵² Guide for the drafting of actions plans and reports for the execution of the judgments of the European Court of human rights, Series Vade Mecum n°1, CoE, Directorate GI, August 2015, 13.

⁵³ E. Mottershaw & R. Murray, « National Responses (...)», 644.

⁵⁴ E. Mottershaw & R. Murray, « National Responses (...)», 645.

⁵⁵ Reply to the Questionnaire, 16th February 2015.



the participation in the “work” of the Committee and not only meetings. It is due to the fact that such participation may be required also beyond meetings”⁵⁶.

Croatia offers another interesting illustration of such permanent inter-institutional networks. The Ordinance adopted in 2012 established an Expert Council for the implementation of the judgments, which is “composed of representatives of all ministries, and representatives of the Constitutional Court, the Supreme Court and the State Attorney’s Office, as well as certain other Government and State Offices. The Council’s meetings are chaired by the Government Agent (...). The Council meets in plenary sessions at least three times a year to discuss specific issues regarding the execution process on domestic level in general, of specific cases if necessary. Apart from plenary meetings, the Council may work in smaller groups on specific issues regarding certain cases »⁵⁷. The government agent draws a first legal analysis of the judgment and disseminates it with a “questionnaire on the execution of the Court’s judgment” to all members of the Council, and to other actors (judges, Parliamentarians) without the questionnaire. The questionnaire, which has to be authorized by the Minister/head of authority in question, is supposed to identify the sources of the violations and the measures to be adopted. In the **Former Yugoslav Republic of Macedonia**, an Inter Departmental Commission was established in 2012. It comprises senior officials in all relevant ministries, the Presidents of the Judicial Council and the Public Prosecutors’ Council, the Ombudsman and the government agent⁵⁸ but other actors may be invited (NGOs, legal experts and professionals)⁵⁹. Its role is notably to recommend individual and general measures, to propose legislative reforms and is obliged to report annually to the Assembly. In **Moldova**, following the recent law, the government agent may be assisted by an advisory council that shall comprise the representatives of state authorities, academia and civil society⁶⁰.

In more countries (**Belgium, Serbia**⁶¹, **Albania, Ireland** etc...) there exists the possibility to set up provisional working groups whose practice and impact may vary. For example, in Romania the practice seems to have been unsatisfactory⁶².

Taking into account these mechanisms set up in some countries a reflection should be engaged on the benefits these permanent inter-institutional bodies offer, on their composition, on the way tasks have been distributed and on the added value of imposing strict deadlines.

- In some countries delays may be an incentive to action in due time. In **Ukraine**, following the law adopted in 2006, the government agent is required to summarize the judgment for publication in an official newspaper within ten days and has to send a ‘quarterly ‘motion on general measures’ to the Cabinet of Ministers. The law requires “relevant draft laws to be submitted by the Cabinet of Ministers to Ukraine’s unicameral Parliament, the Verkhovna Rada, within three months of the Prime Minister’s instruction to the relevant ministries”⁶³. The government agent from **Czech Republic** is entitled to set out limits to the authorities (Art.4, Act n°186/2011). Moreover the importance of having recourse to experts or consultants

⁵⁶ The new provisions are in Appendix 2.

⁵⁷ Reply to the questionnaire, 4th March 2015.

⁵⁸ PPSD (2014)22, 13 October 2014, “The role of parliaments in implementing ECHR standards: overview of existing structures and mechanisms”, Background memorandum prepared by the Secretariat, p.9.

⁵⁹ Reply to the questionnaire, 15th June 2015.

⁶⁰ Art.9, chap.2, Appendix 3.

⁶¹ Reply to the questionnaire, 5th March 2015.

⁶² For D. Anagnostou and A. Mungiu-Pippidi, “Domestic implementation (...)”, 224: “Weak inter-ministerial and inter-institutional coordination of domestic implementation structures and limited resources and human rights expertise account for the fact that national authorities in Greece and Romania are weakly placed to influence the policy process”. The main criticism made to this study was that the data were limited to judgments on Articles 8-11 in nine countries.

⁶³ PPSD (2014)22, “The role of parliaments (...)”.



at the earliest stage (when action plans have to be prepared) has already been stressed by the Council of Europe⁶⁴.

- Moreover, co-ordination with external stakeholders brings real added-value as such actors “can place pressure on the state to take steps”⁶⁵. This is all the more fundamental as academics have shown that the more sensitive the case is, the more the implementation depends on the political pressure at the domestic level; in such cases the implementation is not encouraged by political incentives exerted at the supranational level and is not impacted by effective bureaucracies⁶⁶. “The involvement of a broad range of stakeholders can help to enhance the visibility of a judgment and ultimately increase the pressure that is then brought to bear on the government”⁶⁷. Academics agree that domestic advocacy groups, NGOs, political parties can pressure governments to change behavior. Consequently, it would be useful to launch a reflection on the role civil society, political parties, Ombudsmen, National Human Rights institutions could play in this regard. For M. Wroblewski (Director, Department of Constitutional and International law, Office of the Human Rights Defender), (speaking for the Polish case) “more needs to be done, however, to coordinate the various stakeholders (e.g. executive, parliament, the Ombudsman and NGOs) who need to be involved in ex ante, as well as ex post, scrutiny of legislation for human rights compatibility”⁶⁸. In **Poland**, as of May 2015, the National Council of judiciary influenced by the government agent, “has organized three meetings with the participation of the Government Agent, the Ministry of Justice, courts, the Ombudsman, scholars, NGOs and others (...) to make recommendations and coordinate the actions of institutions in order to implement the European Court of Human Rights’ decisions”⁶⁹.

Unfortunately no specific question had been raised with regard to the degree of involvement of such actors. This is an avenue to be explored in the coming months and governmental experts could exchange good practices on that matter, notably in view of improving the enactment of general measures.

After having identified the respective role and interaction between the government agent, his/her office and potential inter-ministerial bodies, we now come to consider the role played by the executive and the legislative when deciding general measures to be voted.

II/ The interaction between the executive and the legislative in view of the adoption of general measures

A certain number of States have enacted a special regulation (**Poland, Italy, Ukraine, Spain**), while many others have not enacted any specific written procedure (**Bosnia and Herzegovina, Serbia, Lithuania, Luxembourg, Portugal, Hungary, Albania, Slovak Republic, Monaco**). In **Norway** a special circular is currently being prepared by the Ministry

⁶⁴ GT-DH-PR A (2006) 003, “Strasbourg 12 December 2006, Ensuring the existence (...) “b) Early recourse to national experts/consultants.

⁶⁵ E. Mottershaw & R. Murray, « National Responses (...) », 651.

⁶⁶ S. Grewal & E. Voeten, “The Politics of Implementing (...)”, 14.

⁶⁷ E. Mottershaw & R. Murray, « National Responses (...) », 652.

⁶⁸ M. Wroblewski, in Parliaments and the European Court of human rights, 12 May 2015, Warsaw, 9.

⁶⁹ K. Goner, Judge of the Constitutional Court, Member of the National Council of the Judiciary, Poland, in Parliaments and the European Court of human rights, 12 May 2015, Warsaw, 11.



of Justice in order to institutionalize the current practice, including the deadlines as for certain steps of the execution process⁷⁰. The existence of a written procedure does not necessarily impact the process and is more a consequence of the legal and political culture of the State. More problematic seems to be the case when an expert mentions that “there is no entity vested with specific competence for triggering the procedure aimed at the adoption of general measures”⁷¹. In some States it is fundamental that the government agent be recognized certain powers in a specific regulation; in other States (usually small States) the procedure seems to work smoothly without things being written in stone. Furthermore, no expert mentioned a special (written or not) practice concerning pilot judgments.

The question was raised whether such a specific regulation for the adoption of general measures applied to the execution of decisions of other international judicial or quasi-judicial bodies or whether it was only limited to the execution of the European Court of Human Rights judgments. The replies were very heterogeneous but in a majority of countries the response is negative (**Azerbaijan, Ukraine, Croatia, Cyprus, Romania, Hungary, Greece, Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia, Romania, Moldova, Norway** (even if a similar procedure is applied to other international bodies)). In **Belgium**, even if the procedure is different, the authorities are currently reflecting on the opportunity to organize inter-departmental meetings under the auspices of the Ministry of Foreign Affairs twice a year in view of monitoring more effectively the recommendations adopted by the UN bodies⁷². In more limited States (**Czech Rep., Spain, Austria, Finland, Austria**, with more doubts **Luxembourg**) the procedure is applicable by analogy to other judicial and even sometimes non-judicial bodies⁷³.

More fundamental seems to be the degree of involvement and of intricate interplay between the government agent, the executive and the legislative when general measures must be prepared. As noted in 2011 “while the government agents have been entrusted with the general coordination, the primary responsibility for the implementation of the Court’s judgments often lies within the ministries/bodies mainly concerned by a judgment”⁷⁴. Yet the implication of parliaments in the execution process is particularly important in cases of judgments whose implementation requires legislative changes”⁷⁵. Indeed, two steps can clearly be identified, the first one involving the government agent and the executive (A), the second one being at the parliamentary stage (B).

⁷⁰ 2nd Reply to the questionnaire, e-mail dated 3rd March 2015.

⁷¹ Reply to the questionnaire by the Portuguese agent, 2nd February 2015.

⁷² Reply to the questionnaire, 20th February 2015.

⁷³ **Czech Republic**: proceedings before the UN Human Rights Committee and also all proceedings in individual cases before an international human rights body; also applicable to the Court of Justice of the European Union; **Spain**: “It applies to the execution of all those kinds of decisions when it concerns judicial bodies whose decisions have the same level of obligation as that established in art 46.1 of the Convention”; **Finland**: the same procedure applies to other systems (judicial and quasi-judicial).

⁷⁴ Synthesis of the replies, 3.

⁷⁵ Synthesis of the replies, 6.



A/ First step: the executive at the forefront

The overall picture offers some strong common aspects as well as some instructive discrepancies.

- Firstly, the role played by the government agent is varying. In a certain number of States the initiative to adopt general measures lies in the hand of the government agent (like in **Portugal, Luxembourg, Romania, or Monaco**), but most of the time in cooperation with the executive. States which opted for an independent Agent government's Office (Model 2, see above) have usually given larger powers to the government agent. *For instance, in **Cyprus**, the Attorney-general (having a constitutional function) "drafts also the necessary legislation and transmits the bill to the Ministry concerned for processing it to the Council of Ministers and Parliament"⁷⁶. The **Moldovan** new legislation seems to reinforce the powers given to the government agent. The government agent, when necessary or on the request from the authorities, shall present his/her views regarding the compatibility of the draft laws and the legislation in force with the provisions of the Convention and the European Court's case law⁷⁷. In **Belgium** the government agent happened to prepare the legislative change (law on reopening of procedures).*
- Yet, in a majority of States the initiative to adopt general measures lies more openly in the hands of the executive. The procedure may be centralized or more decentralized (like in **Finland**, in **Estonia**, in **Liechtenstein** in conformity with the procedure called "the portfolio schedule" and in **Croatia**) in that each Department may be considered responsible (according to the case under examination). *In **Ireland**, as the government agent operates under the Ministry of Foreign Affairs, the legal Division within the Ministry of Justice delivers advice and information to the Ministry of Foreign Affairs on human rights law. Each Department is responsible and the government agent only tries to get the ball rolling⁷⁸. In **Norway**, the government agent (the Attorney general of civil affairs) is preparing a written note but the agent (as well as the Ministry of Justice and the Ministry of Foreign Affairs) may give advice to the responsible ministry. The legislation Department in the Ministry of Justice is the coordinator. In **Austria**, the initiative may come from the Parliaments, from the executive (Ministry directly concerned), or even from Courts. In **Ukraine**, in accordance with the special regulation in force since 2006, the government agent may initiate measures but the cabinet of Ministers (mentioned in Art.14 of the Law) has the power to order some measures to domestic authorities which are responsible before it too: the Agent sends a quarterly 'motion on general measures' to the Cabinet of Ministers and relevant draft laws are then submitted by the Cabinet to the Ukrainian Parliament within three months of the Prime Minister's instruction to the relevant ministries⁷⁹. An attempt to amend these provisions failed in 2012: according to such amendments the government agent was to submit the motion on general measures to Parliament at the same time as to the Cabinet of Ministers; moreover, the Parliamentary Justice Committee would have conducted regular scrutiny of the judgments against Ukraine (and even against other Member States)⁸⁰. In **Greece** the initiative is usually taken by the government which can be assisted by the Ombudsman and the Greek Committee for Human Rights. The government agent "performs a consultative function to the*

⁷⁶ 1st Reply to the questionnaire, 5th February 2015.

⁷⁷ Chap.2, Art.5(2, d).

⁷⁸ E. Mottershaw & R. Murray, "National responses (...)", 651.

⁷⁹ Art.15 of the 2006 Law.

⁸⁰ A. Donald & P. Leach, "The Role of Parliaments following judgments of the European Court of human rights", chap.4 in M. Hunt, H. Hooper & P. Yowell, Parliaments and Human Rights, Redressing the democratic deficit, Hart Publishing, 2015, 63, fn 34 & 35.



Ministry of Justice in order to play a role in the preparation of drafts of law”⁸¹. In **Macedonia** it seems that the government agent only has the power to indicate the problematic legislation⁸². In **Spain**, the procedure is out of control of the government agent, as “the Agent will send the judgment to the competent office of the Central Government or Regional or Local governments who may be in charge of promoting the relevant Draft legislation, through the ordinary or urgent legislative procedure”. An absolute centralization is illustrated by the **Azerbaijan** case: here, “without any parliamentary control over the process, the executive power operates without checks and balances, and the process is overwhelmingly dependent on the Presidential Administration”⁸³.

- Besides the issue of who takes the initiative and whether the institutional mechanism is centralized or decentralized, with the pros and cons to be carefully considered in each system, another issue is related to a potential disagreement between these actors. Not many experts dared to raise this matter. In **Czech Republic** the government agent initiates the procedure by indicating which measures should be taken following a judgment. “If the Government Agent and the relevant domestic authorities do not reach a consensus regarding the measures that need to be taken, the Government will, based on a proposal by the Minister of Justice, decide what further action to take” (Section 9(3) of Res. No. 1024/2009)⁸⁴.

Thus several topics emerge from this analysis which should contribute to stimulating a discussion within legal experts:

- Whether the government agent should be allocated more powers when the question of drafting general measures comes; surprisingly the government agent does not seem to be in a position to submit a draft of the general measures to be taken in many of the 38 legal systems under our scrutiny.
- The distribution of tasks between the government agent office, the Ministries of Foreign Affairs and Justice and the Ministry directly involved in the case at issue, and the tools at their disposal in order to solve potential conflicting views;
- The benefits of a centralized and of a decentralized system taking into account the peculiarities of each political and legal system;
- The advantages of involving other actors, such as civil society, experts and ombudsmen. It seems obvious that the more consultations take place, the more successful the draft proposals will be. In a federal State like **Austria**, the Human Rights coordinators in the federal ministries play a crucial role. The proposals circulate in order to enhance the review process with regard to the requirements of the judgments of the European Court of Human Rights (yet such a review process is “constant government practice”), “reflecting the high political importance attached to the implementation of Strasbourg judgments”⁸⁵. The legal service collaborates with all competent ministries and with the Constitutional Court; “it often invites political parties and interest groups to comment on the results of its review (...)”⁸⁶. The Constitutional Court and the Austrian National Assembly may also give an opinion. An expert-opinion may be given by the Chancellery-Constitutional Service. The government agent is also competent to comment on drafts. **Norway** seems to offer another good practice as the process may involve experts and be “the product of an

⁸¹ Mr J. Bakopoulos, Theme III, in The role of government agents in ensuring (...), 90: whereas “His role is more active towards the administrative authorities because he can give specific instructions for the execution of a Court’s judgment”.

⁸² Ms R. Lazareska-Gerovska, Theme II, in The role of government agents in ensuring (...), 58.

⁸³ Execution of judgments of the European Court of human rights in Azerbaijan (...), 16.

⁸⁴ Reply to the questionnaire, 12th February 2015.

⁸⁵ D. Anagnostou & A. Mungiu-Pippidi, “Domestic implementation (...), 221.

⁸⁶ D. Anagnostou & A. Mungiu-Pippidi, “Domestic implementation (...), 221



extensive preparatory procedure in which organizations, other Government bodies and institutions are consulted”⁸⁷. Thus in complex legislative reforms, ad hoc Committees were set up with a mandate to prepare a report (with experts/professors) followed by a consultation such as in the Lindheim case⁸⁸. The advantage is that it “gives national stakeholders an opportunity to influence on the proposal”, even if it can be more time-consuming than the usual legislative process, but it was considered useful “to provide the government with a broad basis for proposals”⁸⁹. In some countries the Ombudsman and/or a National Human Rights institution may be competent to give an opinion on the compatibility of draft laws with the ECHR. For example, in **Greece** the Ombudsman, established under Act n°3094/2003 and in charge of protecting citizens’ rights “may impose a deadline on the administration, which must inform the Ombudsman of the measures taken”⁹⁰. The National Commission of Human Rights (Act n°2667/1998) is competent to examine preliminary draft laws affecting human rights and to submit recommendations to the government, notably regarding the need to respect the ECHR as interpreted by the European Court of Human Rights⁹¹. But it is a consultative body to which the government is not obliged to refer all draft legislations. The **Spanish** case offers another example as compliance is also ensured by the Spanish Ombudsman (art.527(a) of the Code of criminal procedure), who “reviews the compatibility of certain Spanish laws with the Strasbourg decisions”, and such activities “have proven to be a very useful tool to encourage legislative amendments or changes in the behavior of the administrative authorities”. For this author “As a national human rights institution, the Ombudsman has a positive effect on the application of the ECHR in Spain”⁹². Would it be therefore feasible to involve these actors more systematically and ex ante when the issue is linked to a judgment delivered by the European Court of Human Rights?

- As regard the res interpretata issue, it is worth mentioning that in some countries the government agent’s body disseminates cases delivered against other States which may raise an issue for their own country (**Andorra**). Undoubtedly “the impact of dissemination will be extended if it is accompanied by guidance or analysis”⁹³. This issue is also connected to the previously mentioned question of resources.
- Moreover, a certain number of replies to the questionnaires spontaneously refer to the importance of having consultations for the government agent with the Department for the implementation of the judgments (**Romania, Ukraine, Slovak Republic, Serbia** when no indication is given by the Court, **Luxembourg, Bosnia and Herzegovina and Andorra**). More assistance is required from several experts as well as a quicker feedback on the action and report plans. The expert for **Belgium** mentioned that regular phone calls, e-mails and also visits on the ground by this Department help much to pressure the various actors⁹⁴. It is instructive to note that according to the expert for **Lithuania**, in case of opposition by the Parliament to adopt the required legislative provisions, “some external help (coming from the Execution Department, like rendering visits and consultations with national legislative

⁸⁷ O. Wilkung, “The reception process in Sweden and Norway”, in H. Keller & A. Stone Sweet, A Europe of Rights, OUP, 2008, 210.

⁸⁸ In this case, the Committee was chaired by a Professor of law, with two other neutral members (a lawyer and an associate prof.), and two others representing interest groups.

⁸⁹ 2nd Reply to the questionnaire, 3rd March 2015.

⁹⁰ I. Özden Kaboglu & S.-I. G. Koutnatzis, “The reception process in Greece and Turkey”, in A Europe of rights, 503.

⁹¹ I. Özden Kaboglu & S.-I. G. Koutnatzis, “The reception process (...)”, 504.

⁹² M. Candela Soriano, « The Reception process in Spain and Italy », in A Europe of rights, 431-432.

⁹³ E. Mottershaw & R. Murray, “National responses (...)”, 646.

⁹⁴ 2nd Reply to the questionnaire, 6th March 2015.



authorities etc.) would be most welcome; in those cases no working groups would give any reasonable prospects of success”⁹⁵.

B/ Second Step: The (remaining) role played by the legislative

The implementation of the judgments of the European Court of Human Rights has somehow an impact on the relations between the executive and the legislative by increasing the role played by governments. Thus the dominant model, as it appears from the replies to the questionnaire, seems to be that the executive prepares and proposes the amendments and that the legislative then has to adopt them (like in **Norway, Finland, Greece, Bosnia Herzegovina** or **Croatia**). More precisely, at the first step (above), the executive (along with the government agent) prepares the reforms; at the second step the legislative and the executive interact, the modalities of such interaction being quite different from one State to another.

Surprisingly, even when we come to the implementation of legislative measures, Parliaments do not always have the opportunity to exercise their responsibility from the outset of the procedure, whereas it seems to us that they should initiate legislative proposals and amendments to law⁹⁶. As noted by Mr Y. Pozzo di Borgo, “in terms of remedial action, parliaments are capable of holding governments to account for the swift and effective execution of adverse judgments, and proactively engage in preparing those legislative changes which are necessary to give effect to the Court’s judgments”⁹⁷.

Through our interviews and phone contacts (notably with the experts from **Andorra, Belgium** and **Andorra**), we got the impression that some experts seemed to share the view that it would be beneficial to involve the Parliament at an earlier stage (at least in order to avoid opposition when the vote is taken). *For example, in Albania, the inter-ministerial working group in charge of enacting the Law on social insurances was not followed by the legislator. The government agent admitted that the fact that these working groups composed on a case-by-case basis, are never opened to any parliamentarians, may be one factor explaining the risk of opposition between the legislative and the executive*⁹⁸. *In Slovenia, following the Lukenda case, the first draft proposal submitted by the Ministry of Justice could not be adopted and new consultations within the legal community were necessary*⁹⁹, precisely “participation at the later stage of representatives of certain local and district courts”. “The Supreme Court of the Republic of Slovenia and representatives of the State Attorneys’ Service, and from the Government of the Republic of Slovenia also the Government Service for Legislation, participated in the very speedy completion of the Draft Act before it was presented to the Government of the Republic of Slovenia. The Draft Act was sent to all courts of the Republic of Slovenia, and slightly under half of them made comments. The majority of these related to the question of additional burdening of the courts, some of the comments were in the sphere

⁹⁵ 2nd Reply to the questionnaire, e-mail dated 6th March 2015.

⁹⁶ See also the Appendix to Resolution 1823(2011), 23 June 2011, PACE.

⁹⁷ PACE, Report | Doc. 13719 | 02 March 2015, “The effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond”, Committee on Legal Affairs and Human Rights, Para.46.

⁹⁸ Interview on 26th January 2015.

⁹⁹ Peter Pavlin, “Pilot judgments and systemic human rights violations – the need to establish an effective remedy in the domestic system – the Slovenian Experience”, in 3rd Informal seminar for government agents and other institutions on pilot judgment procedure in the European Court of Human Rights and the future development of human rights’ standards and procedures, Warsaw, 14–15 May 2009, Kontrast, Warsaw, 2009, 44-45.



of fairly detailed proposals for improving the Draft Act, while only a minority of the courts had no comments to the Draft Act”¹⁰⁰.

Thus, even if it might be considered as time-consuming to consult more actors at the beginning of the procedure, this process is fundamental to facilitate the final vote of the law, notably when the issue might be sensitive (ethics, morals, religious issues, ...) and/or when major changes are required, and/or when the executive faces major political opposition (even inside its own party) at the Parliament. Previous studies have revealed that the greater role the Parliamentary plays the more effective the implementation of the judgments of the European Court of Human Rights is¹⁰¹. This observation has been done by academics as well as by actors on the ground¹⁰². So a cost/benefice analysis is largely in favor of a broader consultation at the outset.

Thus several avenues need to be explored:

- Whether a co-proposal power could be recognized both to the executive (Ministries along with the government agent) and to the legislative, and if so under which modalities.
- Whether the Parliament could be consulted by the executive (and the government agent) and/or represented in inter-ministerial bodies when such bodies do exist. This is already the practice experienced by some European States;
- Indeed the adoption of legislative amendments even required by the ECHR, remains a political issue and the democratic debate as well as the independence of the legislator shall be preserved. Nevertheless, at the very least, more cooperation and synergy should be developed in order to pave the way for parliamentarians when they have to vote amendments. Indeed opposition for strictly partisan and electoral reasons should be avoided. **(i)** Such a synergy may be deepened within the new established structures among parliaments (sub-committees on human rights competent on the issue of the implementation of the judgments of the Court or more broadly of the ECHR). *States have opted for varied parliamentary structures, either a specialized human rights Committee (Hungary, Montenegro), or a specialized sub-committee with a human rights remit (Czech Republic, Poland, Romania), or hybrid models combining elements of both specialization and mainstreaming like in Lithuania, which are all valid. The concern is more related to the powers such Committees have the resources at their disposal and whether they are full committees or not; in case they are only sub-committees, “their remit is vulnerable to change between elections”¹⁰³. Yet no general rule may apply; in some countries (for instance Ukraine and Romania cited in the study we are referring to), considering the relative weakness of Parliament vis-à-vis the executive, “it cannot be assumed that parliamentarians will invariably urge the executive towards full or swift compliance with a judgment; sometimes the opposite is the case”¹⁰⁴. One of the suggestions could be to develop cooperation between these Sub-Committees with the Government agent’s office as soon as*

¹⁰⁰ Peter Pavlin, “Pilot judgments (...)”, 47-48.

¹⁰¹ D. Anagnostou & A. Mungiu-Pippidi, “Why do States implement differently the European Court of human rights judgments ? The case law on civil liberties and the rights of minorities, JURISTRAS Project (2009) 23.

¹⁰² M. Chrzanoska “noted that 2012 was a crucial moment for the implementation of the Court’s decisions in Poland, as Polish Parliament became more involved”: in Parliaments and the European Court of human rights, 12 May 2015, Senate, Warsaw, 9. She shares the view that “Parliament has become more cooperative when amendments to the law are necessary to implement a decision” (10).

¹⁰³ A. Donald and P. Leach, “The Role of Parliaments (...)”, 65, have noticed in a study covering five States, that in Romania the sub-Committee cruelly lacked resources and knowledge of the ECHR in order to supervise the implementation of the judgments and that the HR Committee lacked in credibility and was viewed as lower status than the legal Committees.

¹⁰⁴ A. Donald and P. Leach, “The Role of Parliaments (...)”, 87.



the need for a legislative reform has been clearly identified. “Where a strong parliamentary committee does not exist, an independent NHRI could fulfil this function, being much more likely to have a broader mandate which encompasses reference to international as well as national legal standards”¹⁰⁵. A certain number of good practices already need to be shared among countries. In **Lithuania**, since 2010 the Law enforcement Committee of the Seimas (Parliament)¹⁰⁶ holds a meeting twice a year to discuss the issues connected to the implementation of the judgments. The Government Agent also presents an annual report to it. In **Greece** it was noted that “such obstacles have disappeared after the constant Agent’s recommendations and clarifications to the national authority”¹⁰⁷. In **Poland**, the inter-ministerial Committee for matters of the European Court of Human Rights has the competence, among others, to issue opinions concerning the compatibility with the Convention of the most important draft laws; the meetings of the sub-committee of the Sejm responsible for monitoring the implementation of European Court of Human Rights judgments would be of “great value, as representatives of government agencies responsible for the implementation of specific decisions are invited to them”¹⁰⁸. In **Romania**, the Sub-Committee on monitoring the execution of European Court of Human Rights judgments established within the Chamber of deputies “held regular public hearings and consultations” with the inter-ministerial committee in the case of *Maria Atanasiu and others*¹⁰⁹. “The sub-Committee also regularly addresses questions to the Government Agent; ministers and other public authorities, such as the National Authority for Property Restitution are involved in drafting amendments to existing legislation. The Government agent is required to provide regular updates to the Sub-Committee and to share information about her communications with the Department for the execution of Judgments”¹¹⁰. It is interesting to note that **Belgium** has recently launched a reflection on how to make the legislative and the executive interact at the Federal level, as many judgments against Belgium have required some legislative changes. One of the ideas on the table would be to enlarge the powers recognized to the Committee set up in 2007 in order to examine the cases delivered by the Constitutional Court (Law of 25 April 2007, art.9 & 10)¹¹¹. **(ii)** In some countries the Parliament receives regular reports submitted by the Agent’s Office on the implementation of the judgments (for instance **Romania** since 2014, **Croatia** since 2013); in countries where the executive plays a stronger role, the executive should be in charge of delivering a report to the Parliament and there could be a formalized procedure to respond to these reports. In **Poland** reports are debated in Parliament with the representatives of NGOs. In others the Parliament is at least informed by the executive when reforms are required (**Armenia**). **(iii)** As suggested by the Secretariat of the Parliamentary Project of the Support Division to the Parliamentary Assembly of the Council of Europe, with the assistance of Dr Alice Donald, a regular parliamentary scrutiny of action plans/reports “would not only facilitate retrospective monitoring of executive action but would also have the additional advantage of galvanizing executives to improve the quality and timeliness of actions plans/reports from the outset”¹¹². **(iv)** The Draft Principles and Guidelines drafted by Murray Hunt, Legal Adviser to the Joint Committee on Human Rights in the

¹⁰⁵ E. Mottershaw & R. Murray, “National responses (...)”, 651.

¹⁰⁶ “A possibility of institutionalizing the involvement of the Seimas (...) is currently under consideration” (Reply to the questionnaire, 12th February 2015).

¹⁰⁷ 2nd Reply to the questionnaire, 6th March 2015.

¹⁰⁸ Opinion of M. Chrzanowska, in Parliaments and the European Court of human rights, 12 May 2015, Senate, Warsaw, 9. For instance this sub-committee “contributed to the creation of a special strategy by the Ministry of Internal Affairs aimed at implementing the judgments “in the Dzwonkowski group of cases (9).

¹⁰⁹ D. Florea, in Parliaments and the European Court of human rights, 12 May 2015, Senate, Warsaw, 10.

¹¹⁰ D. Florea, in Parliaments and the European Court of human rights, 12 May 2015, Senate, Warsaw, 10.

¹¹¹ Reply to the questionnaire, 20th February 2015.

¹¹² PSD (2014)22, “The role of Parliaments (...)”, para.21.



UK Parliament, contain some provisions on the relationship with other key actors such as the National Human Rights Institutions (referring to the Belgrade principles), with “relevant civil society networks” and with “Ombudsmen, relevant commissioners, and independent reviewers”¹¹³.

- Moreover, “a point of particular importance to stress is the need for parliaments to possess an efficient ‘legal’ service – with specific human rights competence”¹¹⁴: *in Austria*, the previous head of the Parliament’s legal service was a former government agent before the Strasbourg Court.

C/ Amendment of a constitutional provision

A question was raised as to whether constitutional amendments had occurred in the past as a consequence of a judgment of the European Court of Human Rights. This issue does not seem to raise peculiar concerns. Some experts replied that they have not experienced such changes so far (**Armenia, Belgium, Finland, Hungary, Croatia, Cyprus, Monaco, FYR of Macedonia**). Others referred to the changing interpretation of the constitutional provisions taking into account the ECHR standards (**Croatia**). Some States had to amend constitutional provisions: in **Romania**, “The judgment *Pantea* (3 June 2003), determined a change in the interpretation of the notion of “magistrate” who can order a preventive custody. Subsequently, in October 2003, when the Constitution was revised, the article concerning this aspect was amended. The new form of the article provides that “preventive custody shall be ordered by a judge”. In **Slovak Republik** an amendment of a constitutional provision followed the *Harabin* case (n°58688/11) in order to allow reopening of the procedure. In **Ukraine** and **Lithuania** amendments respectively occurred after the judgments *Oleksandr Volkov* and *Paksas*. Yet in **Lithuania** the attempt to revise the Constitution in view of implementing the case *L.* failed. In **Greece** following the *Hornsby* case, “the new Article 94(4) al.3 provides that judicial decisions against State institutions are subject to compulsory enforcement”¹¹⁵. The *Gitonas and others* case also provoked a constitutional reform¹¹⁶.

D/ Tools at the European level to encourage the adoption of general measures

Not surprisingly, experts adopt very diverse opinions when we come to the question of the utility for the Court to indicate measures to be adopted under Article 46 in their judgments. It appears that the diversity of opinions can be explained more on the personal experience, and not at all on the size of the country neither necessarily on the political and/or legal culture. For a certain number of States such indications could be helpful (in **Czech Republic** and **Belgium** “as long as they abide by the principle of subsidiarity”, in **Greece** and in **Bosnia Herzegovina**), or even very useful (**Moldova**, to avoid misinterpretations, **Andorra** in order to convince politicians, in **Hungary**¹¹⁷, in **Former Yugoslav Republic of Macedonia, Austria**¹¹⁸ and **Slovak Republik** to identify the required reforms). The **Romanian** Government agent noted in 2008 that “a few cases have arisen, however, in which the execution of a judgment has been troublesome because the Court has not given sufficient, or sufficiently clear, reasons for its decisions”¹¹⁹. Such

¹¹³ Appendix to Parliaments and the European Court of human rights, 12 May 2015, Senate, Warsaw.

¹¹⁴ A. Drzemczewski & J. Lewis, “The work of the Parliamentary Assembly of the Council of Europe”, in Hunt, Hooper & Yowell, Parliaments and Human Rights, 2015, 323.

¹¹⁵ I. Özden Kaboglu & S.-I. G. Koutnatzis, “The Reception process (...)”, 487.

¹¹⁶ I. Özden Kaboglu & S.-I. G. Koutnatzis, “The Reception process (...)”, 488.

¹¹⁷ In the case of R. R. for instance: reply to the questionnaire, e-mail dated 6th March 2015.

¹¹⁸ Austria added that the utility also depends on seriousness of the violations and the number of persons concerned (scale).

¹¹⁹ R. Horatiu Radu, Theme III, in The role of government agents in ensuring (...), 94.



perceptions depend mostly on the legal culture and established jurisprudence. On the opposite, such indications are considered unnecessary in **Finland**, in **Spain** (as they may endanger the principle of subsidiarity, so Spain prefers indications by the Committee of Ministers), inappropriate in **Portugal** (as it brings confusion as to the respective roles of the Court and the Committee)¹²⁰, in **Monaco** (because of the complexity of measures to be adopted and the diversity of situations in Europe), in **Croatia** (because domestic authorities are better placed to identify measures). **Ukraine** even considers that it makes the implementation of the judgments more difficult as it leaves no room for alternative measures. Interestingly the expert for **Belgium** also suggested that it would be useful that the Court mentions the cases where no additional measure in addition to the payment of just satisfaction, is required¹²¹. May be a consensus could emerge on this¹²². This author wishes to add that academics have noted that the judgments where the Court made indications as to Article 46 (including with deadlines) are better and more quickly implemented than others¹²³. It would be useful, on a case by case basis, that government agents, when the Court is going to conclude to a violation of the ECHR, indicate to the Court that giving some clarifications under Articles 41 and 46 could facilitate the implementation of the judgments. As a minimum, every time the Court clarifies the source of the violation, it greatly facilitates the execution process (**Armenia**).

Concerning the authority of interim resolutions in the national legal system, many experts mentioned the fact that due to the lack of previous practice, the answer to such a question was difficult (in **Moldova** and **Croatia** where probably they would be given the same impact as other decisions of the Committee, **Norway**, **Finland**, **Spain**, **Austria**, **Belgium** (with a less impact in comparison with the judgments of the Court), in **Monaco** (with a moral effect). The expert for **Greece** considers them as soft law but with nevertheless a binding impact. Other States consider them as binding (**Bosnia Herzegovina**, **Portugal** and **Hungary**).

Academics have shown in a recent study that “as judgments are pending longer (and perhaps are more politically sensitive), executives with high constraints are less able to resist pressures to comply than those with fewer constraints. We find at best weak evidence that international pressures also contribute to faster implementation, thus corroborating the recent literature that domestic constraints are the key to compliance with international human rights treaties”¹²⁴. So “if States choose to resist implementation, powerful states are more likely to endure that resistance”¹²⁵. Thus, “in countries where legislatures exercise a strong constraint on power, legislatures could force unwilling executives to comply”¹²⁶. Thus pressure must be exerted both at the European and at the domestic level; with regard to this latter, undoubtedly “the ability to exert government pressure is also shaped by the nature and organisation of different kinds of societal interests, as well as the extent to which they can

¹²⁰ Reply to the questionnaire, 2nd February 2015.

¹²¹ Reply to the questionnaire, 20th February 2015.

¹²² We also refer to the current discussions that take place within the GT-GDR-F meetings (working documents and meeting reports) (http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/default_EN.asp?, 13th September 2015).

¹²³ P. Leach, “No Longer Offering Fine Mantras to a Parched Child ? The European Court’s developing approach to remedies”, in A. Follesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: The European Court of human rights in a National, European and Global context*, CUP, 2013, 160. E. Lambert Abdelgawad, « L’exécution des arrêts de la Cour européenne des droits de l’homme (2013), bilan et perspectives d’avenir », RTDH, 2014, 599-600.

¹²⁴ S. Grewal & E. Voeten, “The Politics of Implementing (...)”, 4.

¹²⁵ S. Grewal & E. Voeten, “The Politics of Implementing (...)”, 22.

¹²⁶ S. Grewal & E. Voeten, “The Politics of Implementing (...)”, 8 who refers to Hillbrecht, “From paper tigers to Engines of change” (41).



enlist sufficient support from public institutions or influential political actors”¹²⁷. Thus the combination of European and national pressures should be favoured when there is a political reluctance to implement a peculiar judgment.

We now come to consider the role played by the judiciary with regard to the implementation of general measures. National judges seem to be equipped with certain tools and have taken diverse initiatives to adapt national law with the requirements of the ECHR.

III/ The key role played by national Courts when faced with the need to adopt general measures

The questionnaire also contained questions related to the role played by Tribunals. The whole picture here emerging out of the replies seems once more heterogeneous, not only with regard to the practice developed by Courts of first instance (A) but also by Higher Tribunals (B).

A/ Courts of first instance and the possibility of referral to Higher Tribunals

With regard to domestic Courts of first instance, there seems to be, in most systems, no possibility nor an established procedure for referral to the Supreme Court and/or Constitutional Court when facing a problem of compliance with the ECHR judgments which require the adoption of general measures (for instance in **Finland, Croatia, Moldova, Monaco, Former Yugoslav Republic of Macedonia and Norway**). Yet experts do consider that there is no real concern as domestic Courts directly apply the ECHR “even before the change of the domestic legal provision which led to the violation of the Convention” (in **Romania, Cyprus, Monaco, Norway and Greece**).

Some States offer a possibility of referral, *like in Lithuania but there has been no practice so far. In Czech Republic, the case should be referred to the Constitutional Court when there is a doubt regarding the compatibility with the ECHR. In Austria, it is possible for the Courts of first instance to send the case to the Constitutional Court (to assess the conformity with the Constitution, including the ECHR and its case-law): the Constitutional Court is competent to rescind the ordinance or law. In Luxembourg, it is possible to ask a question to the Constitutional Court (if the conditions are fulfilled); the Public Prosecutor has also the possibility in a pending case with similar issues to lodge an appeal in a higher court in the interest of law. In Greece, the administrative Courts can refer the case to the State Counsel for an issue of general interest. In Spain, “in the potential event of an impossibility of interpreting a law according to the Conventional obligations, the Courts of Justice –regardless of their position in the judicial hierarchy- can refer the question to the Constitutional Tribunal before deciding on the merits”¹²⁸. In Belgium, the Constitutional Court may be asked to rule on the conformity of a legislative act with the Constitution (indirectly with the ECHR) by way of a preliminary ruling by an ordinary or administrative Court. Such ordinary Courts are obliged to refer the case to the Constitutional Court and abide by the decision adopted by this Court¹²⁹. In some countries the Supreme Courts may issue recommendations to lower Courts; in Ukraine, “The High Specialized Court of Ukraine for Civil and Criminal Cases, as well as the High Administrative Court, issue recommendations to the lower courts as to judicial practice in the specific area law. Such*

¹²⁷ D. Anagnostou, “Introduction, Untangling (...)”, 18.

¹²⁸ Reply to the questionnaire, 10 February 2015.

¹²⁹ G. Schaiko, P. Lemmens & K. Lemmens, « chap. 3 Belgium », in Implementation of the European Convention on Human rights and of the judgments of the European Court of Human Rights in national case-law, a comparative analysis, J. Gerards, J. Fleuren (eds.), Intersentia, 2014, pp.95 et s., 108-109.



recommendations are extremely important when the Court discloses the systematic problem at the national level pertaining to the judicial practice"¹³⁰; in **Azerbaijan**, "the domestic courts may apply to the Supreme Court for practical direction on certain matter, or to the Constitutional Court for interpretation of the legislation" (the latter being frequently used)¹³¹. In **Moldova**, domestic courts will change their interpretation only if they are so required by the Supreme Court.

Thus Courts of first instance seem to be equipped when facing the issue of the implementation of a general rule which has been declared or could be incompatible with the ECHR. Nevertheless an in-depth and more systematic study of the case-law would be required.

B/ The role played by the Supreme Court and the Constitutional Court in determining and initiating general measures

Usually "Higher Courts can only make a declaration of incompatibility to inform the legislative authorities about the conflict with fundamental rights and freedoms"¹³². As a matter of fact, in most systems, the role of the Supreme Court and/or Constitutional Court extends to the coherent interpretation of national provisions with the ECHR. In **Romania**, in case of diverging jurisprudence, "the Supreme Court can regulate it through an appeal in interest of the law or by means of the procedure of the preliminary question" and the Constitutional Court through the procedure of the exception of unconstitutionality"¹³³. In **Moldova**, the Supreme Court can change practices by enacting Regulatory rulings or thematic recommendations for the Courts.

The question arises as to whether Courts can order the legislature or the State to adopt general measures. This possibility does not exist in many European countries due to the separation of powers. Several experts refer to the attendance of members of the Highest Courts to inter-Departmental meetings where there exists a possibility for the judiciary to suggest general measures like in **Luxembourg**¹³⁴. In **Croatia**, where a new mechanism has been set up, "both the Supreme Court and the Constitutional Court of the Republic of Croatia participate in the work of the Expert Council. Therefore, they both have the obligation to fill out the preliminary questionnaire on the execution in which they have to identify any possible execution measures within their respective competences"¹³⁵. But because of the separation of powers and independence of the judiciary, changes of case-law may only be initiated by the Courts themselves. **Moreover several peculiarities** exist in very limited cases and the principle of separation of powers has been challenged for the sake of the cause. The **Bosnian Herzegovinian** Constitutional Court shall order amendments to the provisions which are found to be incompatible with the ECHR¹³⁶. In the **Former Yugoslav Republic of Macedonia**, the Supreme Court adopted two legal opinions in the past in connection with judgments delivered by the European Court of Human Rights. In **Azerbaijan**, "Besides the adoption of decisions of practical direction for lower court, the Supreme Court has the power of legislative initiative. There were instances when the Plenum of the Supreme Court adopted both the decision giving practical direction to the lower courts and the decision on submission of draft law to the Milli

¹³⁰ Reply to the questionnaire, 11 March 2015.

¹³¹ Reply to the questionnaire, 10 February 2015.

¹³² J. Gerards & J. Fleuren, chap.9 Comparative analysis, in Implementation of the European Convention on Human rights and of the judgments of the European Court of Human Rights in national case-law, a comparative analysis, J. Gerards, J. Fleuren (eds.), Intersentia, 2014, 333 et s., 347.

¹³³ Reply to the questionnaire, 10 February 2015.

¹³⁴ Reply to the questionnaire, 11 February 2015.

¹³⁵ Reply to the questionnaire, 4 March 2015.

¹³⁶ Reply to the questionnaire, 8 January 2015.



Madjilis within the general measures”¹³⁷. In **Czech Republic**, the Constitutional Court may indicate general measures and it is also possible for the Constitutional Court and the Supreme Court to dialogue with the government agent and see whether a reversal of interpretation is possible. “Interestingly, the Constitutional Court Act provides another option. 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 legal person was infringed, and if such infringement was based on a normative act in force, the Government shall submit to the Constitutional Court a motion for annulment of such normative act, or individual provisions thereof, if there is no other way to assure it will be repealed or amended. However, this option has never been used so far”¹³⁸. In **Belgium** following the finding by the Constitutional Court that there exists a legislative gap contrary to the Constitution, there emerges a “legal obligation for the legislature to fill such a gap”. Since the constitutional Court applies “the constitutional rights and freedoms in line with the Convention, the order to legislate in fact can be indirectly based on the ECHR”¹³⁹. The ex ante review of legislation carried out by the Supreme Administrative Court Council of State “reviews whether the legislation has respected the federal allocation of powers, as well as constitutional and directly applicable treaty rights”¹⁴⁰. Yet the advice is not always followed by the government¹⁴¹. In **Spain** the Constitutional Court and the Supreme Court incorporate the case-law of the European Court of Human Rights into their rulings which are directly applied by the rest of the domestic courts. Article 87(1) of the Organic law of the Constitutional Court obliges all public authorities to abide by the judgments and decisions of the Constitutional Court¹⁴². In **Austria**, the Constitutional Court has the power to rescind an ordinance or law which is found to be incompatible with the ECHR¹⁴³.

¹³⁷ Reply to the questionnaire, 4th March 2015.

¹³⁸ Reply to the questionnaire. 12th February 2015.

¹³⁹ J. Gerards & J. Fleuren, Chap. 9, Comparative analysis, (...), 344-345.

¹⁴⁰ E. de Wet, “The reception process in the Netherlands and Belgium”, in H. Keller and A. Stone Sweet, A Europe of rights, 283.

¹⁴¹ Idem, 283-284.

¹⁴² M. Candela Soriano, “The Reception process in Spain and Italy”, in A Europe of rights, 432.

¹⁴³ 1st Reply to the questionnaire, 23rd February 2015, citing judgments of 25th September 2010 (G58/10) and of 2nd July 2009 (B1397/08).



IV. Concluding Remarks

Through our documentary research and interviews we explored the challenges of domestic implementation and tried to synthesize the various options offered by some States so far, to put the emphasis on some potential good practices and recent changes and to make some avenues for future reflection to emerge. Some systems seem to be equipped with much more effective domestic capacities than others to implement general measures. It should give a fresh impetus for further exchanges, taking into account the peculiarities of each system.

The principle of separation of powers and balance between the executive, the judiciary and the legislative has, with various degrees, been challenged by the requirements linked to the implementation of the judgments delivered by the European Court of Human Rights. Thus one of the conclusions we have come to, and this has already been noted by a previous academic covering eight countries¹⁴⁴, is that these domestic structures “reflect a largely top-down implementation process. While they vary considerably across States, they overwhelmingly share a common feature: their institutional arrangements predominantly rely on the executive and in most countries that are characterized by a strong degree of centralization in the latter”. “(...) On the other hand, the involvement of the legislative in the implementation process is limited (...)”¹⁴⁵ whereas Tribunals seem to benefit from more possibilities to impact general rules. With regard to general measures, surprisingly, the government agent does not always play a key role and many stakeholders are not sufficiently involved at the domestic level: not only parliamentarians, but also civil society, the Ombudsmen, national Human rights institutions. More interconnection seems to occur between the judiciary and the executive, why wouldn't it be feasible to develop more cooperation with other actors? Some recent initiatives deserve to be disseminated as they may inspire other countries. The author of this report is fully aware of the vast variety of situations among Europe and some tools useful in some countries may be counterproductive in other States. This is why some more profound reflections need to be launched within the Council of Europe.

Besides the diversity of solutions, this report could help to reveal the failures of domestic capacities in too many States in order to implement general measures, may be overestimating the possibilities for the government agent and the executive to make rules change.

This Report has taken note of the Declaration of the Brussels Conference and the subsequent decisions adopted at the Ministerial session on 19 May 2015¹⁴⁶ calling upon the Committee of Ministers “to take stock of the implementation of, and make an inventory of good practices relating to Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights and, if appropriate,

144

JURISTRAS,

D.

Anagnostou,

http://www.eliamap.gr/old/eliamep/content/home/research/research_projects/juristras/en/index.html

(11th

September 2015).

¹⁴⁵ D. Anagnostou, « Introduction, Untangling (...) », 12.

¹⁴⁶ Item 9 i) of the decision adopted at the 125th Session, 19 May 2015 – Item 3 - Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights: [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/PV\(2015\)125add1&Language=lanEnglish&Ver=Item3&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/PV(2015)125add1&Language=lanEnglish&Ver=Item3&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383).



provide for updating the Recommendation in the light of practices developed by the States Parties". This work will be carried out in the next biennium by the Committee of Experts on the system of the European Convention on Human Rights¹⁴⁷ (DH-SYSC; subordinate body of the Steering Committee for Human Rights (CDDH)).

This report could provide preliminary elements to the work that will be carried out by this Committee. This being said, we interpret our role in our capacity as an independent expert to conclude this report with a precise recommendation. We thus consider that time has come not only for exchange of good practices but it has become important to go further Recommendation 2008(2) in order to draw up a more precise framework in order to give States the opportunity to enhance the domestic capacities to better implement the judgments delivered by the European Court of human rights. This could be made through amendments to the Recommendation or Appendix to it without infringing the principle of subsidiarity.

This is a condition for States to face the challenge of shared responsibility and an absolute necessity for the whole system to move forward as smoothly as possible.

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24th September 2015

¹⁴⁷ See the Draft Terms of Reference of DH-SYSC, expected result iv); CDDH, Report of the 83rd meeting, 17 July 2015, doc. CDDH(2015)R83.



APPENDIX 1: QUESTIONNAIRE SENT TO GOVERNMENT AGENTS (5th January 2015)

Questionnaire

for expert reviews

We are interested in your review concerning the questions below and would welcome your comments on these questions where applicable. Please use a separate sheet and adhere to the numbering, write your statement in English, give your full name and sign the document (giving the date of signature as well).

Questions we would appreciate being replied to:

1. What is the procedure for the adoption of general measures following the ECtHR judgments in your country? Is there any such procedure established by law or another text (e.g. Government's regulations, internal ministerial instructions, etc.)? What triggers the process of adoption of general measures once the judgment becomes final?
2. What are the respective roles of the executive and the legislator and how they interact in this process? Is there a particular body vested with the competence to initiate and coordinate the process of adoption of general measures?
3. How the measures required by the judgments are identified in your legal system? Would the process be different depending on the type of the ECtHR judgment to be enforced (e.g. a judgment limited to individual circumstances or revealing an underlying systemic problem, a semi-pilot or a pilot judgment)? How are the measures identified when a judgment does not specify any? Would a specific indication by the Court about general measures be helpful for the definition of such measures? What is the legal status and practical effect of the interim resolutions of the Committee of Ministers calling for specific general measures to be adopted?
4. Does your country's domestic procedure for adoption of general measures apply to the execution of decisions of other international judicial or quasi-judicial bodies or it is only limited to the execution of the ECtHR judgments?
5. How the domestic courts of first instance react when facing a problem of compliance with the ECtHR judgments which require the adoption of general measures (e.g. a change of a domestic legal provision which led to a violation of the Convention)? Is there a possibility or an established procedure for referral of such an issue to the Supreme and/or the Constitutional Court?
6. What is the role played by the Supreme Court(s) and the Constitutional Court in determining and initiating general measures? What is the procedure they follow in that regard?
7. Has any judgment of the ECtHR ever required an amendment of a constitutional provision or a change in its interpretation? If yes, what measures have been taken? How was a (potential) conflict between the constitutional and conventional requirements or divergent interpretations eventually resolved?
8. Other comments

Please send your written contribution by email (scan of the original including letterhead and signature) addressed to: e.lambert@unistra.fr



**Order of the Prime Minister of 19 July 2007
establishing the Committee
for Matters of the European Court of Human Rights**

Pursuant to Article 12(1)(3) and Article 12(2) of the Act on the Council of Ministers of 8 August, 1996 (Dz. U. of 2003, No. 24, item 199, as amended¹⁴⁹, it is hereby ordered as follows.

§ 1

1. An inter-ministerial Committee for Matters of the European Court of Human Rights, hereinafter referred to as the "Committee", is hereby established.
2. The Committee shall be an opinion-making and advisory body to the Prime Minister.

§ 2.

1. The Committee shall have the following tasks:
 - 1) at the request of the minister competent for foreign affairs or the chairman of the Committee, to elaborate proposals of positions on the most important problems arising from applications communicated by the European Court of Human Rights (hereinafter referred to as the "Court") and its rulings issued in cases against Poland;
 - 2) at the request of the minister competent for foreign affairs or the chairman of the Committee, to elaborate and submit to the Council of Ministers proposals of actions intended to prevent violations of the Convention for the Protection of Human Rights and Fundamental Freedoms by Poland;
 - 3) to monitor the execution of judgments and decisions of the Court with respect to Poland on the basis of documents and information concerning the execution of judgments and decisions submitted by the competent ministers, on their own initiative or at the request of the minister competent for foreign affairs, and to analyse possible problems related to their execution;
 - 4) to draft annual reports on the state of the execution of judgments of the Court to be submitted by 31 March of the year following the reporting year, through the office of the minister competent for foreign affairs, to the Council of Ministers for adoption;
 - 5) at the request of the minister competent for foreign affairs, another competent minister or the chairman of the Committee, to issue opinions on draft legal acts whose conformity with the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the Court raises particular doubts;
 - 6) to discuss the most important problems related to the case-law of the Court with respect to other countries and general problems concerning the operation of the Court and their implications for Poland;
 - 7) at the request of members of the Committee, to analyse other problems related to human rights protection.

¹⁴⁸ I wish to thank the Polish co-agent for providing me with the English translation of these new provisions.

* The restated text was drafted pursuant to Order no. 73 of the Prime Minister dated 19 July, 2007 establishing the Committee for Matters of the European Court of Human Rights, Order No. 3 of the Prime Minister of 8 January, 2008 amending the Order establishing the Committee for Matters of the European Court of Human Rights, Order no. 20 of the Prime Minister of 8 March, 2013, amending the Order establishing the Committee for Matters of the European Court of Human Rights and Order no. 6 of the Prime Minister of 23 January, 2015, amending the Order establishing the Committee for Matters of the European Court of Human Rights.

¹⁴⁹ Amendments to the restated text of the mentioned statute were promulgated in Dz. U of 2003, no. 80, item 717, of 2004, no. 238, item 2390 and no. 273, item 2703, of 2005 no. 169, item 1414 and no. 249, item 2104 and of 2006, no. 45, item 319, no. 170, item 1217 and no. 220, item 1600.



2. The Committee may attach to the report referred to in § 2(1)(4):
 - 1) proposals of amendments to the law, the purpose of which is to properly implement Poland's obligations in the field of human rights protection;
 - 2) conclusions concerning activities of public administration authorities resulting from the case-law of the Court.
3. Provisions of § 2(1) and § 2(2) shall apply as appropriate to other international human rights protection bodies acting pursuant to international treaties ratified by Poland.

§ 3.

1. The Committee shall be composed of:
 - 1) chairman – Plenipotentiary of the Minister for Foreign Affairs for proceedings before the European Court of Human Rights;
 - 2) members – experts designated by: ministers in charge of government administration branches pursuant to the Act on Government Administration Branches of 4 September, 1997 (Dz. U. of 2007, no. 65, item 437, as amended¹⁵⁰), President of the General Solicitor's Office of the State Treasury, Chief of the Chancellery of the Prime Minister and the Government Plenipotentiary for Equal Treatment;
 - 3) secretary – a person appointed by the chairman from among employees of the organisational unit of the Ministry of Foreign Affairs in charge of representing Poland before international human rights protection bodies.
2. The chairman of the Committee, on his or her own initiative or at the request of a member of the Committee, may invite to participate in the work of the Committee, as advisors, persons who are not members of the Committee, in particular representatives of: the Sejm and Senate of the Republic of Poland, the Chancellery of the President of the Republic of Poland, the Supreme Audit Chamber, the Human Rights Defender (Ombudsman), the Ombudsman for the Rights of the Child, the Ombudsman for the Patient's Rights, the Constitutional Court, the Supreme Court, the Supreme Administrative Court, the National Judiciary Council, representatives of common and administrative courts, the Prosecutor General, the Commander in Chief of the Police, the General Director of the Prison Service, the Legislative Council, the Government Legislative Centre, representatives of other competent authorities of central and local government administration and representatives of other institutions and State authorities, representatives of legal professions and representatives of non-governmental organisations dealing with human rights protection issues.

§ 3a.

Members of the Committee:

- 1) shall participate in all of the Committee's meetings and in warranted cases ensure the representation of the entity by other authorised persons;
- 2) shall be responsible for elaborating and presenting positions in the field of competence of the entity they represent as regards all issues dealt with by the Committee;
- 3) shall be responsible for the submission to the chairman of information, documents and positions indicated in §§ 4a – 4c.

§ 4.

1. The chairman of the Committee may establish working and advisory groups to examine issues that do not require the Committee members' full participation, especially in order to entrust them with the performance

¹⁵⁰ Amendments to the restated text of the mentioned statute were promulgated in Dz. U of 2007, no. 107, item 732, no. 120, item 818 and no. 173, item 1218, of 2008, no. 63, item 394, no.199, item 1227, no. 201, item 1237, no. 216, item 1370 and no. 227, item 1505, of 2009, no. 42, item 337, no. 68, item 574, no. 77, item 649, no. 157, item 1241, no. 161, item 1277, no. 168, item 1323 and no. 201, item 1540, of 2010, no. 28, item 143 and 146, no. 107, item. 679, no. 127, item 857, no. 155, item 1035 and no. 239, item 1592, of 2011, no. 234, items 1385 and 1386 and no. 240, item 1429 and of 2012, items 595, 908 and 951.



of some of the Committee's tasks. Provisions of § 5(1) and of § 5(2) shall apply as appropriate.

2. The chairman of the Committee may commission expert opinions and opinions necessary for the realisation of the Committee's tasks.
- 2a. Entities referred to in § 3(2) may submit expert opinions and opinions to the Committee's chairman on their own initiative.
3. At the request of the Committee's chairman or a member authorised by him or her, government administration authorities and State organisational units reporting to them shall provide comprehensive assistance to the Committee in the performance of its tasks; in particular they shall provide it with the necessary information or documents.

§ 4a.

1. The Committee shall perform the task referred to in § 2(1)(3) 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:
 - 1) translation of a judgment into Polish;
 - 2) information on the actions intended to disseminate 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;
 - 3) an action plan for the execution of a final judgment of the Court, hereinafter referred to as "action plan", containing information on required and planned:
 - a) individual measures that is measures intended to ensure that the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms found by the Court in respect of the applicant ceases and that the applicant is put in the same situation, as far as possible, which he or she enjoyed before the violation of the Convention, hereinafter referred to as "individual measures,"
 - b) general measures that is measures concerning the applicable law or the practice of its application, which are intended to terminate the state of violation of the Convention for the Protection of Human Rights and Fundamental Freedoms and prevent similar new violations of the Convention from happening in the future, hereinafter referred to as "general measures"
 - together with deadlines of the implementation thereof;
 - 4) updated information on the state of the implementation of an action plan;
 - 5) report on the actions taken in order to execute a final judgment of the Court, hereinafter referred to as "action report" containing information on the implemented individual and general measures indispensable for the judgment to be fully executed.
2. The Committee shall perform the task referred to in § 2(1)(3) 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.
3. The obligation to present a translation of a judgment referred to in § 4a(1)(1) shall not apply, if according to the classification of cases applied by the Court, the judgment concerns repetitive cases and the competent minister in agreement with the chairman of the Committee consider that translating judgments of the Court issued in similar cases suffices.
4. In the event that a judgment or decision of the Court concerns the competence of two or more ministers, the Committee shall perform its task referred to in § 2(1)(3) on the basis of documents and information submitted by each minister within his or her competence.
5. In the event that the execution of a judgment or decision necessitates action to be taken by another public authority subordinate to, or supervised by, the minister competent with respect to the violation found, the documents submitted by the minister



which are referred to in § 4a(1), shall take into account also actions planned or undertaken by that authority.

6. The chairman of the Committee shall support and coordinate the implementation of the Committee's task referred to in § 2(1)(3), including in particular:
 - 1) shall inform without undue delay the Committee's members about the adoption by the Court of a judgment or decision and in justified cases shall explain their contents or final nature;
 - 2) may submit proposals or comments concerning the manner of execution of judgments and decisions of the Court by the competent ministers or other entities;
 - 3) shall ensure the coordination of work by the Committee's members, in particular in cases referred to in § 4a(4);
 - 4) shall inform the Committee's members about the positions of the Committee of Ministers of the Council of Europe as regards the execution of judgments and decisions of the Court by Poland;
 - 5) shall inform the Committee about the execution of judgments and decisions of the Court by Poland and about possible problems related to their execution.

§ 4b.

1. The translation referred to in § 4a(1)(1) shall be submitted not later than 2 months after the date of the delivery of the judgment. The translation may be accompanied by a motivated motion of the competent minister for submitting a request for referral of the case to the Grand Chamber.
2. Information referred to in § 4a(1)(2) shall be submitted no later than 2 months after the date when the judgment becomes final.
3. A draft action plan shall be submitted not later than 2 months after the date when the judgment becomes final. The first sentence shall not apply if a draft action report is submitted before this deadline.
4. Information referred to in § 4a(1)(4) shall be submitted every 6 months as of the date of submission of an agreed action plan and each time the Committee of Ministers of the Council of Europe so requests.
5. A draft action report shall be submitted without delay after the implementation of all the actions outlined in the action plan or if all the required individual or general measures have been implemented on other grounds.
6. Information referred to in § 4a(2) shall be submitted within 3 months as of the date of the publication of the relevant decision of the Court in the database of judgments and decisions run by the European Court of Human Rights (HUDOC).
7. Comments on draft documents referred to in § 4a(1)(2-5) and information on the positions of the competent ministers with respect to the comments shall be submitted not later than within one month after the date of their receipt.
8. An agreed action plan shall be submitted no later than within 4 months after the date when the judgment becomes final. The first sentence shall not apply if an agreed action report is submitted before this deadline.
9. Information on the positions of the competent ministers with respect to comments, decisions and resolutions of the Committee of Ministers of the Council of Europe shall be submitted no later than within one month after the date of their receipt.
10. In warranted cases, in particular when a case is particularly complex, the chairman of the Committee may agree to extend deadlines for the submission of documents and information referred to in § 4b(1)-(9).

§ 4c.

In order to implement the task of the Committee referred to in § 2(1)(4), members of the Committee shall submit to the Committee's chairman, in line with their competence by 31 January of the year following the reporting year, a consolidated report on the actions taken by the entity they represent in order to execute the Court's judgments within the field of their competence, a report on the current state of the execution of judgments and possible obstacles in the process of their execution.

§ 4d.



1. By the 10th day of the month following the reporting period the chairman of the Committee shall submit to the Prime Minister quarterly reports on the work of the Committee. Provisions of § 2(2) shall apply as appropriate.
2. In the quarterly reports, the Committee's chairman may draw attention to problems identified in the operation of the Committee, including non-appointment of members of the Committee by entities referred to in § 3(1)(2) or the failure on the part of government administration authorities and State organisational units to fulfil their obligations referred to in § 4(3) and §§ 4a-4c.

§ 5.

1. The Committee's meetings shall be called at least once every three months by the chairman on his or her own initiative or at the request of a secretary or of at least one half of the Committee's members. The Committee's chairman shall preside over meetings and direct the Committee's work.
2. If the chairman is absent, meetings shall be called by the secretary or by a person designated by the chairman from among employees of the organisational unit of the Ministry of Foreign Affairs in charge of representing Poland before international human rights protection bodies. Provisions of § 5(1) shall apply as appropriate.
3. A report shall be drawn up after each meeting of the Committee or its working group.

§ 5a.

1. The Committee may adopt resolutions in matters referred to in § 2.
2. Resolutions shall be adopted by the Committee's members at meetings or in writing (by correspondence).

§ 6.

1. The office of the minister competent for foreign affairs shall support the work of the Committee, in particular by providing assistance, in justified cases, in drafting agreed action plans and reports based on the requirements of the Council of Europe, in translating them into an official language of the Council of Europe and in submitting them to the Committee of Ministers of the Council of Europe.
2. The costs of supporting the work of the Committee shall be covered by the State budget from the part administered by the minister competent for foreign affairs.
3. Participation in the work of the Committee shall not be remunerated.

§ 7.

Within two weeks as of the date of entry into force of the Order, the authorities referred to in § 3(1)(3) shall appoint one or more experts to participate in the work of the Committee.

§ 8

The Order shall enter into force on the day it is signed.



APPENDIX 3: Unofficial Translation of the Moldovan Law (31 July 2015, entered into force on 21 August 2015¹⁵¹);

Law No. 151 of 30.07.2015 on the Governmental Agent
Published: on 21.08.2015 in Official Journal No. 224-233 art No: 455

The Parliament enacts the following primary law

Chapter I GENERAL PROVISSIONS

Article 1. The scope and the domain of application of the law

(1) The present law has the scope of securing compliance with the European Convention for the protection of human rights and fundamental freedoms (hereinafter "the Convention") in the Republic of Moldova and it regulates the representation of the Republic of Moldova before the European Court of Human Rights (hereinafter "the European Court") and the execution of its judgments and decisions.

(2) The present law defines the status of the Governmental Agent, his responsibilities as the representative of the Republic of Moldova before the European Court, his responsibilities concerning the execution of judgments and decisions of the European Court and the responsibilities concerning implementation of the Convention at national level, as well as other powers and duties.

Chapter II THE STATUS OF THE GOVERNMENTAL AGENT

Article 2. Appointment of the Governmental Agent

(1) A person who applies for the Governmental Agent's incumbency should meet the following conditions:

- a) holds citizenship of the Republic of Moldova;
- b) has full legal capacity;
- c) holds a bachelor's degree in law or equivalent thereof;
- d) has no criminal record;
- e) knows the national language;
- f) knows at least one of the working official languages of Council of Europe;
- g) meets the necessary medical requirements to hold the office;
- h) has at least 7-year experience appropriate to perform his duties;
- i) is not deprived of the right to occupy certain positions or to practice certain activities as principal or complementary punishment set up by a final judgment.

(2) The Governmental Agent is appointed by the Government, following the proposal of minister of justice, for a single mandate up to seven years. The European Court and the Secretariat of the Committee of Ministers of Council of Europe are informed about the appointment of the Governmental Agent by the Ministry of Foreign Affairs and European Integration.

Article 3. Status of the Governmental Agent

(1) The incumbency of the Governmental Agent is of public dignity and it is irreconcilable with any other public, political activity or any other gainful employment, except didactical, scientific and creative activity.

(2) Pending his incumbency, the Government Agent should respect the Constitution of the Republic of Moldova, the Convention, the Rules of the European Court, the present law and other legislation and international treaties to which the Republic Moldova is party.

(3) The Governmental Agent is subordinated to the Prime-minister and minister of justice.

Article 4. Conclusion of the Governmental Agent's incumbency

(1) The incumbent Governmental Agent should end his activity in the following cases:

- a) resignation;
- b) loss of the Moldovan citizenship;
- c) labour incapacity, which is proven by a medical certificate;
- d) partial or total legal incapacity as found by final judgment;
- e) criminal conviction found by final judgment;
- f) deprivation of the right to occupy certain positions or to practice certain activities as principal or complementary punishment established by final judgment;
- g) reaching the retirement age;
- h) termination of the mandate;

¹⁵¹ I wish to thank the Moldovan government agent for providing me with the English translation of this new law.



- i) death;
 - j) in other cases provided by law.
- (2) Dismissal of the Governmental Agent is decided by the Government following the proposal of minister of justice.
- (3) The Government shall appoint new Governmental Agent at least within 3 months after the conclusion of the old Agent's incumbency.

Article 5. Powers of the Governmental Agent

(1) The Governmental Agent represents the Republic of Moldova before the European Court and brings his contribution, in a manner prescribed by law, to execution of judgments and decisions of the European Court in cases against the Republic of Moldova.

(2) The Governmental Agent has the following powers in field of the representation of the Republic of Moldova before the European Court:

- a) represents the Republic of Moldova before the European Court;
- b) pursues preventive measures before finding of a violation of the Convention by the European Court in cases against the Republic of Moldova;
- c) pursues measures to remedy the alleged violations of the Convention and for compensation of damages;
- d) recommends measures to the authorities for an appropriate implementation of the Convention and application of human rights standards imposed by the European Court's case-law;
- e) provides the translation in state language of judgments and decisions of the European Court in cases against the Republic of Moldova and their inscription into the state register of judgments and decisions of the European Court in cases against the Republic of Moldova;
- f) asks for an interpretation, revision or rectification of judgments and decisions of the European Court in cases against the Republic of Moldova.

(3) In the field of execution of judgments and decisions of the European Court, the Governmental Agent has the following powers:

- a) develops and proposes measures to be taken for execution of the European Court judgments and decisions and coordinates the implementation thereof;
- b) monitors the execution of judgments and decisions of the European Court in cases against the Republic of Moldova;
- c) represents the interests of the Republic of Moldova in relation with the Secretariat of Council of Europe what concerns execution of European Court judgments and decisions in cases against the Republic of Moldova;
- d) informs the Prime-minister, minister of justice, minister of foreign affairs and European integration and other relevant authorities about the leading cases against the Republic of Moldova and serious issues appeared during the execution of European Court judgments and decisions.

(4) In the field of national implementation of the Convention, the Governmental Agent:

- a) represents the Republic of Moldova as an expert at plenary sessions of the intergovernmental human rights committees of the Committee of Ministers of Council of Europe, in coordination with the Ministry of Foreign Affairs and European Integration;
- b) in cases provided by law, intervenes or attends the national proceedings or requests their reopening;
- c) informs the competent authorities about the need to amend national legislation as a result of the developments of the European Court case-law;
- d) submits, if necessary or at the request of authorities, his opinions regarding the compatibility of national legislation and draft legislation with the Convention and the European Court case-law;
- e) informs the Government and Parliament about the overall situation in the fields of the representation of the Republic of Moldova before the European Court, as well as the execution of judgments and decisions of the European Court;
- f) informs the judges, prosecutors, public servants and other relevant authorities about the activity of the European Court and about the decisions of the Committee of Ministers of Council of Europe and disseminates such information.

(5) In case of the Governmental Agent's vacancy, temporal inability to exercise his powers or in a situation of conflict of interests in an individual case, the minister of justice shall appoint a chief of the specialized division that assists the Governmental Agent in his activity as a person who will exercise temporarily the Governmental Agent's powers.

Article 6. Responsibilities of the Governmental Agent

(1) In fulfilling his powers, the Governmental Agent has the following responsibilities:

- a) to represent the interests of the Republic of Moldova with an utmost diligence;
- b) to respect the confidentiality of friendly settlement proceedings and information, and in other cases stipulated by the Rules of the European Court;
- c) to ensure non-disclosure of the identity of an applicant in cases decided by the European Court;
- d) to ensure protection of personal data contained in the case files of his possession;
- e) to refrain himself from public statements that could damage the image and interests of the Republic of Moldova in the proceedings before the European Court or before the Committee of Ministers of Council of Europe;



f) to refrain himself from providing consultations or any other legal assistance, which are contrary to the scope of his mandate.

(2) The responsibilities of the Governmental Agent set in the paragraph (1) points c) and d) should be kept even after the closure of his incumbency.

(3) A person who has served as Governmental Agent may not represent or advise an applicant before the European Court or in any other proceedings in the cases communicated during the period when he was being the Government Agent.

Article 7. Assistance of the Governmental Agent

(1) The Governmental Agent is assisted by a specialized subdivision of the central apparatus of the Ministry of Justice, where there are public servants and secondments from other authorities.

(2) The structure and the number of personnel of the specialized subdivision for assistance of the Governmental Agent, within the limits of the Ministry's provided employees, its relations with other subdivisions of the Ministry of Justice should be set up by a Decision of the minister of justice, following a proposal of the Governmental Agent.

(3) The prosecutors and other public officials may be seconded to specialized subdivision for assistance of the Governmental Agent, following his proposal and with agreement of the minister of justice, under the conditions established by law.

(4) The Governmental Agent may request an assistance of experts or specialists, while handling complex cases or when special knowledge is required.

(5) The minister of justice, at the proposal of the Governmental Agent and if it is appropriate, may employ translators, interpreters, experts and specialists on contractual basis.

(6) The responsibilities of the Governmental Agent as provided by Article 6, what concerns confidentiality, due diligence and refrainment from public statements, shall be extended correspondingly to the persons who fall within the provisions of the present Article.

Article 8. Expenses of the Governmental Agent

(1) All expenses of the Governmental Agent and any other costs related to his and/or the assisting persons' attendance to the proceedings before the European Court and before the Committee of Ministers of Council of Europe, as well as any other missions' expenditures should be borne by the budget of the Ministry of Justice.

(2) Where the representation in a case before the European Court required special knowledge, the Governmental Agent may request conclusions from an expert or specialist.

(3) The expert conclusions submitted by public authorities or affiliated institutions are free of charge. The expert conclusions provided by third persons should be sought with a prior consent of the Minister of Justice and the costs thereof should be borne by the budget of the Ministry of Justice.

Article 9. Advisory Council of the Governmental Agent

(1) In order to guarantee a better representation of the Republic of Moldova before the European Court and the execution of its judgments and decisions, the Governmental Agent benefits from an Advisory Council assembled from the representatives of public authorities, of academic and civil society.

(2) The composition and working methods of the Advisory Council shall be established by a Statute approved by the Government upon the proposal of the Minister of Justice. The registry of the Advisory Council is secured by the specialized subdivision that assists the Governmental Agent.

Chapter III THE REPRESENTATION OF THE GOVERNMENT BEFORE THE EUROPEAN COURT

Article 10. Contentious proceedings before the European Court

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Article 11. Friendly settlement proceedings of the cases pending before the European Court

...

Article 12. Unilateral declarations

...

Article 13. Interim measures

(1) The interim measures ordered by the European Court to the authorities of the Republic of Moldova are binding and enforceable.

(2) The Governmental Agent, by his motion requires the competent authorities for an immediate execution of any interim measure ordered by the European Court, and explains the way of its execution. The motions of the Governmental Agent made under the provisions of the present article are mandatory for examination and adoption of measures under the law.



Article 14. Interstate cases

...

Article 15. Third party intervention in the proceedings before the European Court

...

Article 16. Referral of a judgment before the Grand Chamber of the European Court

...

Chapter IV EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT

Article 17. Execution of judgments and decisions of the European Court

(1) Final judgments of the European Court concerning remedial measures and financial compensations are writs for execution.

(2) A friendly settlement agreement or a unilateral declaration becomes writ for execution after the notification of the European Court's decision of striking the case out of the lists, and the clauses and remedial measures included therein are binding for all authorities.

(3) The detailed procedure for the execution of European Court judgments and decisions is governed by a Statute approved by the Government.

Article 18 Execution of individual measures

(1) The execution of individual measures consists of remedial actions and / or payments of financial compensations following from the European Court's judgment or as provided by a friendly settlement agreement or unilateral declaration accepted by the European Court's decision.

(2) The Governmental Agent, within one month after the day when the judgment or decision of the European Court becomes final, shall inform the relevant authorities about the requirement of implementation and the way of execution of the needed individual measures. The informed authorities are responsible for execution of the judgment or decision of the European Court.

(3) The amounts awarded by the European Court's judgments and decisions shall be paid unconditionally by the Ministry of Finance, irrespective of whether or not there were envisaged financial means for this purpose in the state budget law for the current year.

(4) The payment shall be made within the time limit prescribed by the European Court's judgment or decision or friendly settlement agreement or unilateral declaration. If such a period has been not set up, the payment shall be made within 3 months from the day when the judgment or decision of the European Court becomes final.

Article 19 Execution of general measures

(1) Execution of general measures has the scope of prevention of future Convention's violations, removal of systemic problems identified by the European Court, which require adoption or amendment of legislation, policy documents, setting up or changing practices and other relevant measures.

(2) The Governmental Agent, within 3 months after the European Court's judgment becomes final, proposes general measures to the authorities, coordinates and monitors their implementation.

(3) Execution of the general measures is primary task for the authorities, which have an active role in their implementation.

Article 20. State Register of European Court judgments and decisions, translation and publication

(1) The Governmental Agent keeps the State Register of judgments and decisions of the European Court in cases against Moldova. The rules of such a Register shall be set up by a regulation approved by the Minister of Justice.

(2) The Governmental Agent provides a translation in the national language of the judgments and decisions of the European Court in cases against Moldova and ensure translation of judgments or decisions of the European Court in others cases against another state, or a summary thereof, upon a necessity.

(3) The translated judgments and decisions of the European Court in cases against the Republic of Moldova should be included in the State Registry, which is public, and notified to the relevant authorities. An applicant can acquire the translation of judgment or decision of the European Court in a case against the Republic of Moldova to which he or she was party.

Article 21. The Governmental supervision

(1) Before the 31st of January each year, the authorities involved in the execution of the European Court judgments and decisions must submit to the Governmental Agent their reports on execution of general and individual measures for the previous year.



(2) The Governmental Agent may request the authorities involved in the execution of the European Court judgments and decisions any information on the execution of general and individual measures, and they are required to submit such information.

(3) Before the 15th of March each year, the Governmental Agent prepares and submits for the Government's approval the draft annual report for the previous year on the measures taken for the execution of judgments and decisions of the European Court, as well as on other important issues relevant to the execution or plans for execution. This report is to be submitted to the Parliament for information until the 15th of April each year.

Article 22. The Parliamentary control

(1) The execution of general and individual measures is subjected to the parliamentary control in the manner prescribed by the present law and the Regulation of the Parliament.

(2) The Parliament shall be informed periodically or upon its request by the Governmental Agent about the judgments and decisions of the European Court, the measures to be taken or that have been already taken for the execution thereof, as well as about any relevant correspondence with the Committee of Ministers of Council of Europe on execution of judgments and decisions of the European Court.

Article 23. Submissions to the Committee of Ministers of Council of Europe

(1) The Government Agent is empowered to prepare submissions before the Committee of Ministers of Council of Europe, through the Ministry of Foreign Affairs and European Integration, on the execution of European Court judgments and decisions in cases against Moldova.

(2) Following an invitation of the Ministry of Foreign Affairs and European Integration, the Governmental Agent may attend the debates by the Committee of Ministers of Council of Europe of resolutions and decisions concerned to the Republic of Moldova.

Article 24. The Resolutions and Decisions of the Committee of Ministers of Council of Europe

Resolutions and Decisions of the Committee of Ministers of Council of Europe adopted in cases against the Republic of Moldova shall be published, translated, disseminated and notified to the authorities similarly as in Article 20.

Chapter V Responsibility for the violations of the Convention

Article 25. Individual liability

(1) A person whose actions or omissions have led or significantly contributed to a violation of the Convention, i.e. the violation found by the European Court in its judgment or the violation that imposed a friendly settlement of the case before the European Court or a unilateral declaration, shall be held liable under criminal, administrative, disciplinary or civil law.

(2) The guilt and liability of individuals shall be established in each individual case by the authorities that are competent under the law to initiate proceedings or to adopt decisions on criminal, administrative, disciplinary and civil liability; the degree of such a guilt or liability does not directly depend on the amount of financial compensation paid under the judgment or decision of the European Court.

(3) The Governmental Agent notifies the authorities that are competent to initiate proceedings or to adopt decisions on criminal, administrative, disciplinary, and civil liability and explains how the action or omission of the person concerned led to the finding of a violation of the Convention in a judgment of the European Court or imposed a friendly settlement agreement of the case before the European Court or a unilateral declaration.

Article 26. Institutional liability

(1) Institutional liability occurs when the actions or inaction of an authority, taken individually or as a whole, have led or contributed significantly to a violation of the Convention, i.e. the violation found by the European Court in its judgment or the violation that imposed a friendly settlement of the case before the European Court or a unilateral declaration

(2) Institutional liability consists of, where it is appropriate, official apologies presented on behalf of the authority to the applicant and / or decommissioning of the authority's budgetary resources.

(3) The official apologies to the applicant shall be presented by the authority at the request by the Governmental Agent on basis of a judgment or decisions of the European Court.

(4) The Governmental Agent informs the Ministry of Finance whether the institutional liability for the purposes of the present Article could be applied by decommissioning of the authority's budgetary resources. The Ministry of Finance may, while drowning up annual budget, apply decommission of financial resources according to the law.

Article 27. Right of recourse

(1) The State has the right of recourse against persons whose actions or omissions have led or significantly contributed to a violation of the Convention, which was established by a judgment or imposed a friendly settlement of the case before the European Court or a unilateral declaration.



(2) The amounts awarded by a judgment or decision of the European Court, by friendly settlement agreement of the case before the European Court or by unilateral declaration shall be returned on the basis of a domestic judgment proportionally to the degree of liability.

(3) The Ministry of Justice shall pursue legal recourse, under the provisions established by law, within 3 years from the day of payments of amounts awarded by the European Court's judgment or decision or by friendly settlement agreement.

Chapter VI IMPLEMENTATION OF THE CONVENTION

Article 28. General motions

(1) The Governmental Agent by his own motion notifies the authorities which practices, actions or omissions reveal a systemic problem, what can lead to massive violations of the Convention's rights and can raise the flaw of the applications before the European Court. The general motions of the Governmental Agent are mandatory for consideration by the authorities.

(2) The Government Agent, at the express request of an authority, makes an assessment of an individual case through the applicability of the Convention and the European Court case law. This assessment is advisory and it can be requested and submitted on confidential basis.

Article 29. Notification about developments of the European Court case law and the compatibility of national legislation with the Convention

(1) The Governmental Agent, by his own motion or at the request of an authority, submits information about the relevant developments of the European Court case law.

(2) The Governmental Agent, by his own motion or at the request, submits his opinions on the compatibility of national legislation with the Convention, insofar as it does not runs counter his mandate.

Chapter VII FINAL AND TRANSITORY DISPOSITIONS

Article 30

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Signature
The deputy President of the Parliament
No. 151. Chişinău, 30 July 2015.



Univ.-Prof. Dr. Katharina Pabel

Questions to the experts – the Austrian Perspective

1. What is the procedure for the adoption of general measures following the ECtHR judgments in your country? Is there any such procedure established by law or another text (e.g. Government's regulations, internal ministerial instructions, etc.)? What triggers the process of the adoption of general measures once the judgment becomes final?

There is no specific procedure for the implementation of judgments delivered by the European Court of Human Rights (ECtHR) which establish a violation of rights of the Convention of Human Rights by Austrian authorities. Such a procedure does not exist in any case, neither if the judgment required an individual measure or the paying of compensation nor if the judgment required general measures. If a judgment found a violation of the Convention by Austrian authorities it undergoes a legal analysis by the Government Agent in the Federal Ministry for Europe, Integration and Foreign Affairs and by the Deputy Government Agent in the Federal Chancellery (Prime Minister's Office). The Government Agent and the Deputy Government Agent assess *prima vista* what kind of measures have to be taken in order to implement the respective judgment. In the following, the judgment is sent to the federal ministry or the *Land* (i.e. the federal state) accountable for the violation for consideration. It is the task of the accountable authority – where necessary supported by the agents – to identify and to take the measures required by the judgments of the ECtHR. The Federal Ministry for Europe, Integration and Foreign Affairs has to be informed about the measures taken or planned to implement a judgment. On the basis of this information the Government Agent's office submits, in close co-ordination with the Deputy Government Agent, action plans and actions to the Council of Europe's Execution Department. This approach does not follow a written procedure but it forms a long standing government practise.

The competence of the government agent in the Federal Ministry for Europe, Integration and Foreign Affairs is based on the Federal Ministries Act 1986. This Act i.a. organised the competences of the federal ministries being the top of the federal administration.

According to this Act foreign affair matters comprise in particular “to represent the Republic of Austria vis-à-vis government of foreign countries and other entities of international law, comprising international organisations and to communicate with these”. This includes the representation of the Republic of Austria vis-à-vis the Council of Europe and its bodies. Within the Foreign Ministry there is a division specialised in international law including human rights and humanitarian law (*Völkerrechtsbüro*) where the Agent is selected from.

According to the above-mentioned Act the Federal Chancellery is responsible for “matters concerning the Constitution”. The Legal and Constitutional Service of the Federal Chancellery (“*Bundeskanzleramt-Verfassungsdienst*”) where the Deputy Agent is selected from, acts as a legal expert and advisor in various fields. In particular, it reviews all draft laws and ordinances from other ministries and the *Länder* (federal states) with regard to their compatibility with constitutional law (which includes the European Convention on Human Rights, see question 5). Furthermore, it represents the Federal Government before the Austrian Constitutional and the Republic of Austria in proceedings before the European Commission and the European Court of Justice as well as before the European Court of Human Rights (together with the Foreign Ministry).

These two branches of the Federal Ministry for Europe, Integration and Foreign Affairs and the Federal Chancellery have been cooperating in various fields, including the representation before the ECtHR and the execution of its judgments, on a regular basis and as well-established practise.

2. What are the respective roles of the executive and the legislator and how do they interact in this process? Is there a particular body vested with the competence to initiate and coordinate the process of the adoption of general measures?

Initially, it has to be clarified whether a specific judgment finding a violation of the Convention by Austria required general measures and what kind of general measures. This clarification is based on the respective assessment by the Government Agent and the Deputy Government Agent, both parts of the governmental departments (see question 1). If general measures are envisaged or have to be taken in order to implement a judgment this fact is pointed out in the action plan or action procedure to the Committee of Ministers.

In some cases the implementation of a judgment requires the adoption or the amendment of a law. The competence to initiate laws lies with the Government and with the parliament. In most cases, the federal ministry being assigned with the relevant subject (according to the Federal Ministry Act) has to develop a draft proposal for the law. Legislative proposals are widely circulated in a review process in which it can be discussed whether the draft fully implements the judgment of the European Court of Human Rights. At this stage, the

Constitutional Service of the Federal Chancellery is providing its expert opinion with respect to the Austrian Constitution including the European Convention on Human Rights. After the final draft of a law has been adopted by the Federal Government it is sent to parliament together with an explanatory memorandum for debate, revision and enactment. Moreover, parliament can initiate laws on its own. In this case, it is not dependent on any act by the executive.

In other cases, the implementation of a judgment requires the adoption or the amendment of ordinances. Ordinances are drafted and adopted by the competent federal minister.

If general measures have to be taken by way of laws or by way of ordinances is a question of national constitutional law.

There is no specific, centralised and specialised body entrusted with initiating and coordinating the process of adoption of general measures following a judgment by the ECtHR. The development and adoption of the necessary general measures falls within the competence of the respective authority (e.g. it falls within the competence of the Ministry of Justice if a judgments required the amendment of the code of criminal procedure). By way of cooperation between all bodies of administration the Government Agent and his deputy provide support, if necessary, in respect of the interpretation of the Convention and the case-law of the Court and they comment on drafts.

Due to the federal constitution of Austria occasionally general measures has to be taken by the *Länder* (federal states). The division of competences between *Bund* and *Länder* according to the Austrian constitution has to be observed when implementing judgment of the ECtHR. In this case, the general measures required have to be taken by the competent authorities of all *Länder* or of the *Länder* concerned. There is no specific procedure to ensure the fulfilment of the obligations of the *Länder* stemming from the judgments. There is no specific body having the competence to give a formal instruction in order to legally force the *Länder* to implement a judgment (for the Constitutional Court see question 5 and 6). In this respect, the importance of the “human rights coordinators” (*Menschenrechtskoordinatoren*) should be mentioned. They were being established in 1998 on the basis of a decision of the Federal Government, the governments in the *Länder* did likewise. The human rights coordinators meet at least twice a year to exchange relevant information on human right issues. The Deputy Government Agent in the Federal Chancellery being one of the human rights coordinators coordinates these meetings. During these meetings i.a. implementation measures following judgments of the ECtHR are discussed, if necessary. By this, an effective and useful exchange of experts of all administrative departments specialised in human rights is guaranteed which improves the effectiveness of the implementation of judgments.

In Austria, the European Convention on Human Rights has been given the status of a constitutional law (see also question 5). Since more than fifty years it forms an integral part of the constitution. The fact, that the Convention and the Strasbourg case-law are most relevant criteria in the jurisprudence of the Austrian Constitutional Court (*Verfassungsgerichtshof*) strengthened its relevance and importance for the Austrian legal order. There is a strong political consensus to comply with the Convention and to fully implement the judgments of

the ECtHR. However, there are judgments by the Court relating to Austria which lead to criticism and political discussion, e.g. the right to vote for prisoners, the scope of LGBT-rights or family issues.

3. How the measures required by the judgments are identified in your legal system? Would the process be different depending on the type of the ECtHR judgment to be enforced (e.g. a judgment limited to individual circumstances or revealing an underlying systemic problem, a semi-pilot or a pilot judgment)? How are the measures identified when a judgment does not specify any? Would a specific indication by the Court about general measures be helpful for the definition of such measures? What is the legal status and practical effect of the interim resolutions of the Committee of Ministers calling for specific general measures to be adopted?

It is the competent authority's task to identify the measures required by judgments of the European Court of Human Rights. In most cases, it is the function of the federal ministry being assigned with the relevant subject. If necessary, the Government Agent and his deputy provide support and legal advice (see question 1 and 2). Since there have not been any (semi-) pilot judgments with respect to Austria no specific procedure has so far been necessary. The same is true for interim resolutions.

A specific indication by the Court about general measures could be helpful to identify such measures for the implementation process at domestic level. Particularly, if a large number of applications referring to a specific problem are pending and a large number of persons are affected by this problem it may be effective to identify specific necessary measures. The previous efforts of the state concerned may also be a reason for the Court to give or not to give more concrete references to the necessary measures. Certainly, in most cases the necessary measures may be identifiable as a consequence of the human rights violation established by the Court. Furthermore, it falls into the discretion of the state concerned to decide how to execute a judgment. This margin of appreciation should be respected by the Court as well as the underlying principle of subsidiarity. The implementation of judgment under the review of the Committee of Ministers ensures the effective execution of the judgments and provides for the appropriate flexibility.

4. Does your country's domestic procedure for adoption of general measures apply to the execution of decisions of other international judicial or quasi-judicial bodies or it is only limited to the execution of the ECtHR judgments?

The Austrian procedure for adoption of general measures as prescribed before (see question 1 and 2) applies to the execution of judgments of the ECtHR as well as to the execution of decision of other international judicial or quasi-judicial bodies.

5. How the domestic courts of first instance react when facing a problem of compliance with the ECtHR judgments which require the adoption of general measures (e.g. a change of a domestic legal provision which led to a violation of the Convention)? Is there a possibility or an established procedure for referral of such an issue to the Supreme and/or the Constitutional Court?

In Austria, the European Convention on Human Rights has been given the status of a constitutional law. Consequently, all legislation and all acts of the administration (including ordinances) as well as the judiciary have to comply with the Convention. That includes the case-law of the Court of Human Rights. The Constitutional Court has the competence to review laws and ordinances in order to establish any violation of constitutional law including the Convention and to rescind the law or ordinance violating constitutional law including the Convention.

All domestic courts (including the courts of first instance) have to observe the Convention. If a court has concerns regarding the compatibility of a law or an ordinance with the Convention as interpreted by the ECtHR, it shall file an application with the Constitutional Court for rescission of this law or ordinance. Only the Constitutional Court is empowered to rescind a law or an ordinance but every court can apply with the Constitutional Court to exercise this power. Furthermore, all courts have to interpret legislation and ordinances in conformity with the constitution, which includes – as said before – the Convention and the jurisprudence of the Court. Therefore, if a judgment of the ECtHR can be complied with by way of applying a specific interpretation of legislation or ordinances, all courts are obliged to apply this interpretation in their judgments.

In order to provide the necessary information for the courts (and other bodies) summaries of the judgments with respects to Austria and of other relevant judgments are submitted by way of circular by the Federal Chancellery at least twice a year.

6. What is the role played by the Supreme Court and the Constitutional Court in determining and initiating general measures? What is the procedure they follow in that regard?

Neither the Constitutional Court nor the Supreme Court have a specific role or specific powers in determining or initiating general measures following a judgment by the Court. Particularly, the Constitutional Court and the Supreme Court do not have the competence to initiate the adoption or amendment of a law or an ordinance.

As mentioned before (see question 5) the Constitutional Court has the power to rescind laws and ordinances if it finds it to violate the Convention. The Supreme Court is not empowered

to rescind laws, neither is any other court. The specific competence of the Constitutional Court to rescind laws requires an application duly brought before the Constitutional Court. According to Article 140 of the *Bundes-Verfassungsgesetz* (Federal Constitutional Law) courts are entitled to lodge an application as well as one third of the members of the *Nationalrat* (National Council) or the *Bundesrat* (Federal Council). In specific cases, the *Länder* (federal states) have the right to apply with the Constitutional Court to assess the conformity of laws with the Constitution. Moreover, the Constitutional Court itself can decide on the conformity of a law or an ordinance with the constitution including the Convention if the law or ordinance is decisive in an individual case pending at the Constitutional Court. The competence of the Constitutional Court to assess the conformity of laws and ordinances with the constitution including the Convention and to rescind the law or the ordinance in case of the incompatibility (*Normenkontrollverfahren* – procedures to assess the compatibility of laws with the constitution) plays a crucial role for the implementation of the Convention and the jurisprudence of the European Court of Human Rights. The control of legislation by the Constitutional Court is not limited to the implementation of judgments delivered with respect to Austria. But it is a tool to implement the full range of the Strasbourg case-law in the domestic legal order irrespective of the states concerned in the judgments.

7. Has any judgment of the ECtHR ever required an amendment of a constitutional provision or a change in its interpretation? If so, what measures have been taken? How was a (potential) conflict between the constitutional and conventional requirements or divergent interpretations eventually resolved?

Since the Convention has been given the status of a constitutional law in Austria, the interpretation of the Convention by the Constitutional Court is adapted to the Strasbourg case-law. In some cases, the Constitutional Court had to change its interpretation of the constitution (which includes the Convention) after a judgment of the European Court of Human Rights. This change of interpretation can lead to the rescission of a law.

One example for this way of implementation of a judgment of the ECtHR is the judgment of the Court with respect to Austria, relating to Jehovah's Witnesses (ECtHR 31.7.2008, Appl. No. 40825/98). In its judgment of 25 September 2010 (VfSlg 19.166/2010) the Constitutional Court established that it has to change its own interpretation of Article 14 together with Article 9 of the Convention with regard to the time period required by the respective domestic law as a precondition before being recognised as a religious community. The Constitutional Court rescinded the relevant law.

This above mentioned example highlights the fact that the Constitutional Court explicitly shows its willingness to follow the case-law of the European Court of Human Rights even if it has to change its own interpretation of the Convention as part of the domestic constitutional law. Former decisions of the Constitutional Court could lead to another assessment. In its judgment of 14 October 1987 (VfSlg 11.500/1987) the Constitutional Court established that it is bound by basic constitutional provisions establishing the organisation of the state even if

they are not in line with the Convention in the interpretation of the Strasbourg Court. It emphasized that it was the competence of the legislative authority to amend the Constitution if there was an incompatibility with the Convention. The very last sentence of the quoted paragraph shows that the Constitutional Court found itself not to be empowered to amend constitutional provisions establishing the organisation of administration and courts being a part of the organisation of the state. This approach of the year 1987 cannot be regarded as the current status of the consideration of the Constitutional Court. Today, this judgment could not be regarded as a general reservation of the Constitutional Court *vis-à-vis* Strasbourg judgments challenging the Austrian constitutional order. The Constitutional Court has proven that it accepts the judgments by the Court and that it is willing to implement them without any exemption or reservation.

An amendment of the constitution had been necessary with regard to the system of remedies in administrative law. This question had been touched by the Constitutional Court's decision of 1987 mentioned above. As a consequence of the jurisprudence of the ECtHR relating to Article 6 and Article 5 of the Convention it became clear that the system of remedies in administrative law consisting of administrative remedies and a review by the Administrative Court did not meet the requirements of the Convention. Austria had therefore to introduce a two-stage system of administrative court review in order to fully comply with the Convention. For this reform, which took a long time, several amendments of provisions of the constitution had been necessary. After some "interim solutions", the Administrative Jurisdiction Amendment Act 2012 (Federal Law Gazette I Nr. 51/2012) entered into force in 2014 amending i.a. the *Bundes-Verfassungsgesetz* (Federal Constitutional Law). It fundamentally reorganized the mechanisms of legal protection against individual decisions of administrative authorities with view to the requirements of the Convention and the case-law of the ECtHR and of the European Charter of Fundamental Rights.

ENHANCING NATIONAL MECHANISMS FOR EFFECTIVE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*Constitutional Court of the Russian Federation, Saint-Petersburg,
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FRENCH REPORT

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1. What is the procedure for adoption of general measures following the ECtHR judgments in your country? Is there any such procedure established by law or another text (e.g. Government's regulations, internal ministerial instructions, etc.)? What triggers the process of adoption of general measures once the judgment becomes final?

The execution of a judgment of the ECtHR relies on the initial assessment by national authorities. Therefore, it falls under the competence of either the executive, legislative or judicial authorities. As soon as the judgment of the Strasbourg Court is adopted, the executive is informed about it.

Law does not establish the procedure. The decision to adopt general measures stems from the cooperation between the various bodies involved, including judges and administrative authorities. In matters of administrative litigation, the main interlocutors of the Ministry of Foreign Affairs and International Development (MFAID) are the *State Council* (the administrative Supreme Court) and the Ministry of Home Affairs, which are working in a close relationship with the administrative courts. In matters of judicial litigation, the main interlocutors of the MFAID are the *Court of Cassation* and the Ministry of Justice. The High Judicial and Administrative Courts have greatly contributed to defining practical modalities of the execution of the ECtHR judgments.

Techniques used to adapt the domestic law following the ECtHR judgments are the following ones:

- First, **communication of the judgment** of the ECtHR to the involved bodies; In France, a bill has also been filed on April 13, 2011, aimed at presenting to the Parliament an annual report on the execution of judgments of the European Court of Human Rights by

France. The bill was referred to the Committee on Foreign Affairs. The objective was to strengthen the monitoring of the execution of ECtHR judgments by the French Parliament;

- **publication and dissemination of the judgment in legal journals and on websites:** on the French Government website Legifrance (www.legifrance.gouv.fr) and for example in the case of *Menesson v. France* of September 26, 2014 (on the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy arrangement), publication on the intranet of the Court of Cassation by the documentation, studies and report department of the Court of Cassation (*Veille de droit européen*, May-June 2014, No. 65);

- the government may also edict **administrative circulars** in order to issue instructions to the involved authorities to implement Strasbourg case-law and to prevent the repetition of a violation due to a misapplication of domestic law. These circulars are interpretative circulars and not regulatory ones. A circular addressed to judges should not be understood as mandatory because of the principle of separation of powers. This is just a recommendation. As the State Council wrote, in a judgment of December 7, 1992, *Mr. Terrin*, which sought the annulment of two circulars of the Minister of Justice addressed to courts following the *Kruslin and Huvig* ECtHR's case: "If these notes invite the authorities to whom they are addressed to ensure that wiretaps are ordered in accordance with the conditions set by these decisions, they contain no mandatory provision". Despite this reminder, the Court of Cassation has reversed its position following the Ministry of Justice April 27, 1990 note.

Jurisprudential changes can also be the result of the judiciary reversing a previous ruling. The Court of Cassation has not escaped the influence of the European Convention on Human Rights. The most significant example was the reversal of a precedent of the High Judicial Court regarding the right of a transsexual to have his civil status and his name changed. Initially, the Supreme Court refused to recognize such a right to transsexuals (in 1990). The non-recognition of such a right was considered by the European Court of Human Rights as contrary to the right to privacy guaranteed by Article 8 of the European Convention on Human Rights (ECtHR case *B. v. France* of March 25, 1992). In light of this judgment of the Strasbourg Court, the Plenum of the Supreme Court decided to abandon its legal position in a December 11, 1992 decision. Similarly, in a judgment of July 30, 2014 meeting, *Mr. Vernes*, the State Council held that when a violation found by the Court is related to an administrative sanction, the competent national authority must, if it is requested to and provided that the violation continues, terminate, in whole or in part, the execution of that sanction, taking into account not only the "interests which it is responsible, [its] grounds (...) and [of] the seriousness of its effects" but also to "the nature and [of] seriousness of the breaches identified by the Court". The principle of "conventional loyalty" was applied in that case¹.

- Sometimes, in order to cease the repetition of unlawful conduct, one might appeal to the **legislative power and to normative changes**. In case of failure of the legislature, the regulatory authority may also intervene through the adoption of a regulatory act.

¹ According to Professor Sudre expression, see *Droit européen et international des droits de l'homme*, PUF, 2012, n°451.

2. What are the respective roles of the executive and the legislator and how they interact in this process? Is there a particular body vested with the competence to initiate and coordinate the process of adoption of general measures?

The executive and the legislature work together, although sometimes Members of Parliament are reluctant to change domestic legislation. The Directorate of Legal Affairs of MFAID includes a sub-department of human rights that is vested with contentious task (it represents France before the ECtHR) and consultative (it answers questions on the interpretation of the European Convention on Human Rights). The latter ensures interdepartmental cooperation and informs the authority, involved by the finding of a violation of the ECHR, about the necessity to conform national law to the European Convention.

If Parliament regularly intervenes in order to conform to European requirements, sometimes the executive performs a regulatory change to conform to the expectations of the European Court of Human Rights. Much ink has been spilled in France, with many controversies, about the existence of the institution of *Commissaire du Gouvernement*. This is neither a government representative nor a public prosecutor. Yet, based on the theory of appearances, the ECtHR held that the presence at the deliberations of the Government Commissioner disregarded the requirements of a “fair trial” (ECtHR, 7 June 2001, *Kress v / France*, 12 April 2006, *Martinie v / France*). After showing its displeasure, France finally decided to have the proceedings before administrative courts modified. A Decree No. 2005-1586 of December 19, 2005 said that the Commissioner “attends deliberations. He does not participate.” Then, facing the pressure exerted by the Court, another Decree No 2006-964 of 1 August 2006, provided that from September 1, 2006 the *Commissaire du Gouvernement* no longer attend the deliberations before the lower courts and before the Council, at the request of a party, the *Commissaire du Gouvernement* may be banned from attending the deliberations. And finally, a decree was adopted on January 7, 2009 in order to replace the name “*Commissaire du Gouvernement*” with “*public rapporteur*”. And very recently, in a decision dated June 4, 2013, *Marc-Antoine v. France*, the ECtHR held that the fact that the public rapporteur, and not the parties to the proceedings, was the only one to receive communication of the draft decision did not violate Article 6.1 of the ECHR. It almost took ten years to end the joust or “dialogue of the deaf” that was experienced between the Strasbourg Court and France.

3. How the measures required by the judgments are identified in your legal system? Would the process be different depending on the type of the ECtHR judgment to be enforced (e.g. a judgment limited to individual circumstances or revealing an underlying systemic problem, a semi-pilot or a pilot judgment)? How are the measures identified when a judgment does not specify any? Would a specific indication by the Court about general measures be helpful for the definition of such measures? What is the legal status and practical effect of the interim resolutions of the Committee of Ministers calling for specific general measures to be adopted?

The European Court noted on several occasions that the Court’s judgment is essentially declaratory and “leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53” (new Article 46)².

² CEDH, *Marckx c. Belgique*, 13 juin 1979 ; CEDH, 29 avril 1988, *Belilos c. Suisse* ; CEDH, 24 juillet 2007, *Baumet c. France*.

Therefore the State remains free to choose the means to fulfil its obligations under Article 46 of the Convention, insofar as they are consistent with the conclusions contained in the judgment of the Court³.

General measures implemented through legislative change stem from the requirement of guarantees against the repetition of unlawful conduct. We can distinguish two types of situation: when the domestic legislation is directly challenged by the European Court (either because the absence of a provision constitutes a violation of the Convention, or because the non-application of the law is not enough to cease in the future an unlawful conduct) and when the domestic legislation is only indirectly challenged (the violation of the Convention is the result of a measure taken in application of a law). In the latter case, adoption of general measures may be more complex and difficult, as the government regulation might be used as a “screen”. Notably, if the law is not directly called into question by the judgment of the Court, it then raises the question of the basis for the obligation for the State to change the law. In addition, the French doctrine remains divided on the obligation incumbent on the State to adopt general measures to implement a judgment of the ECtHR. The then invoked argument is the relative value of the judgments of the ECtHR⁴.

The decision to amend the legislation is therefore heavily dependent on the political will of the government. For example, following the *Kruslin and Huvig* case, Mr Toubon, at the time member of Parliament, referred to “the legal obligation... to draft a specific law that meets the conditions set by the Strasbourg Court in the two judgments by which France was condemned”⁵ in matters of wiretapping. And the French Act that was adopted on July 10, 1991 was based on the precise indications given by the ECtHR about the nature of the offenses that may result from wiretapping or the acceptable time limits.

Similarly, the French legislature deliberately amended the law on custody by adopting the Act of April 14, 2011 that provides that a lawyer may attend all hearings of the person from the beginning of the custody and that he will be informed of the right to remain silent. This law came after two rulings *Salduz v. Turkey* (ECtHR Grand Chamber, November 27, 2008,) and *Dayanan v. Turkey* (ECtHR October 13, 2009) in which the European Court recalled the requirements of a fair trial by stating the right of everyone to be assisted by a lawyer from the beginning of the custody and the right to remain silent, these two rulings being adopted prior to the *Brusco v. France* ruling from October 14, 2010 by which France was directly targeted and condemned by the ECtHR.

Sometimes, when matters are socially sensitive, the legislature failed to provide a normative solution because of the lack of consensus in Parliament. This is what happened about the question of simplifying the change of sex procedure in the civil state. France had indeed been condemned in the judgment of March 25, 1992 in *Botella v. France*. Because the Parliament failed to adopt a law, the Judiciary decided to speed things up by reversing its legal position in order to put an end to the violation of the Convention.

The reaction of the French authorities would indeed be different in the case of a pilot judgment, which emphasizes a systemic and structural violation of the Convention and in which the Court is not just ruling on the case but gives guidance on how to remedy these dysfunctions. One might expect that the French public authorities – the Government or the

³ CEDH, GC, 30 septembre 2009, *Verein gegen Tierfabriken Schweiz (VGT) c. Suisse*, req. n°32772/00, §88

⁴ According to M.L. Rassat, the State « can very well... decide *de jure* not to amend its domestic law », in *Institutions judiciaires*, PUF, 1993, p.27.

⁵ JOAN, 2nd meeting of June 13, 1991, p. 3146, quoted by Frédéric Lazaud, *L'exécution par la France des arrêts de la Cour Européenne des Droits de l'Homme*, PUAM, 2006, Volume 1, p. 236.

Judiciary – will be attentive to the indications given by the ECtHR and put an end to the repetition of the unlawful conduct. The threat of a potential application to the ECtHR would invite them to anticipate and avoid a possible condemnation.

The State Council has, for example, redefined in three cases adopted in 2007 (*Mr. Boussouar, Mr. Planchenault and Mr Payet*) the criteria of “internal administrative measures” in prisons in order to broaden the categories of legal acts that can be challenged before the administrative judge. The French administrative judge preferred to change its legal position according to the ECtHR guidelines (ECtHR, January 27, 2005, *Ramirez Sanchez v. France* and ECtHR, June 12, 2007, *Frérot v. France*) rather than be probably sanctioned in the future.

A proper execution of the ECtHR judgments requires the judgements to be clear and precise. It may happen that the State’s interpretation of the judgment does not correspond to the European requirements. A specific indication of general measures by the ECtHR could thus help the State to adopt legislation in conformity with the European requirements. However, the subject remains sensitive because beyond the fact that until the 2000s the ECtHR refused to implement a power of injunction, a systematic implementation of such a power could infringe on the sovereignty of the national legislator.

In the case of a politically or socially sensitive matter, the Legislative’s reluctance could thus be strengthened. Let’s take the example in France of the recent cases on the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of a surrogacy arrangement and the couples who had the treatment⁶. If the French government is committed to implement the decision, by the adoption of individual measures, and recognized following the ECtHR judgment the primacy of children’s interests prevailing over the choice made by their parents, it nevertheless seems that the French government will not – at least in the immediate future – legalize the use of surrogacy. Indeed, even a more detailed decision by the ECtHR would not have changed anything.

Under the French positive law, interim resolutions of the Committee of Ministers have a non-binding legal authority. They contain recommendations and incentives. Nevertheless, *de facto* they have a persuasive influence on the State, which is expected to conform its domestic law the requirements of European law.

4. Does your country’s domestic procedure for adoption of general measures apply to the execution of decisions of other international judicial or quasi-judicial bodies or it is only limited to the execution of the ECtHR judgments?

Historically, the question of the obligation to execute the judgments of international courts has not much retained the attention of international courts themselves, nor of the French legislator. Indeed, the spontaneous execution was considered the logical corollary of the recognition of the jurisdiction of the Courts (ICJ, ICC...). Article 94 (1) of the UN Charter⁷ clearly shows that a voluntary compliance from States was expected. The implementation of the ICJ decision thus results from the goodwill of States, even if is also provided an enforcement mechanism (Article 94.2) – that was never used against France.

⁶ CEDH, 5e sec., 26 juin 2014, *Labassee c. France*, affaire numéro 65941/11 et *Menesson c. France*, affaire numéro 65192/11.

⁷ According to article 94.1 : “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party”.

The execution of judgments issue however does not have the same impact in the context of the ICJ as in the ECtHR's context, because of the large number of decisions adopted by the ECtHR and because of the great interweaving of legal orders within Europe.

5. How the domestic courts of first instance react when facing a problem of compliance with the ECtHR judgments which require the adoption of general measures (e.g. a change of a domestic legal provision which led to a violation of the Convention)? Is there a possibility or an established procedure for referral of such an issue to the Supreme and/or the Constitutional Court?

The ECHR is rarely invoked before the French courts of first instance, which do not always master very well the Strasbourg case law. However when they consider that an Act violates the Convention, they may avoid the application of the law. Since 1975, ordinary Courts are in charge of the conventionality review of laws. There is no established procedure for referral of such an issue to the Constitutional Council or the Court of Cassation.

6. What is the role played by the Supreme Court and the Constitutional Court in determining and initiating general measures? What is the procedure they follow in that regard?

The French Constitutional Council does not play a direct role in determining the general measures. In 1975, in its *Abortion case*, it declined jurisdiction to review the conventionality of laws, considering that it was within the jurisdiction of ordinary courts. Therefore, the Constitutional Council has no "direct" contact with neither the Convention nor with the decisions of the ECtHR, which are not used as standards of reference in its judicial review or as interpretative principles of the French Constitution.

However, the Constitutional Council can play an indirect role, since it takes into account – even if it is not expressly stated in its decisions – the ECtHR judgements. As an example, one might mention the evolution of its jurisprudence on legislative validations under the influence of the ECtHR⁸. One can also point out how the Constitutional Council was inspired by the ECtHR case law when it declared that the principle of pluralism as a condition of democracy was an objective with constitutional value (Cons. Const., No. 86-217 DC of 18 December 1986), following the jurisprudence of the European Court of Human Rights concerning freedom of expression (ECtHR, *Handyside* judgment of December 7, 1976; *Lingens* judgment of 8 July 1986).

Similarly, the Court of Cassation and the State Council decision-making is more and more inspired by the ECtHR's case law. Even if the State Council considers, in accordance with consistent case law, that the ECtHR judgments have just a relative authority, *de facto*, it strives to comply with the Court's rulings to which it recognizes in fact an *erga omnes* effect. And, on its side, the Court of Cassation admitted more formally the interpretative authority of the Strasbourg Court's judgments. In an April 15, 2011 decision adopted by the Plenary Chamber (about custody), it considered that "the States parties to the Convention are required

⁸ In its October 28, 1999 judgment, *Zielinski and Pradal v. France*, the European Court of Human Rights considered that a "compelling ground of the general interest" was required to accept a legislative validation law, while the French Constitutional Council considered that the sole invocation of a "simple" general interest was sufficient. In its decision of December 21, 1999, the Constitutional Council changed its position and mentioned a "sufficient general interest".

to respect the decisions of the European Court of Human Rights, without waiting for being brought before it or having amended their legislation”.

One might also highlight the evolution of the position of the French State Council in the *Baumet* decision of October 4, 2012, by which the administrative judge tried to give an answer of principle to the question of the mandatory execution of the ECtHR judgments. The State Council gave an extensive definition of the obligation imposed on the state, based on a combined reading of Article 1, 41, and 46 of the Convention, therefore following the framework defined by the Strasbourg Court’s case law. At the same time, the State Council considers that the ECtHR decision has no impact on *res judicata*, which cannot be questioned, and is not likely to produce a “suspensive effect”⁹ on the national judgment. Thus, the French administrative judge has decided to avoid creating any exceptional hypotheses of non-execution of the ECtHR judgment that would have led him on a slippery slope.

7. Has any judgment of the ECtHR ever required an amendment of a constitutional provision or a change in its interpretation? If so, what measures have been taken? How was a (potential) conflict between the constitutional and conventional requirements or divergent interpretations eventually resolved?

At the moment, a conflict between a ECtHR judgement and a constitutional standard has never arisen in France. In consequence, no constitutional amendment has been adopted due to the adoption of a decision of the European Court of Human Rights.

There might be the potential question of the compatibility of the QPC mechanism (“priority preliminary ruling on constitutionality” mechanism) – introduced by a constitutional amendment in 2008 – with the respect to the right to a fair trial (art. 6.1 of the ECHR). But such compatibility has not been questioned yet before the ECtHR.

⁹ In the case of a “suspensive effect”, the national court decision would not have been executed.

Angelika Nußberger, Judge

**Enhancing National Mechanisms for Effective Implementation of the European Convention
on Human Rights**

Report on Germany

1. What is the procedure for the adoption of general measures following the ECtHR judgments in your country? Is there any such procedure established by law or another text (e.g. Government's regulations, internal ministerial instructions, etc.)? What triggers the process of adoption of general measures once the judgment becomes final?

2. What are the respective roles of the executive and the legislator and how they interact in this process? Is there a particular body vested with the competence to initiate and coordinate the process of adoption of general measures?

In Germany, no written procedure for the adoption of general measures exists. Once a judgment becomes final, the Agent's Office within the Federal Ministry of Justice will analyse the judgment and determine whether general measures are deemed to be necessary. If so, the Ministry of Justice will initiate the necessary steps – depending on the nature of the measures, which may necessitate federal legislation, *Länder* (state) legislation, practice directions or the mere dissemination of information to the judiciary, including the translation of ECtHR judgments.

The lack of a written procedure may stem from the fact that the judgments establishing a violation by Germany have – compared to many other Contracting States - never been very numerous (178 since 1959) which might be explained by the powerful position of the German Federal Constitutional Court. After a moderate peak in the 2000's numbers have even dropped to ten violations found in 2012 and three in 2013 and 2014 respectively. Moreover, some judgments do not require special general measures as they are resolved solely on an individual level.

Another reason why no unitary procedure of implementation is laid down might be that the judgments which do require implementation of general measures have been of great diversity, thus involving a wide spectrum of legislative and other issues. It illustrates the specific German situation that in the past decade the majority of cases in which a violation was found involved length of proceedings issues (102 violations since 1959) which triggered the – up to now - only pilot judgment concerning Germany (*Rumpf v. Germany*, no. 46344/06, 2 September 2010, see in detail question 3). Significant numbers of violations found also came from judgments in cases concerning preventive detention and the rights of fathers not married to the mother of a child, resulting in major changes in German family law and of the twin-track system of German criminal law. Implementation of general measures were also undertaken in the law of hunting following the judgment *Herrmann v. Germany* ([GC], no. 9300/07, 20 June 2012) and are under way in the law of criminal procedures after *Neziraj v. Germany* (no. 30804/07, 8 November 2012).

In spite of the diversity of the cases most general measures require a piece of federal legislation. In these instances the executive will be obliged to come up with a draft for the necessary legislative measures which will then be examined by the legislative bodies. The legislature will usually leave the first draft to the executive, but it also has the right of initiative. The Ministry of Justice will be the first to identify any need for legislation, but the official coordination of such measures will fall to whichever ministry is responsible for the respective field of legislation. Thus, the procedure does not differ from the general law-making procedure.

It must be stressed that sometimes measures must also be taken by the legislature of the 16 *Länder* (States) as well as by the executive branch of both federal and *Länder* level. The latter is important as most federal laws are executed or applied by the administrative and judicial bodies of the *Länder*, who are responsible for the highest courts. This means that on the federal level a new statute on preventive detention may be passed while on the *Länder* level the more detailed regulation and the application of the law in practice take place.

For instance, federal law provides now for compensation in cases of unreasonable length of proceedings but it is mostly for the *Länder* to pay compensation in these cases and to provide the means for swift proceedings by appointing a sufficient number of judges. Moreover, each of the *Länder* legislature have to provide for the *Länder* constitutional courts separate remedies for unreasonable length of proceedings as the federal law does not apply to them.

Given these complications deriving from the federal system, it is understandable that there is no single approach for the adoption of general measures. The necessary steps are decided on a case-by-case basis. While the Agent's Office represents Germany before the Council of Europe organs it has no formal supervising status when working with the institutions in immediate charge of the implementation measures. However, the Agent's Office is well placed at the Ministry of Justice, the administrative body which is involved in almost all new laws and can make use of its advisory role to reach out even to the decision-making bodies of the *Länder*.

3. How the measures required by the judgments are identified in your legal system? Would the process be different depending on the type of the ECtHR judgment to be enforced (e.g. a judgment limited to individual circumstances or revealing an underlying systemic problem, a semi-pilot or pilot judgment)? How are the measures identified when a judgment does not specify any? Would a specific indication by the Court about general measures be helpful for the definition of such measures? What is the legal status and practical effect of the interim resolutions of the Committee of Ministers calling for specific general measures to be adopted?

Following a judgment, the Agent's Office will have to present the action plan to the Committee of Ministers. In the process of drafting the plan the necessary measures will have to be identified in cooperation with the responsible authorities in the German system. Up to now specific measures have never been indicated by the Court. Given the already complicated ways of German legislation in a federal system stakeholders on the German side would most likely consider specific indications counterproductive as they narrow the space for negotiations and thus prolong the implementation process by excluding possible

viable alternatives. The national authorities see themselves in a far better position in deciding about the most appropriate way of preventing further violations than the Court.

Example: length of proceedings

In 2010 the Court issued a pilot judgment regarding the problem of unreasonable length of proceedings, as mentioned above the only pilot judgment concerning Germany. In *Rumpf v. Germany* (cited above) it found – again – violations of Articles 6 and 13 and held in the operative provisions that

...

(4) the above violations originated in a practice incompatible with the Convention which consists in the respondent State's recurrent failure to help ensuring that proceedings determining civil rights and obligations are completed within a reasonable time and to take measures enabling applicants to claim redress for excessively long civil proceedings at a domestic level;

(5) the respondent State must set up without delay, and at the latest within one year of the date on which the judgment becomes final in accordance with Article 44 § 1 of the Convention, an effective domestic remedy or combination of such remedies capable of securing adequate and sufficient redress for excessively long proceedings, in line with the Convention principles as established in the Court's case-law;

In the reasons the Court explicitly pointed out that

*it is in principle not its task to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. (*Rumpf v. Germany*, cited above, § 71)*

The kind of “remedy” or “redress” asked for was not specified by the Court. The Court acted knowing that Germany had attempted to implement a new remedy already since 2005. In the judgment of *Sürmeli v. Germany* (no. 75529/01, 8 June 2006) the Grand Chamber had found “that the remedies available in the German legal system do not afford litigants an effective means of complaining of the length of pending civil proceedings and therefore do not comply with the Convention” (§ 136). At the same time the Grand Chamber expressed its hope that the legislative initiative introduced in 2005 would change this situation to the better. In the 2005-2009 legislative period this did not succeed and when *Rumpf* was delivered the legislative proceedings were not likely to be concluded anytime soon.

The *Rumpf* judgment became final on 2 December 2010. On 3 December 2011, exactly a year later, a new remedy law came into effect which includes the possibility to claim

compensation. Up to now the Court has considered this an effective and meaningful remedy (see *Garcia Cancio v. Germany* (dec.), no. 19488/09, § 47, 29 May 2012; *Taron v. Germany* (dec.), no. 53126/07, § 40, 29 May 2012) even though it more recently has identified difficulties in the field of contact rights proceedings concerning young children (see *Kuppinger v. Germany*, no. 62198/11, § 141, 15 January 2015).

It can be said that the Court's setting of a reasonable time-limit in the *Rumpf* judgment has helped to conclude the process of legislation without making specific indications on how the new Act should be spelled out in detail. Even though the time-limit was viewed as rather strict by lawmakers the new legislation reached out even further than the pilot judgment had called for. It covers not only civil proceedings but also criminal proceedings and any other proceedings which are not even subject to Article 6 because they are neither considered civil nor criminal under the Convention, e.g. tax court proceedings, etc.

Thus, specific indications have not been made and apparently were not necessary.

Example father-children relation:

Judgments of the Court have triggered new legislation also in the field of family law, especially in cases concerning the relationships of fathers with their children when they do not live with the mother:

In the case of *Zaunegger v. Germany* (no. 22028/04, 3 December 2009) the Court found that in Germany joint custody against the will of the mother of a child born out of wedlock at the relevant time was *prima facie* considered as not being in the child's interest. The Court held that in the case of the applicant this amounted to a violation of his Convention rights under Article 14 in conjunction with Article 8 because it was not justified to treat him differently than a mother or a father of a child born in wedlock.

On 21 July 2010 the Federal Constitutional Court (1 BvR 420/09) followed suit and – citing at length the ECtHR's *Zaunegger* judgment - declared the relevant provision unconstitutional. Within two years the respective section of the Civil Code was amended, granting fathers the right to apply for joint and sole custody. Joint custody has to be granted if the parents do not submit anything which shows that this would be contrary to the child's best interest. The new legislation came into effect on 19 May 2013.

In the case of *Anayo v. Germany* (no. 20578/07, 21 December 2010) the Court held that it violated Article 8 that the applicant was not granted contact rights with his biological children because they were born while the mother was married to somebody else. Mother and children were living with the husband and thus the applicant was neither the legal father nor had he ever lived with the child. The Court held that the family court had failed to give any consideration to the question whether, in the particular circumstances of the case, contact between the twins and the applicant would be in the children's best interest.

Since the family court had acted in application of the relevant section of the Civil Code, once again the law had to be changed in order to allow the child's best interest to be considered. The Government initiated new legislation in early 2013 which smoothly passed the legislative bodies and came into force on 13 July 2013. It not only gave the biological (but not legal) father who had shown substantial interest in the child contact and information rights if in accordance with the best interest of the child but also provided for a procedure

to factually establish biological fatherhood in these cases which had been legally impossible before.

Both changes of legislation ended on-going debates on these issues within German society and were possible without a pilot judgment or any specific indications of the ECtHR. The relative smoothness of the legislative procedure was most likely possible as no systemic shortcomings were at issue, the financial implications were quite limited and the case-law of the ECtHR was clear and consistent.

Interim resolutions of the Committee of Ministers have not been relevant in the past as far as the implementation of judgments against Germany was concerned.

4. Does your country's domestic procedure for adoption of general measures apply to the execution of decisions of other international judicial or quasi-judicial bodies or it is only limited to the execution of the ECtHR judgments?

The Agent's responsibility applies only to ECtHR judgments. Furthermore, the implications of the procedure at the Committee of Ministers do not exist as far as other intergovernmental bodies are concerned. The implementation of European Union law is thoroughly different as EU law and its application in Germany is of a wholly different nature.

Quasi-judicial bodies are active in very many different fields. As a rule they do not adopt binding decisions, but recommendations. Thus the follow-up cannot be compared to the follow-up to ECHR-judgments. The procedure to be adopted is often predetermined by the international instrument on the basis of which the quasi-judicial bodies work. They are not necessarily linked directly to the Ministry of Justice, but can be in permanent cooperation with other ministries. Thus, the Ministry of Labour is the partner for implementing ILO conventions.

5. How the domestic courts of first instance react when facing a problem of compliance with the ECtHR judgments which requires the adoption of general measures (e.g. a change of domestic legal provisions which led to the violation of the Convention)? Is there a possibility or an established procedure for referral of such an issue to the Supreme and/or the Constitutional Court?

There is indeed a problem for the courts of first, second and third instance when they have to apply the current law even if there might be contradicting jurisprudence of the ECtHR. However they would have to interpret any legal provision in the light of the ECtHR's decision. This is not always possible. In the case of *Neziraj v. Germany* (no. 30804/07, 8 November 2012) the ECtHR had found a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention because in criminal proceedings on the applicant's appeal the defense counsel was not allowed to defend him in his absence and the respective regional court dismissed the appeal without hearing evidence. German criminal procedure law generally does not allow trials *in absentia* with few exceptions. The respective provisions are very clear. Consequently, various Courts of Appeal in similar cases held, that it was impossible to give a different interpretation to the domestic statutory law in question because of its wording (among others: Thuringen Court of Appeal, 4 StRR (A) 18/12, § 11, 17 January 2013, juris) or the clear intention of the lawmakers (Bremen Court of Appeal, 2 Ss

11/13, § 13, 10 June 2013, juris). The Appeal Courts thus dismissed the respective complaints without further considerations, noting that the ECtHR had not the power to declare domestic law invalid. The Courts of Appeal though did not turn to the one body which has this power.

Article 100 § 1, first sentence of the German Basic Law provides as follows:

“If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained ... from the Federal Constitutional Court where this Basic Law is held to be violated.”

This constitutional provision makes it possible to have the Federal Constitutional Court examine the constitutionality of a law before the court of first, second or third instance have to apply it. The courts do not make frequent use of this instrument as the admissibility requirements are strict. The law in question must be decisive for the decision, the court of instance has to be convinced that any possible interpretation of the law is unconstitutional and the reasons of the court’s request to the Federal Constitutional Court have to discuss the relevant case-law and literature.

According to its wording, Article 100 § 1 of the Basic Law does not apply to the issue whether German law is compatible with the European Convention on Human Rights. Nevertheless, the Federal Constitutional Court takes into account the Convention and the corresponding case-law of the ECtHR. But still the procedure under Article 100 § 1 refers only to a violation of the Basic Law, thus the respective court needs to be convinced that the domestic law is not only incompatible with the Convention but at the same time with at least one provision of the Basic Law.

In cases where a violation of the Convention is at stake, the Federal Constitutional Court itself (see case no. 2 BvR 1481/04 “Görgülü”, 14 October 2004, English translation available at

http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs2004_1014_2bvr148104en.html; among others also 2 BvR 209/14, § 43, 18 December 2014) observes that incompatibility with the Convention can be contrary to Article 20 § 3 of the Basic Law. This provision enshrines the *Rechtsstaatsprinzip*, the principle of rule of law in its continental European version, and thus indirectly grants the Convention the privilege of becoming part of the constitutionality review. *Mr Görgülü* was the father of a child born out of wedlock which was placed for adoption by the mother without knowledge or consent of the father who at that time had not been registered as the child’s father. The competent Court of Appeal declined to grant *Mr Görgülü* custody and access rights and held that the child had already integrated into a foster family. Finally, the ECtHR decided that this amounted to a violation of his right to respect for his family life under Art 8 of the Convention (*Görgülü v. Germany*, no. 74969/01, 26 May 2004). Notwithstanding, in subsequent proceedings the Court of Appeal still did not grant any access rights to Mr Görgülü. It claimed that the Convention and the ECtHR’s judgments were binding only for the Federal Republic of Germany but not for its courts. The Federal Constitutional Court (2 BvR 1481/04) accepted Mr Görgülü’s constitutional complaint and quashed the Court of Appeal’s decision. It held that the obligations of the Federal Republic of Germany deriving from the Convention were not limited to the executive branch entrusted with foreign relations. Art 20 § 3 of the Basic Law rather stipulated that all authorities and all courts were bound by rule of law which included the guarantees of the European Convention on Human

Rights. Disregard of the Convention or the judgments of the ECtHR could – and in this case did - therefore constitute a violation of fundamental rights under the German Basic Law in conjunction with Art 20 § 3 of the Basic Law (see no. 2 BvR 1481/04 “Görgülü”, § 47).

Nevertheless, to question the validity of a law which may have been in force for over 100 years deems extremely difficult in cases in which the Federal Constitutional Court has already ruled that the provision in question was compatible with the Constitution. Before pleading his case in Strasbourg *Mr Neziraj* was unsuccessful with a constitutional complaint before the Federal Constitutional Court although he had made reference to the case-law of the ECtHR on the issue (concerning other Contracting States). In 2006, the Federal Constitutional Court in its reasoned decision did not find his submissions convincing. It is not impossible but extremely burdensome for a court of instance to refer a case like this anew to the Federal Constitutional Court thus implying that it had overlooked a violation of the Basic Law.

As far as the Government is concerned it appears more prudent to initiate for the sake of clarity a change of legislation – which actually occurred in the aftermath of the *Neziraj* judgment (cited above) : In 2014 the Government submitted its draft law providing for the possibility that the accused may be represented by his defense counsel in the appeal hearing before the Regional Court. The amendments will most likely come into force in 2015.

6. What is the role played by the Supreme Court(s) and the Constitutional Court in determining and initiating general measures ? What is the procedure they follow in that regard?

Supreme Courts

Germany has five major branches of jurisdiction (ordinary courts, administrative courts, social courts, tax courts, labour courts) each of those headed by a federal high court (Federal Court of Justice, Federal Administrative Court, Federal Social Court, Federal Tax Court, Federal Labour Court). These courts are informed by the Agent’s Office of ECtHR judgments. If the necessary general measure would be the adoption of a different interpretative approach to a certain legal provision, they would at the next opportunity bring their jurisprudence into line with the ECtHR’s. This proves sometimes difficult especially in civil or family law cases whenever fundamental rights of both parties need to be balanced. This can lead to situations where the protection of one human right leads to the interference with another.

One example is the judgment *Hannover v. Germany* (no. 59320/00, 24 June 2004) concerning the photographs of the daughter of the late Prince of Monaco taken in public by so called “paparazzi” photographers and published in German press magazines. The Federal Court of Justice, Supreme Court in civil and criminal cases, found that the freedom of the press outweighed the applicant’s right to have her private life respected because she was seen as a “figure of contemporary society *par excellence*”. The Federal Constitutional Court accepted this decision. The ECtHR balanced differently because the applicant had no official functions and the publication did not contribute to a public debate but had the sole purpose to satisfy the curiosity of a particular readership. The criterion “contribution to a public debate” was new to the German courts. In several follow-up judgments the Federal Court of

Justice included this criterion in its balancing procedure, ultimately gaining the approval of the ECtHR.

Other general measures cannot officially be initiated by the federal supreme courts. They can make use of their judgments though to call for a change in legislation. The Federal Administrative Court, in a widely noted judgment (no. 2 C 1/13, 27 February 2014) concerning teachers strikes, has made use of this possibility. In Germany, a public employee who is appointed civil servant may not engage in strike. While the vast number of postal, telecommunication and railway employees does not have this opportunity anymore, the great majority of teachers chooses to engage in this special relationship with the State. This means that their remuneration as well as holidays, health benefits etc. are fixed by statutory law. Collective negotiations do not take place. This all is part of the “traditional principles of the professional civil service” which are enshrined in Article 33 § 5 of the Basic Law. In the case to be decided by the Federal Administrative Court a teacher had participated in a strike. The Berlin judges found that the prohibition to go on strike interfered with the right of the teacher to join trade unions according to Article 11 of the European Convention on Human Rights. This interference could not be justified under Article 11 § 2 second sentence of the Convention which allows for lawful restriction on the exercise of these rights by members of the armed forces, of the police or of the state administration. Referring to the case-law of the ECtHR, *inter alia* in the case of *Ennerji Yapi-Yol Sen v. Turkey* (no. 68959/01, 21 April 2009), it held that these restrictions under the Convention were only possible if necessary for the functioning of the State itself. Thus the criteria whether a public employee may be prevented from going on strike does not depend on her or his formal status but the function carried out within the state administration. Applying this criteria, the Federal Administrative Court found that teachers at public school are not part of the state administration in the meaning of Article 11 § 2 second sentence of the Convention. Consequently, it found it a violation of the Convention that the teacher in question was punished.

Notwithstanding this finding, the Federal Administrative Court observed that the prohibition of strikes according to the traditional principles of the professional civil service was laid down in the German Basic Law. The federal administrative judges saw no possibility of interpreting the Basic Law otherwise with a view to the case-law of the Federal Constitutional Court, according to which not the function but the status of the public employee was decisive. They therefore found that the strike in question had violated the Constitution but could be justified by the Convention. Since the Basic Law in the hierarchy of law is seen higher than international treaty law, the Federal Administrative Court saw no other solution than to regard the teacher’s participation in the strike as illegal. It nevertheless stressed this dilemma as a serious legal problem and called for a change in legislation.

The Federal Constitutional Court

The role of the Federal Constitutional Court is different from the other federal courts. It has certain competences that may be considered as “law-making”. The Federal Constitutional Court’s Act provides that the FCC’s decisions in most proceedings are binding on all State authorities. In case a law is found unconstitutional the Federal Constitutional Court may also set transitional regulations until new legislation is enacted. In the joint custody cases (see

question 3) the Federal Constitutional Court (1 BvR 420/09, §§ 75-76, 21 July 2010) ordered that joint or sole custody has to be granted on the application of an (unwed) parent if this was in the best interest of the child. Thus for a short period (in this case about three years) the Federal Constitutional Court may implement a general measure, though not permanently. There are no special procedures for this, the transitional regulation is included in the Federal Constitutional Court's judgment and subsequently published in the Federal Law Gazette. Transitional regulations may be ordered in proceedings according to Article 100 § 1 of the Basic Law (see above, question 5) as well as from individual complaints proceedings. It is also possible as a result of a review on the compatibility of a law requested by the Federal Government, a Land Government or one fourth of the members of the federal parliament (Article 93 § 1 no. 2 of the Basic Law) or other abstract review proceedings.

7. Has any judgment of the ECtHR ever required an amendment of a constitutional provision or a change in its interpretation? If yes, what measures have been taken? How was a (potential) conflict between the constitutional and conventional requirements or divergent interpretations eventually resolved?

No judgment of the ECtHR against Germany has yet required the amendment of constitutional provisions.

However, changes in the interpretation of constitutional provisions triggered by ECtHR judgments did occur. The most prominent example was caused by the judgment in the cases of *M. v. Germany* (no. 19359/04, 17 December 2009) concerned preventive detention ordered following the end of their prison term. German criminal law establishes a twin-track system of sanctions and distinguishes between penalties and measures of correction and prevention. The latter can only be ordered by a criminal court and include confinement to a psychiatric hospital as well as preventive detention. In the past the first preventive detention order could not exceed 10 years no matter how dangerous the convict was at the end of the detention. In 1998 new legislation was passed which maintained the maximum length of ten years - but only if there was no danger that the detainee committed serious crimes. Moreover, this legislation was declared applicable without restriction, meaning that also preventive detention could also be ordered retroactively. The German courts, including the Federal Constitutional Court, did not see a problem of retrospective punishment (*nulla poena sine lege*) because, according to domestic law, preventive detention was not a penalty.

In *M. v. Germany* the ECtHR decided that under the Convention preventive detention had to be regarded a penalty in the meaning of Art 7 and thus established a breach of the Convention because the new legislation was applied retrospectively. Already on 4 May 2011 the Federal Constitutional Court (2 BvR 2365/09, a complete English translation can be found at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504_2bvr236509en.html) reconsidered its position. On the one hand it did not change the legal qualification and held that preventive detention under domestic constitutional law could not be considered a penalty, thus making it possible to maintain the traditional twin-track system of sanctions. Consequently it did not find a breach of the *nulla poena* principle under domestic constitutional law. On the other hand, however, in the light of the ECtHR's

case-law, the Federal Constitutional Court now conducted a strict examination of the principle of proportionality under the constitutional provisions dealing with the right to liberty (Art 2 § 2 second sentence and Art 104 of the Basic Law). On this basis it emphasised that the legitimate expectations of the detainees amounted to an almost absolute protection in the cases of retrospective application of the 1998 law (§ 139). The Federal Constitutional Court now agreed that the actual execution of imprisonment and preventive detention in the same buildings and under similar conditions made it impossible to distinguish both measures from each other. It therefore declared the corresponding laws unconstitutional, established interim provisions and called the legislature to pass new laws. New legislation had to observe the “distance requirement” (“Abstandsgebot”) formulated by the Federal Constitutional Court, which prescribed, *inter alia*, a therapy-oriented approach to preventive detention.

In doing so the Federal Constitutional Court chose an innovative approach in line with well-entrenched legal conceptions and thus found a compromise which was deemed to be compatible with the Convention and the case-law of the ECtHR and the Constitution. The judgment, which cited the ECtHR about 30 times, most likely prevented the ECtHR to deliver another pilot judgment. It marked another important step on the long way of mutual recognition of the Federal Constitutional Court and the Strasbourg court.

ENHANCING NATIONAL MECHANISMS FOR EFFECTIVE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS. NATIONAL REPORT - ITALY

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1. The procedure for the adoption of general measures following the European Court of Human Rights judgments in Italy

In Italy, the procedure for the adoption of general measures¹ following the European Court of Human Rights (hereafter: 'ECtHR') judgments is provided for under the Law no. 12/2006, 'Rules on the enforcement of ECtHR judgments'. This law consists of only one article, which introduces a letter *a-bis*) into Article 5 of the Law no. 400/1988. This article specifies the duties of the President of Council of Ministers. According to this law, the President of the Council of Ministers:

- supports compliance action following the ECtHR judgments against Italy;
- transmits details of such action promptly to Parliament for examination by the parliamentary standing committees;
- presents a yearly report to Parliament on the state of enforcement of those judgments.

As it is evident from the wording of the provision, the Azzolini Law does not give specific consideration to the procedure applicable to the adoption of general measures.

In order to take all the necessary administrative steps in order to implement the Azzolini Law, the Decree of the President of the Council of Ministers of 1 February 2007 was issued. Article 1(2) of this Decree authorizes the Department for Legal and Legislative Affairs to coordinate all issues relating to compliance with the ECtHR judgments. More specifically, the Office within the Department that is competent to deal with the relevant issues is the Office for Legal Advice and Relationships with the European Court in Strasbourg.

Article 1(3) of the Decree authorizes the Department for Legal and Legislative Affairs, after reaching agreement with the Permanent representative Italian office at the Council of Europe, to give notice to the competent Administration and also to the Minister for the Economy of the ECtHR judgments issued against Italy in order to start procedures relating to its enforcement, according to Articles 41 and 46 European Convention on Human Rights ('ECHR').

¹ See recently A. Bultrini, *La questione cruciale dell'attuazione delle sentenze della Corte nella prospettiva del futuro del sistema convenzionale*, in S. A. Sonelli (ed), *La convenzione europea dei diritti dell'uomo e l'ordinamento italiano*, Turin, 2015.

It is worth noting that Article 1(4) of the Decree provides that the Department for Legal and Legislative affairs has the competence to ‘invite’ the State Administration directly involved in a specific judgment to comply with ECHR principles, to suggest, if appropriate, the adoption of the individual and general measures considered necessary and to coordinate the appropriate measures to prevent further violations of the ECHR.

As is evident from the wording of the provision, the Department in question essentially plays a role of ‘moral suasion’, which does not appear to be consistent with the binding obligation to comply with the ECtHR judgments stemming from Article 46 ECHR.

Article 2 of the Decree deals, *inter alia*, with the implementation of the provision of the Azzolini Law concerning the annual report which must be submitted to Parliament. More precisely, it states that each year the Department for Legal and Legislative Affairs must draw up a report addressed to the Parliament on the state of domestic compliance with and enforcement of ECtHR judgments, along with indications of the action required in order to comply with ECtHR case law².

It is pointed out in the 2014 report that, thanks to the systemic reforms which have been adopted in relation to prison overcrowding and the excessive length of judicial proceedings, there has been a fall of 30% pending cases involving Italy before the Strasbourg Court (around 4,000 thousand petitions less than 2013).

2. The roles of the executive and the legislator in the adoption of general measures

On the basis of the relevant legislation, the interaction between the executive and the legislator in the process is clearly biased in favour of the former.

The whole process relating to the identification and adoption of general measures and, more generally, to compliance with the ECtHR judgments rests ‘in the hands’ of the executive and, more specifically, the Office of the President of the Council of Ministers. The Department for Legal and Legislative Affairs, which acts as the driving force for the process, is incorporated into the Office of the President of the Council of Ministers and is directly answerable to the President.

Shifting from law in books to law in action, the role of the executive, represented by the President of the Council of Ministers, seems to be even more significant (and the role of the legislature is accordingly reduced). In fact, the role of the executive is not limited to carrying out the acts that are necessary in relation to the adoption of general measures, but extends to the specific adoption of such measures, which are more frequently adopted by a legislative act of the executive, known as the decree-law (‘decreto legge’) rather than by ordinary parliamentary legislation.

² See http://www.governo.it/Presidenza/CONTENZIOSO/contenzioso_europeo/relazione_annuale.html

The decree-law is an instrument adopted by the executive in certain special cases involving extraordinary necessity and urgency (see Article 77³ of the Italian Constitution), which have equal force to a legislative act. It must be converted into law by Parliament within 60 days of publication, failing which it loses its effects *ab initio*.

It is possible to identify three main areas in which the Italian executive has adopted decree-laws concerning the implementation of general measures following ECtHR judgments.

The first concerns the controversial issue of overcrowding in the Italian prisons and follows the statements contained in the pilot judgment *Torreggiani*⁴ in which Strasbourg Court held that Italy had violated Article 3 ECHR.

A second category of general measures adopted by decree-law relates to the problem of the excessive length of judicial proceedings in Italy. In response to the perennial problem of excessively long proceedings before the Italian courts, the Pinto Law sought to provide redress by enabling the courts to make awards of just satisfaction. The Pinto Law was introduced in the wake of the 1999 *Bottazzi v Italy* judgment⁵ in which the Grand Chamber first focused on a systemic violation of the right to trial within a reasonable time under Italian law. As is known, the ECHR has ruled against Italy on several occasions, and did so in this respect due to the violation of Article 6 ECHR, i.e. the right to a fair trial. The Pinto Law, enacted in 2001,⁶ was amended by the Decree-Law no. 83/2012, converted into the Law no. 134 of 7 August 2012, after the ECtHR

³ ‘The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such a measure to Parliament for transposition into law. During dissolution, Parliament shall be convened within five days of the introduction of such a measure. Such a measure shall have no effect from the outset if it is not transposed into law by Parliament within sixty days of publication. Parliament may regulate the legal relations arisen from the rejected measure’.

⁴ *Torreggiani and Others v Italy*, App 43517/09, judgment of 08-01-2013.

⁵ *Bottazzi v Italy*, App 34884/97, judgment of 28-07-1999.

⁶ The Pinto Law was adopted as an initial response to a number of judgments in which, whilst not being pilot judgments, the ECtHR pointed out that the frequency with which violations were found to have occurred showed that there had been ‘an accumulation of identical breaches’ which were ‘sufficiently numerous to amount not merely to isolated incidents’ In *Bottazzi and Others v Italy*, par. 22.

had found problems relating to enforcement of that legislation in the *Scordino*⁷ and *Gaglione*⁸ judgments.

The amendments introduced by the Decree-Law no. 83/2012 relate to the following points: definition of the threshold up to which the length of proceedings is assumed to be ‘reasonable’; definition of the amount of redress for each year exceeding that period; definition of cases in which the right to redress is excluded due to an abuse of trial by the applicant; the provision of a procedure to obtain redress in the form of a payment order.

The amendments introduced by the Decree-Law no. 83/2012 were challenged before the Italian Constitutional Court (hereafter: ‘ICC’) in 2014. Specifically, in this case⁹ the ICC heard a referral questioning a provision which stipulated that fair compensation for excessively long trials was only available after the trial in question had been concluded, and not whilst proceedings were still ongoing, even if the trial was already unreasonably long. The Court rejected the question as unfounded, referring to the fact that previous legislation allowing for this possibility had been amended, whilst also interpreting the existing legislation with reference to legislative intention and the consistency of this solution with other applicable legislation. It also noted, referring also the case law of the ECtHR, that, whilst the state was under an obligation to provide a remedy, there was no specific mandatory form of redress and the choice between the available options was in the hands of the legislator, acting within the margin of appreciation allowed to it. Nevertheless, the constitutional judges added ‘that whilst – for the reasons set out above – the breach ascertained and the need for the legal system to offer an effective remedy in view of the violation of the principle that trials must have a reasonable length have no bearing on the inadmissibility of the question and do not call into question the ‘priority status of Parliament’s assessment as to whether the means used to achieve a goal necessary under constitutional law are appropriate’, they nonetheless require this Court

⁷ In *Scordino v Italy*, App 36813/97, judgment of 29-03-2006, the Grand Chamber of the ECtHR found a double systemic problem concerning the effectiveness of Law no. 89 of 24-03-2001, known as the Pinto Law, which established a procedure for lodging complaints with the Italian courts in respect of excessively long proceedings, along with the right to receive compensation for expropriation. In order to satisfy its obligations under Article 46 the ECtHR held that Italy should, above all, remove all obstacles on the award of compensation reasonably related to the value of the expropriated property. This should be guaranteed by appropriate statutory, administrative and budgetary measures in order that the right in question is guaranteed effectively and rapidly in respect of other claimants affected by expropriated property. The ECtHR noted in relation to the Pinto Law that, although the existence of a remedy is necessary, it is not of itself sufficient and invited the respondent state to take all measures necessary to ensure that the domestic decisions are not only in conformity with the case-law of the ECtHR but that they are also executed within six months of being deposited with the registry. It is worth mentioning that these indications did not appear in the operative part of the judgment and similar pending cases were not adjourned.

⁸ *Gaglione and others v Italy*, App 45867/07, judgment of 20-06-2011. In this case the Court found that general measures were required to remedy the improper processing of ‘Pinto’ applications in Italy (at 07-12-2010, more than 3,900 applications concerning, among other things, delays in paying compensation under the Pinto Law were pending before the Court). It disagreed with the assertion that the applicants had not suffered a significant disadvantage and dismissed for the first time a request seeking the application of the new admissibility criterion introduced by Protocol No. 14 (no significant disadvantage).

⁹ Constitutional Court, judgment no. 30/2013.

to assert that any excessive prolongation of legislative inertia in relation to the problem identified in this ruling would not be tolerable’.

On December 2014, the so called ‘Pinto Action Plan’ (‘Piano d’azione Pinto’), agreed upon between the Italian Government and the Committee of Ministers of the Council of Europe, was finalized in order to tackle the problem of the high number of applications brought against Italy due to the inappropriate nature of the remedy offered by the Law no. 89/2001. Particularly, the grounds for challenging that Law focused on the lack of an appropriate redress as a way of ensuring actual and swift protection of the right to a fair trial. The Pinto Action Plan, which involves a number of actors (Office of the President of the Council of Ministers, Minister of Foreign Affairs, Office of the Agency of the Government, Ministry of Justice and Ministry of Economy and Finance), has resulted in the settlement of 7,046 pending applications, most of which were based on a delay in the enforcement of the payment order issued by the Court of Appeal competent to assess the amount due by way of redress.

However, the Italian Permanent Representatives to the Council has noted that many other applications have been filed with the ECtHR with respect to the same problem (delayed payment of redress). Thus, the violation of the right to a fair trial by the Italian State still raises concerns also at supranational level. Italy is one of the states against which most applications have been filed. The commitment by the Italian Government which led to the settlement of a number of pending cases has however been welcomed by the Council of Europe.

An important initiative taken in order to tackle the problem of the delay in the enforcement of the so called ‘Pinto Decrees’ (which is the cause of most applications filed with the Strasbourg Court) has been implemented by the Ministry of Justice by arranging a ‘recovery plan’ made possible by financial resources allocated to this purpose.

The Plan tasks the Court of Appeal with extinguishing the debts accrued over the time, on the basis of a detailed timetable which each Court of Appeal must promptly communicate to the Ministry along with a report of the payment orders pending enforcement and the respective deadline foreseen.

On the basis of this plan, the Ministry of Justice will remit payment of the amount due from the Court of Appeals to the applicants. Payments will be processed by the central administration, supported by the Bank of Italy.

As final remark, it should be added that the use of decree-laws seems to be quite inappropriate, since it risks definitively marginalizing the role of Parliament in relation to the implementation of general measures.

3. The identification of the measures required by the ECtHR in the Italian legal order

It could be interesting exercise to identify, first, a case in which, on account of the failure to act by the executive and the legislature, the judiciary (in particular the Italian Constitutional Court) has played a crucial role in the adoption of general measures, acting *de facto* as a negative legislator and, secondly, a further case in which the Italian political authorities have displayed a less passive attitude as regards the adoption of general measures .

1. The post-Scoppola domestic scenario

Considering the way in which the judiciary has tried to remedy the inertia on the part of the executive and the legislature with regard to the necessary reforms to be implemented in order to comply with ECtHR judgments, it is worth considering some cases concerning individual measures which subsequently resulted, on account of the involvement of the ICC, in the adoption of general measures. The main source of inspiration is the ‘second chapter’ of the Scoppola saga.¹⁰

In 2009 the ECtHR held that Italy had violated Article 7(1) ECHR due to the application of Article 7 of the Decree-Law no. 341/2000.¹¹ Therefore, Italy was required to ensure that the penalty of life imprisonment imposed on the applicant was replaced by a penalty not exceeding a term of imprisonment of thirty years.

The domestic implications of the Scoppola *judgments* are very interesting, especially with regard to the case law of Italian Constitutional Court. More specifically, in judgment no. 210/2013, the ICC held that, whilst the Scoppola judgment of the ECtHR was not a pilot judgment and did not specify the general measures required under Italian law to remedy the violation, this did not mean that general measures in a certain form were not necessary.

In connection with this last point, different positions concerning the precise nature of Scoppola judgment have been adopted on the one hand by the ICC and on the other hand by the Joint Divisions of the Court of Cassation which, in the case under examination, referred a question concerning the constitutionality of the Decree-Law no. 341/2000 to the ICC.

According to the Court of Cassation, the ECtHR judgment of 17 September 2009 in *Scoppola v Italy* features the substantive characteristics of a ‘pilot judgment’. More specifically, according to the Court of Cassation, ‘whilst Scoppola does not provide specific indications regarding the general measures to be adopted, it nonetheless stresses the existence within Italian law of a structural problem due to the non-compliance with

¹⁰ See *Scoppola v Italy*, App 50550/06, judgment of 10-06-2008; *Scoppola v Italy (no. 2)* [GC], App 10249/03, judgment of 17-09-2009; *Scoppola v Italy (no. 3)* [GC], App 126/05, judgment of 22-05-2012.

¹¹ *Scoppola v Italy (no. 2)* [GC], App 10249/03, judgment of 17-09-2009.

the ECHR of Article 7 of the Decree-Law no. 341 of 2000, as interpreted under national case law’.

By contrast, according to the ICC, there is no specific reference to the ‘pilot judgments’ in the *Scoppola* case, since the wording itself of the judgment departs from that model when providing that, ‘in the present case, the Court does not consider it necessary to indicate general measures required at national level for the execution of its judgment’. The ICC crucially continues its reasoning by noting that ‘in view of the above, it must be concluded that the manner in which the member state adopts structural measures to comply with the judgments of the Strasbourg Court is not always specified in substantive form in those judgments, and may in fact be established with a reasonable margin of appreciation. Therefore, it is not necessary for the judgments of the ECtHR to specify which ‘general measures’ are to be adopted in order to conclude that, notwithstanding their discretionary configuration, they nonetheless represent a necessary consequence of the structural violation of the ECHR by national law. When this happens, the branches of state are obliged to take action in order to ensure that the legislative effects that breach the ECHR cease, each acting strictly in accordance with its own powers. It must therefore be concluded that the core content of the *Scoppola* judgment – that is the part of it to which the obligation laid down under Article 46(1) ECHR applies, and more generally with reference to which the aspects which the state responsible for the violation must take into account when establishing the measures to be adopted in order to comply with it are determined – is broader in scope than that stated in the operative part, with specific reference to the violation ascertained, in which the ECtHR limits itself to declaring that the respondent State is responsible for ensuring that the sentence of life imprisonment imposed on the applicant is replaced by a penalty consistent with the principles set out in the present judgment, that is the penalty of thirty years’ imprisonment’.

In its reasoning, the ICC also focused on the reaction of the political authorities to the *Scoppola* judgment, noting - as regards the general measures - that Italy had announced that in the light of the ‘direct effect’ granted by the Italian courts to the judgments of the ECtHR, and in view of the possibilities offered by the enforcement review procedure to individuals whose circumstances are similar to those of the claimant in this case, the authorities considered the publication and circulation of the judgment of the ECtHR among the competent courts to be sufficient to prevent similar violations.

That said, despite the formal difference of opinion concerning the nature of the *Scoppola* decision, the ICC agrees with the conclusions of the Court of Cassation that this judgment does not enable Italy to restrict itself to replacing the penalty of life imprisonment imposed in the case in question, but obliges it to resolve the violation on a legislative level and to remove its effects in respect of all individuals convicted whose circumstances are the same as those at issue in the *Scoppola* case.

Since, according to the ICC, the Parliament had not acted to remedy the breach, it was necessary to establish ‘how to eliminate effects that have already definitively arisen in

cases identical to those in which the Convention was found to have been breached, but which were not appealed before the ECtHR, and have thus become definitive'. Finally, in the view of the ICC, whilst the *Scoppola* case could be resolved on the basis of the Italian law regarding the force of the ECtHR rulings, this was not possible in this case, in which the ECtHR had not been involved. Therefore, since the action taken by Italy had not been sufficient, it was necessary to declare the provision of criminal law unconstitutional.

2. The post *Torreggiani* domestic landscape

It is now necessary to take into account another case regarding the adoption of general measures in which - in contrast to the post-*Scoppola* scenario - the ICC decided not to wear its legislative hat, but on the contrary took a step back, while sending a 'warm' invitation to act to the executive and the legislature which, as will be noted, has been taken quite seriously by the latter.

The issue was overcrowding in Italian prisons, and the relevant judgment *Torreggiani and others v Italy*¹² (in which the ECtHR held, unanimously, that Article 3 ECHR had been violated). The Court's judgment was without doubt a 'pilot judgment'. The ECtHR called on the authorities to put in place, within one year, a remedy or combination of remedies providing redress in respect of violations of the Convention resulting from overcrowding in prison. The Court decided to apply the pilot-judgment procedure in the light of the growing number of individuals potentially affected in Italy and along with the judgments that had found that a violation was liable to result from the applications in question.

In an initial response to the judgment, in an unprecedented message to Parliament on 8 October 2013, the President of Republic – at the time Giorgio Napolitano – defined overcrowding in Italian prisons as intolerable, referring expressly and broadly to *Torreggiani* judgment, to the need for Parliament to adopt the necessary general measures required by the pilot judgment and finally, to the case law of the ICC on the effects of ECHR decisions on domestic law.

Given the failure to act by the legislature, the ICC was asked, precisely as occurred also in the post-*Scoppola* scenario, to act as negative legislator. This time, however, the ICC refused to do so, passing on the issue to Parliament.

More specifically, in judgment no. 279/2013, the ICC considered a referral order questioning a provision of the Criminal Code which only allowed for the deferred enforcement of judgments in a specific list of cases, whereas in the cases before the lower courts a deferral was claimed to be necessary on the grounds that enforcement would occur under conditions contrary to human dignity (due to prison overcrowding). The Court rejected the questions as inadmissible, finding that to allow deferred enforcement on the grounds of prison overcrowding would be to differentiate between prisoners in an arbitrary manner. Whilst both preventive and compensatory remedies

¹² *Torreggiani and Others v Italy*, App 43517/09, judgment of 08-01-2013.

were necessary, it had not been demonstrated that the specific power (deferral of enforcement of the judgment) sought by the referring courts was essential and was the only instrument available for rectifying the potential breach of constitutional law. However, the Court finally noted that ‘an excessive prolongation of legislative inertia would not be tolerable, having regard to the serious problem identified in this ruling’.

On this occasion, the warning of the ICC was taken seriously by politicians.

In fact, on 19 December 2013 an action plan was presented by the Government, comprised of four lines of action:

1. Legislative actions aimed at reducing prison entry flows and enabling prisoners to progressively leave the prison system through the adoption of alternative measures accompanying their reintegration in the external community;

2. Managing and organization actions through the implementation of more open prison regimes for

prisoners who are classified as requiring ‘medium or low security measures’, focused on limiting the use of cells as a place of prisoners’ rest and not a place where spending almost their entire day;

3. Building actions, planned according to the present needs of our prison estate;

4. Provision of modalities and procedures both for the ‘preventive remedy’, which puts an end to the perpetuation of situations of violation found by the Court, and the compensative remedy for those who suffered a treatment in violation of their fundamental right not to be subjected to degrading treatment, according to Court’s jurisprudence. It is worth pointing out that the subsequent Decree-Law no. 146/2013, converted into the Law no. 10/2014, has introduced the following additional measures: the increase of early release from 45 to 75 days per semester; the transformation of the minor illicit conducts [sic.] connected to the traffic of narcotic substances into an autonomous offence punished by a shorter penalty; the extension of the use of remote control devices such as the ‘electronic bracelet’; the stabilization of the institution of house detention with the purpose of reducing the phenomenon of overcrowding; the early identification of foreign prisoners reached by an order for expulsion.

However, at meeting no. 1193 of the Committee of Ministers of the Council of Europe (4-6 March 2014), it emerged that in order to comply with the *Torreggiani* judgment, the remedy or the set of remedies to be arranged by Italy must have preventive as well as compensatory nature and must not be restricted to individuals who filed applications with the ECtHR.

Conversely, the information contained in the Action Plan of 19 December 2013 only referred to a remedy ‘which appears to be available in limited circumstances (i.e. to sentenced prisoners currently imprisoned, and who have lodged an application at the European Court)’. Therefore, at the end of the meeting, the Committee of Ministers expressed ‘concern’ and mentioned the commitment to provide remedies to guarantee ‘adequate and sufficient redress’ by the deadline of 27 May 2014.

In reply to the judgment of 8 January 2012, the Government headed by Prime Minister Renzi has provided a remedy by adopting the Decree-Law no. 92 of 26 June 2014. According to this Decree-Law, a judge may order that the penalty imposed on a person who has suffered a violation of Article 3 ECHR be reduced by one day for each ten days of residual period of the sentence still to be served; otherwise, he/she shall be eligible for redress in the amount of a lump-sum payment of 8 Euros.

The provisions considered overall have been considered satisfactory by the ECtHR: in two judgements issued after a few weeks, on 16 September 2014 - *Stella and others v Italy* and *Rexhepi and others v Italy* - the Court found that these remedies fulfilled the requirements applicable to Italy for compliance with the *Torreggiani* decision; however, the Court called for a further analysis of the remedies at a later stage during enforcement of the provisions by the domestic courts.

Additionally, in a very recent judgment handed down on March 2015, the Strasbourg Court took the Italian case as an example, noting that: '[t]he recent example of Italy shows that such measures, implemented in the context of a pilot procedure, can contribute to solving the problem of overcrowding'.

Finally, it must be noted that supreme and constitutional courts in Italy and the ECtHR have entered into a 'dialogue' which has led the latter to take the steps suggested by the former. This occurred in the judgment *Oliari and Others v Italy* in which the ECtHR found, unanimously, that Article 8 ECHR had been violated.

The case originated following an application by three homosexual couples, who were unable to marry or enter into any other type of civil union under Italian law.

The Court held that, in the absence of any legal recognition, the protection of same-sex couples in Italy failed to provide for 'the core needs relevant to a couple in a stable committed relationship'.

However, both the ICC and the Court of Cassation paved the way to the judgment of the Court of Strasbourg

The ICC first addressed protection for same-sex couples in judgment no. 138/2010. The Court said that, under Italian law, same-sex couples were not permitted to marry. In 2014 another important judgment was issued by the ICC: in judgment no. 170/2014, concerning 'mandatory divorce' following the gender reassignment of one of the spouses, the Constitutional Court held that the power to ensure that an alternative to marriage was provided rested in the hands of the legislator. This was, in the case, a necessary step which must be taken in order to prevent the couple concerned from moved from a position of maximum legal protection to a situation of absolutely uncertainty.

Another remarkable decision was adopted by Court of Cassation in case no. 4184 of 15 March 2012. The case concerned two Italian citizens of the same sex who had married in the Netherlands. They had challenged the refusal of the Italian civil registrar to register that marriage on the basis of its 'non-configurability as a marriage'. The Court held that the applicants had no right to register their marriage, as it was incompatible with any

legal effects under Italian law. Thus, the marriage existed and was valid, but could not produce any effects in Italy.

It is important to note that, in the reasoning provided in support of this decision, the Court of Cassation pointed out that cohabiting same-sex couples in a stable relationship enjoy the right to respect for private life and family under Article 8 ECHR. Thus, the Court of Cassation in some senses paved the way for the judgment of the Strasbourg Court.

4. The scope of application of the Law no. 12/2006

As noted above, the Law no. 12/2006 lays down ‘Rules on the enforcement of ECtHR judgments’. All of the provisions contained in it (concerning the activities of the President of the Council of Ministers in relation to action required following ECHR judgments against Italy, along with the prompt transmission of such judgments to Parliament for examination by the parliamentary standing committees, and the presentation to Parliament of an annual report on the state of enforcement of those judgments) relate exclusively to ECtHR judgments.

The Department for the Legal and Legislative Affairs is also tasked with monitoring the enforcement of ECtHR judgments.

5. The remedies for domestic courts facing problems of compliance with ECtHR judgments requiring the adoption of general measures

The well established case law of the ICC, in particular in the wake of the ‘twin’ judgments no. 348 and no. 349 of 2007 describes the most common techniques normally used by judges when resolving conflicts between norms from different legal orders that are relevant in cases brought before the courts.

Among others, the canon of interpretation ‘in line with the ECHR’ has a crucial impact and requires the courts to apply the solution that best fits with the principles enshrined in the ECHR, as interpreted by the Court of Strasbourg, when facing with a number of possible constructions of the same provision.

In case of conflict between a domestic norm and a provision of the ECHR, national courts must therefore interpret the former in a manner consistent with the latter, provided that such a construction is permitted by the wording of the relevant provision. It is only if the contrast cannot be resolved by an interpretative way that the courts may refer a question of constitutionality to the Constitutional Court, as the domestic courts are prevented from enforcing the provisions of the ECHR directly or from setting aside domestic provisions alleged to be in contrast with it (and, accordingly, with the Constitution). Such a question of constitutionality would be based either on Article

117(1) of the Constitution or Article 10(1) (if it involves an international law norm incorporating generally recognized principles of international law).

The reference of a question to the Constitutional Court thus appears to constitute an *extrema ratio*.

6. The role played by the Court of Cassation in determining and initiating general measures

Some remarks may be made with regard to the Court of Cassation. The literature has correctly drawn attention to the loss of this Court's supremacy as a consequence of the increasing role of the ECtHR and the CJEU. The dialogue with these Courts seems to be the crucial aspect of the activity of the Court of Cassation, namely how best to resolve conflicts within a multilevel system. Furthermore, this Court is responsible for preventing possible conflicts between domestic law and supranational law by interpreting the relevant laws and statutes in accordance with the Charter and the ECHR. It is worth noting that, while performing its role as the guarantor of the uniform application and interpretation of the law, this Court extends its scrutiny to the provisions of the Charter as a relevant parameter. According to the Article 360(3) of the Code of Civil Procedure, the violation of international law (except treaties pending ratification) may constitute grounds for appealing to the Court of Cassation.

7. The impact of ECtHR judgments on constitutional provisions and their interpretation

In Italy, there has not been any amendment of constitutional provisions which could be considered a direct consequence of a ECHR judgment so far. However, the constitutional revision of Article 111 and the consequent express constitutional reference, *inter alia*, to the right to fair trial (para. 1) and to the reasonable length of trial (para. 2), have reacted to the Italian systematic violation of Article 6 of the ECHR.

It could be worth mentioning a case which, even if formally deals with statute law, does substantially have a para-constitutional relevance because it is connected with the principle of *res iudicata* and to the review of the proceeding as a consequence of ECtHR judgments

More precisely, Article 630 of the Italian Code of Criminal Procedure allowed the 'review' of final judgments only in four circumstances, excluding the case of a judgment delivered by the European Court of Human Rights.

The post-Dorigo judgment¹³ domestic consequences have changed this *status quo*.

¹³ *Dorigo v Italy*, App 46520/99, judgment of 16-02-2001.

Mr. Dorigo was sentenced by the Court of Udine to thirteen years imprisonment for having participated in the Aviano base attack. His conviction was based on the accusations made by three co-defendants, whose statements were used as evidence without any chances for him to carry out a cross-examination, as required by Article 6 ECHR.

After the judgment became final and *res iudicata*, Mr. Dorigo applied before the European Commission of Human Rights for violation of the right to a fair trial. In 1998 the European Commission stated that the Italian authorities had violated Article 6 of the ECHR.

Following this judgment, the General Prosecutor at the Court of Udine requested the suspension of the execution of the sentence until the assessment of its legitimacy, in light of the judgment of the European court. In 2007, the Court of Cassation, by the decision no. 2800, declared the order of imprisonment invalid and thus ordered to release Mr. Dorigo from prison, carving out the following principle: «the judge of the execution must declare the unenforceability of the sentence if the ECtHR established that the conviction had been issued in violation of the right to fair trial established by art. 6 ECHR and that the convicted shall have the right to the reopening of the proceedings, even if the Legislator has not yet provided for the introduction of a proper possibility of re-examination».

In the meantime, Mr. Dorigo filed a request of re-examination and, in that proceeding, asked the judge to refer a question of constitutionality because of the lack of provisions allowing the reopening of a trial after a judgment of the ECtHR.

The Constitutional Court, in the decision no. 129/2008, rejected the question, although it urged the legislative power to take all necessary steps in order to give execution to ECtHR decisions.

Before the Court of Appeal, another issue of constitutionality was raised, for violation of Article 117 of the Constitution and Article 46 of the ECHR, this latter as an ‘interposed’ parameter referred to by the former (on the ‘quasi-constitutional’ status of the ECHR in the Italian constitutional jurisprudence, see the next paragraph).

Here, the Constitutional Court went farther, and instead of making an exhortation, issued an ‘additive’ decision, declaring Article 630 of the Code of Civil Procedure unconstitutional for not providing a chance of reopening of the criminal proceeding «when it is necessary, under art. 46 cl. 1 ECHR, in order to enforce a final decision issued by the ECtHR».

In order to understand how should a conflict between the constitutional and conventional requirements or divergent interpretations be resolved, it is necessary to refer the scholar debate and the constitutional case law evolution (or involution) related to the role of the ECHR in the domestic legal order.

Starting with the first relevant judgments, the Constitutional Court has argued that, in accordance with the dualistic matrix of the Italian legal system, the ECHR, as well as all ratified international treaties, has the same position in the hierarchy of Italian sources of

law as that assigned to the domestic law through which it has been included in the internal legal order.¹⁴ Given the fact this has happened for the ECHR – as all other international treaties – through the force of ordinary law¹⁵, the Constitutional Court, apart from an exceptional decision¹⁶, has, prior to the judgments in question, attributed to the ECHR the legal value of an ordinary statutory law.

To put it simply, according to this jurisprudential orientation, the ECHR could be abrogated by any successive statutory law that conflicted with it. The abrogative effect, in the absence of any constitutional protection for the ECHR, would result in the mere application of chronological criteria in order to solve the conflict between two statutes placed in the same position on the scale of sources of law.

The constitutional scenario has been integrated by the revision, in 2001, of Article 117(1) which provides that ‘legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from the EU legal order and international obligations’.

There have been three main readings of this provision by Italian constitutional scholars. According to the first thesis, nothing really has changed in the relationship between the Italian legal order and sources of international law.¹⁷ Article 117(1) would only refer to the relationship between sub-national legal orders that integrate the Italian Republic, its purpose would not have been that of governing the new hierarchy of their respective sources of law.

To the contrary, a second interpretation has identified in the new provision the cause for a radical change from a dualistic to a monistic matrix of the Italian legal system. In other words, pursuant to Article 117(1), all the international Treaties, and the ECHR in particular, would enjoy the special status of automatic applicability (?) on a constitutional level in the national legal order, as that awarded to the general norms of international law by Article 10.¹⁸

A third thesis argues the ‘middle way’, that the constitutional provision has given to international Treaties, without changing their dualistic method of ratification, a stronger passive force which allows them to resist abrogation by subsequent domestic law.¹⁹

¹⁴ Constitutional Court, judgments no. 188/1980, no. 153/1987, no. 323/1989 and no. 315/1990.

¹⁵ Law 04-08-1955, no. 848

¹⁶ Judgment no. 10/1993 in which the Constitutional Court speaks, in relation to the ECHR and its ratification by ordinary law, in terms of an ‘atypical source of law’. This special status enjoyed by ECHR, according to this judgment, would place it in a higher position in the hierarchy of sources of law respect to the ordinary legal order.

¹⁷ C. Pinelli, *I limiti generali alla potestà legislativa statale e regionale ed i rapporti con l'ordinamento internazionale e con l'ordinamento comunitario*, in *Foro Italiano*, 2001, 194 ff.

¹⁸ See A. D'Atena, *La nuova disciplina costituzionale dei rapporti internazionali e con l'Unione europea*, in *Rassegna Parlamentare*, 2002, 916 ff.

¹⁹ See, among others, M. Luciani, *Le nuove competenze legislative delle regioni e statuto ordinario*, in www.associazionedeicostituzionalisti.it, and, more recently, M. Cartabia, *La Cedu e l'ordinamento italiano, rapporto tra fonti, rapporti tra giurisdizioni*, in R. Bin, G. Brunelli, A. Puggiotto and P. Veronesi (eds), *Proceedings of the Seminar Amicus Curiae: All'incrocio tra costituzione e Cedu. Il rango delle norme della Convenzione e l'efficacia interna delle sentenze di Strasburgo* (Ferrara, 09-03-2007).

This means that an ordinary law, in conflict with the ECHR, would be subject to review by the Constitutional Court for its potential violation of Article 117(1) of the Constitution.

Until the decisions under comment, the Constitutional Court had never the opportunity to clarify whether or not Article 117(1) of the Constitution changed the relationship between the Italian constitutional legal order and the sources of international law.

In the meanwhile, making almost no reference to ‘new’ Article 117(1), some ordinary judges, in the new millennium, have started looking at the relationship between the ECHR and the national legal order in a surprising, if not revolutionary, way.

The Tribunal of Genoa²⁰, followed by other Courts of first and second instance, in order to solve a conflict between ordinary national laws and ECHR principles, has started to apply the same solution which, since the adoption of the historic decision of the Constitutional Court in 1984²¹, the ordinary judges have applied in cases of conflict between national law and EC law: to put aside the former in favour of the latter.

The latter approach, supported also by the highest ordinary and administrative courts²², has mainly been based on the consideration that, due to the incorporation of the ECHR in the European dimension through the bridge provided for by the general principles of EC law mentioned in Article 6 of the Treaty of the European Union, there would not have been any reason not to apply the same treatment – and not to provide the same constitutional protection – to EU and ECHR law.

In other words, this brave new judicial approach interpreted the famous paragraph 16 of the landmark decision of the European Court of Justice in *Simmenthal*²³ as applying also for ECHR law.

By looking at how the Constitutional Court reacted the first time it had the opportunity to take the floor again in the debate, it is possible to imagine that it did not much like the period of its forced silence²⁴ on the interpretation of the new Article 117(1) of the Italian Constitution with regard to the relationship between national law and the ECHR.

Two decisions handed down by the ICC at the end of October 2007 seemed finally to have an impact on one of the fundamental principles of the Italian Constitution: the notion of openness to international law, embodied in Articles 10 and 11, and above all in Article 117(1).

The final outcome of the two decisions in question may be summarised as follows: (a) Article 117(1) of the Constitution was identified by the constitutional judges as the basis that endows the ECHR with a higher status than ordinary legislation. This means

²⁰ Tribunal of Genoa, 23-11-2000, Court of Appeal of Rome, 11-04-2002, Court of Appeal of Florence, 20-01-2005.

²¹ Constitutional Court, judgment, no. 180/1984,.

²² Corte di Cassazione section I, 19-07-02, no. 10542, Corte di Cassazione, section I, 11-06-2004, no. 11096, Corte di Cassazione United Sections, 23-12-2005, no. 28507; Consiglio di Stato, section I, 09-04-2003, no. 1926.

²³ ECJ, 09-03-1977, *Simmenthal* C-106/77, in ECR I-62, par. 21, according to which: ‘Every national Court must in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with Community law, whether prior or subsequent to the Community rule’.

²⁴ The Constitutional Court cannot intervene *ex officio*, but only on the request of recurring parties.

that in case of conflict between the ECHR and a national statute subsequent to the internal legislation (Law no. 848/1955) that gave the ECHR effect in the domestic legal system, the common judge hearing the case must suspend it and request a decision of the Constitutional Court. This does not imply that the ECHR has a constitutional rank; on the contrary, the ECHR itself has to be consistent with all constitutional provisions, and not just with its fundamental principles (which is the effect of the '*controlimiti*' doctrine applied to EU law). The ICC adopted a two-staged assessment. The first stage is to assess whether a conflict exists between the relevant ECHR provision and the Italian Constitution. If no such conflict exists, the ICC will move to the second stage: to ascertain the possible incompatibility of the domestic legislation in question with the Convention. If a conflict is found to occur, the domestic legislation is struck down because it violates Article 117(1) of the Italian Constitution.

(b) The Constitutional Court specified that the exact meaning of the ECHR can be ascertained only as it is interpreted by the ECtHR. That is why, according to the ICC, the content of the Convention is essentially that which may be inferred from the Court's case law.

With regard to the second crucial element of the 2007 decisions, concerning the self-imposed unconditioned obligation for all judges to give to the Convention only the meaning given to it by the ECtHR in its case law, the first impression is that, said obligation originated as an attempt at some kind of 'judicial compensation'. More precisely, the ICC's goal seems to have been to compensate for the downgrading of the Convention with regard its 'formal' rank after the revision of 2001, at least in connection with the literal interpretation of Article 117(1) according to which the duty to respect, on the one hand, the Constitution and, on the other hand, the obligations stemming from international law, would be on the same rank.

In other words, the ICC tried to compensate the downgrading of ECHR to an intermediate source below the Constitution and above primary law by attaching a special consideration to the ECHR in relation to interpretation of the rights contained therein.

Regardless of the real reasons behind this approach, it seems that the constitutional judges realised almost immediately that such an interpretative constraint, interpreted in a radical and absolute way, gave them too little *margin de manouvre* with regard to the ECtHR case law and, within two years, they had developed the first of (at least) three judicial techniques aimed at departing from that kind of constraint without, at least explicitly, abnegating it.

The first judicial technique in question consists in adopting reasoning according to which the case law of Strasbourg would be binding for the Constitutional Court only in its substance (or in its essence).

Strangely enough, the said judicial technique emerged for the first time in the same judgment in which the constitutional judges drew the most radical implications from the self-imposed obligation to be bound by the ECtHR's case law. More precisely, in decision no. 317/2009, the ICC, on the one hand, affirmed that 'this Court cannot

substitute its own interpretation of a provision of the ECHR for that of the Strasbourg Court, thereby exceeding the bounds of its own powers, and violating a precise commitment made by the Italian state through signature and ratification of the Convention without any derogations'.²⁵

In other words, the ICC is of the view that departing from the ECtHR's interpretation of the ECHR would result in a violation of Italy's obligations under international law. On the other hand, the ICC added that it 'goes without saying that the assessment of the European case law established regarding the relevant Convention provision must be carried out in a manner that respects the essence (or the substance) of case law of the European Court of Human Rights'.²⁶

It is not clear what would be the basis for such limitation: why should only the essence of the case law of the ECtHR be binding when, by contrast, the case law of CJEU is binding in all its elements? In order to explain this difference it is not enough to point out that while, according to the landmark decisions of 2007, the ECHR should respect all the Constitution, by contrast, the well-known case law of the Constitutional Court related to the relationship between the EU legal order and the national one, identifies just the fundamental principles of the Constitution as an obstacle to the national enforcement of EU law. Furthermore, and even more problematically, according to which criteria would it be possible to distinguish between the essence (i.e. the substance) of the ECtHR case law and the non-essential or non-substantive part of it?

No clear answers to these questions emerge in the case law of the ICC. Instead, in 2011, the Court endorsed a second judicial technique with the same aim to depart from the (self-imposed) obligation to consider entirely binding the case law of Strasbourg Court. In the decision no. 236/2011, the ICC considered a reference concerning national legislation which provided that a reduction of the statute of limitation for certain offences would not apply retroactively to the benefit of defendants in proceedings that were already pending before the Court of Appeals or before the Supreme Court of Cassation. The Court found the question to be groundless, drawing away in its judgment from the case law of the ECtHR in a quite original way. The constitutional judges conceded that, if they were to conclude that the principle of the retroactivity of more favorable criminal legislation were to be held more severe than that already recognized in the case law of the Court, this would have constituted, of course, a departure from the case law of Strasbourg Court.

However, the ICC, making concrete use of the distinguishing judicial technique and manipulating the relevant case law of Strasbourg Court, added that 'no such novel characteristic is apparent from the judgment of the European Court of 17 September 2009 (*Scoppola v Italy*). There is nothing in the Court's judgment which can preclude the possibility that, in special circumstances, the principle of retroactivity in mitius may be subject to exceptions or restrictions: this is an aspect which the ECtHR did not

²⁵ Constitutional Court, judgment no. 317/2009, para. 7.

²⁶ Constitutional Court, judgment no. 311/2009, para. 6.

consider, and which it had no reason to consider, given the characteristics of the case upon which it was deciding’.²⁷

In other words, according to the second judicial technique, the ICC distinguished between the case at stake and the relevant case law of the Strasbourg Court.

The two judicial techniques explored so far tried to avoid a direct clash between the ICC and the ECtHR and, even before it, a direct and explicit *revirement* of what has been formally declared in the ‘twin’ decisions of 2007 with regard to the self imposed obligation to follow the ECtHR’s interpretation of the Convention.

By contrast, with the third judicial technique under investigation, the ICC, focusing on a more substantial criterion in order to gain a broader *margin of manouvre* with respect to the case law of Strasbourg, has managed to achieve the second goal, i.e. to avoid an explicit *revirement* of the principle adopted in 2007, but not for sure the first one, i.e. to prevent a direct departure from the case law of the Strasbourg Court.

This time the ICC relied upon substantive-based criteria according to which, regardless of the ‘formal’ rank of the sources of law that enter in conflict, the aim of the Constitutional judges is to achieve two main goals. First of all, to make clear that, when it comes to fundamental rights, respect for international law obligations cannot in any case constitute grounds for a lower protection compared to those already available under national law, but on the contrary, must constitute an effective instrument for expanding that protection. Secondly, and consequently, to achieve, in balancing between conflicting rights, ‘the greatest expansion of protection’, in the words of the Constitutional Court.

The same Court, in the decision no. 317/2009, explained the meaning that should be given to this expression by adding that the ‘greatest expansion of protection must include a requirement to weigh up the right against other constitutionally protected interests, that is with other constitutional rules which in turn guarantee the fundamental rights which may be affected by the expansion of one individual protection. This balancing is to be carried out primarily by the legislature, but it is also a matter for this Court when interpreting constitutional law’.²⁸

The last sentence, concerned with identifying the body best placed to carry out the necessary balance where fundamental rights conflict, deserves further analysis because it goes along with another important element of the same decision, in which the constitutional judges made express reference to the margin of appreciation doctrine. More precisely, according to the ICC, ‘The reference to the national ‘margin of appreciation’ – elaborated by the Strasbourg Court in order to soften the rigidity of the principles formulated on European level – is primarily manifested through the legislative function of Parliament, though it must always be present in the assessments of this Court, which is not unaware that the protection of fundamental rights must be systematic and not broken down into a series of provisions that are uncoordinated and potentially in

²⁷ Constitutional Court, judgment no. 236/2011, para. 13.

²⁸ Constitutional Court, judgment no. 311/2009, para. 7.

conflict with one another. Naturally, it is for the European Court to decide on the individual case and the individual fundamental right, whilst the national authorities have a duty to prevent the protection of certain fundamental rights – including from the general and unitary perspective of Article 2 of the Constitution – from developing in an unbalanced manner to the detriment of other rights also protected by the Constitution and by the European Convention’.²⁹

It is clear that the reference to the margin of appreciation becomes a rhetorical tool, in the reasoning of the ICC, in order to distinguish between the individual justice mandate which, according to the Italian Constitutional judges, should be the exclusive mission of the European Court of Human Rights and the constitutional justice mandate which, by contrast, should be the prerogative of Constitutional Court.

In connection with the identified *summa divisio*, another important distinction between the roles and competences of the two Courts stems from the reasoning of the ICC. While the balancing carried out by the Strasbourg Court would be ‘broken down into a series of provisions that are uncoordinated and potentially in conflict with one another’, the assessment which characterizes the activity of the Constitutional Court would be, instead, ‘systematic’ and ‘coordinated’ because it includes a ‘check and balance’ approach to the different values at the heart of a constitutional legal order.

This implies, in other words, that the same case, in Strasbourg and in Rome, could be decided in different ways because of the different context and the different nature of the adjudication. A difference which was in fact exemplified in the decision no. 264/2012.

In this case the ICC considered a challenge to legislation modifying the arrangements applicable to the calculation of pensions for workers who have spent all or part of their working life in Switzerland. Whereas under the previous interpretation of the legislation, payment of contributions in Switzerland established entitlement to a pension in Italy on the basis of Italian contributions at equivalent salary, irrespective of the fact that the contribution levels in Switzerland were significantly lower, following an enactment providing for an ‘authentic interpretation’, the Italian pension was to be calculated on the basis of the actual level of Swiss contributions, thus resulting in lower pensions. The Court considered the case in the light of ECHR case law, with specific reference to the *Maggio* case, in which the ECtHR held that it was ‘not persuaded’ of the fact that the general interest was compelling enough to overcome the dangers inherent in the use of retrospective legislation and thus concluded that Italy infringed the applicants’ rights under Article 6(1) by intervening in a decisive manner to ensure that the outcome of proceedings to which it was a party were favorable to it.³⁰

Despite the relevant case law of the ECtHR clearly pointing to the annulment of the Italian legislation, the ICC concluded, instead, that there was a compelling general interest for justifying the recourse to retrospective legislation. Indeed, according to the ICC, ‘the effects of the said provision are felt within the context of a pension system

²⁹ Ibid.

³⁰ *Maggio & Ors v Italy*, App 46286/09, judgment of 31-05-2011.

which seeks to strike a balance between the available resources and benefits paid, in accordance also with the requirement laid down by Article 81(4) of the Constitution, and the need to ensure that the overall system is rational (judgment no. 172 of 2008), thus preventing changes to financial payments to the detriment of some contributors and to the benefit of others'.³¹

It is not difficult to identify the application, in a concrete case, of the dichotomy - individual justice *versus* constitutional justice - that the ICC has theoretically developed in the decision no. 311/2009.

It should be added that the ICC, one year later (judgment no. 170/2013) has partially revised its radical contrast with the Strasbourg court in relation to the admissibility of the retrospective legislation. In this case the Court heard a referral from a bankruptcy judge challenging legislation which enabled certain amounts due to the state in respect of tax to be granted priority ranking in bankruptcy proceedings, notwithstanding their otherwise unsecured status, and stipulated that such arrangements were to apply with retroactive effect to bankruptcy proceedings that had already been initiated when the legislation came into force. The ICC held, referring also to the ECHR, that whilst retroactive legislation in the area of private law was permitted as a matter of constitutional law, it must be justified by 'compelling reasons of general interest', which, according to the same Court, were not present in the case.

The last chapter related to the impact and the binding value of the ECHR judgments in the domestic legal order seems to represent a step back of the ICC in relation to the step forward of the decision no. 170/2013.

More precisely, in the judgment no. 49/2015 the Court heard two referral orders questioning the constitutionality of legislation which purportedly prohibited the confiscation of property following the commission of a development offence in the event that, notwithstanding that a finding of criminal responsibility had been made, no conviction was imposed on account of the time barring of the offence. The referring courts stated that, whilst the traditional interpretation of the legislation would have allowed confiscation, the judgment by the European Court of Human Rights in *Varvara v Italy* now precluded such an outcome. The Court ruled the questions inadmissible, holding that the referring courts had ascribed an excessive scope and binding force to the *Varvara* judgment, and that the judgment in the *Varvara* case left scope for interpretation in a manner consistent with the consolidated Italian law permitting expropriation. Although the national courts cannot disregard the case law of the Strasbourg Court once it has become consolidated, isolated rulings that have not achieved such status need not be applied generally beyond the narrow facts of the individual case.

A new, quite slippery differentiation between 'consolidated' and not consolidated ECHR for the first time emerges in the reasoning of the constitutional judges.

³¹ Constitutional Court, judgment no. 264/2012, para. 5.3.

Enhancing national mechanisms for effective implementation of the European Convention on Human Rights – The Netherlands

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THE ROLE OF domestic courts with respect to the implementation of the European Convention on Human Rights (the Convention) is obviously strongly linked with the status of international norms as such in the domestic legal order. In that regard, the Netherlands has a quite unique system. On the one hand, Article 120 of the Constitution of the Netherlands prohibits a judge checking the constitutionality of Acts of Parliament (in line with the doctrine of the supremacy of Parliament). However, at the same time, Articles 93 and 94 of the Constitution provide for direct applicability of international legal norms. Moreover, these norms have a higher standing than domestic legal norms, including the Constitution. So, whereas the Constitution is a relatively weak document, international human rights standards play a vital role in the Dutch domestic legal order. A human rights-related debate in the Netherlands will therefore likely focus on international human rights treaties. Of those international treaties, the European Convention on Human Rights is by far the most relevant for practical purposes, if only because of the detailed case law of the European Court of Human Rights. In this respect, it is important to note that the Dutch judge applies the so-called ‘incorporation doctrine’, meaning that the norm (ie, a provision of the Convention) is interpreted as it has been interpreted by the Strasbourg Court. It is therefore irrelevant whether the Court judgment was against the Netherlands or against a third country. In practice, Court judgments against third countries have often resulted in changes in domestic case law.

I. Introductory comments concerning the reception of the Convention in Dutch law ¹

I would like to discern two (roughly delineated) periods in the reception of the European Convention on Human Rights in the Netherlands. The first period runs from 1950 (the coming into existence of the European Convention on Human Rights)² to the mid-1970s. This period is characterised by judicial inactivity at the Strasbourg Court (and a lack of Court judgments against the Netherlands in which a violation was found) and a lack of interest in the Court from Dutch legal scholars. The second period runs from the mid-1970s to the present day. In this period the Court rendered various judgments that did have substantial implications for the Dutch legal order. As a result of Strasbourg case law, major structural changes were made to the organisation of the Dutch administrative court system (as a result of the *Benthem* case in 1985),³ substantial amendments to Dutch criminal (procedural) law were made (for example, as a result of the *Brogan v UK* case in 1988,⁴ the *Kostovski* case in 1989⁵ and the *Lala and Pelladoah* cases in 1994),⁶ and a fundamental overhaul of the law concerning psychiatric patients was conducted (as a result of the *Winterwerp* case in 1979).⁷ Various areas of law

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¹ This section is based on an earlier publication; see M Kuijer, 'Guaranteeing International Human Rights Standards in the Netherlands: The Parliamentary Dimension', in Hunt, Hooper & Yowell (eds), *Parliaments and Human Rights* (Oxford, Hart Publishing, 2015) 295-305.

² The Convention was signed on 4 November 1950 in Rome and entered into force on 3 September 1953. The Convention was ratified in the Netherlands by law of 28 July 1954. As a result, the various parts of the Kingdom of the Netherlands were bound by the Convention as from 31 August 1954.

³ *Benthem v The Netherlands* [1985] ECHR 11. The judgment led to the Crown Appeals (Interim Measures) Act (*Tijdelijke wet kroongeschillen*), Official State Gazette (*Staatsblad*), 1987, 317; Parliamentary Documents [*Kamerstukken*] II 1985/86, 19 497). See also N Verheij, 'De toegang tot de rechter in het bestuursrecht' ['Access to Court in Administrative Law'] in RA Lawson and E Myjer (eds), *50 Jaar EVRM [50 Years of the ECHR]* (Leiden, NJCM-Boekerij, 2000) 183.

⁴ See IM Abels, 'Brogan-wetgeving: herziening van de regeling van de inverzekeringstelling in het Wetboek van Strafvordering' ['Brogan-legislation: Revision of the Rules on Police Custody in the Code of Criminal Procedure'] (1995) *Ars Aequi* 37; E Myjer, 'The Plain Meaning of the Word "Promptly"' in P Mahoney et al (eds), *Protecting Human Rights: The European Perspective* (Cologne, Heymanns, 2000) 975.

⁵ *Kostovski v The Netherlands* [1989] ECHR 20.

⁶ *Lala and Pelladoah v The Netherlands* [1994] ECHR 31, judgment of 22 September 1994, App Nos 14861/89 and 16737/90.

⁷ *Winterwerp v The Netherlands* [1979] ECHR 4, which eventually led to the Psychiatric Hospitals (Compulsory Admissions) Act (*Wet bijzondere opnemingen in psychiatrische ziekenhuizen*), Official State Gazette (*Staatsblad*), 1992, 669. See also G Mintjes, 'De Wet bijzondere opnemingen in psychiatrische ziekenhuizen' ['Psychiatric Hospitals (Compulsory Admissions) Act'] (1993) *Ars Aequi* 114; and M Kuijer, 'Artikel 5 EVRM en de (procedurele) bescherming van de psychiatrische patiënt' ['Article 5 ECHR and the (Procedural)

were affected by the Strasbourg case law in this period: criminal (procedural) law, administrative law, immigration law, family law, social security law, civil procedure etc. Because of the Court's judicial activity and its impact, the practical importance of the Court's work became apparent to practitioners. The Court (and its case law) became 'mainstream' in Dutch political debate as well as in domestic case-law.

In the first decades of its existence, the Convention resembled a Sleeping Beauty.⁸ In itself, and from a theoretical perspective, it was a revolutionary document. For the first time in history, a legally binding document in the politically sensitive field of human rights had been agreed upon. Until then, states regarded human rights issues as a purely domestic matter. Moreover, states had agreed upon an international supervisory mechanism in the field of human rights. And, even more innovatively, public international law directly affected the rights of individuals by granting them an (optional) right of petition. At the time, the only legal entities usually acknowledged by public international law were states. Therefore, there were sufficient reasons to qualify the youthful Convention as a 'Beauty'.

For the first 20 to 25 years of its existence, however, this Beauty was very much asleep. The theoretical importance of the Convention might have been self-evident, but the practical importance of the Convention was fairly non-existent.⁹ Lawyers seldom invoked the provisions of the Convention, fearing that the judge would not take their case seriously. One obviously did not have a very strong case if one had to invoke such a vague legal text as the Convention. Since domestic courts were not frequently confronted with provisions of the Convention, they were largely unfamiliar with its requirements. Frequently, courts did not even have a copy of the Convention at their disposal. Legal scholars did not seem too passionate about the Convention either. Eminent Dutch lawyers like Leijten thought that the

Protection of Psychiatric Patients'] in RA Lawson and E Myjer (eds), *50 Jaar EVRM [50 Years of the ECHR]* (Leiden, NJCM-Boekerij, 2000) 61.

⁸ See also E Myjer, 'Over hoe het EVRM verzeild raakte in de Nederlandse strafrechtspleging en aan wie dat valt toe te rekenen' ['On How the ECHR Ended up in Dutch Criminal Procedure'] in AW Heringa, JGC Schokkenbroek and J van der Velde (eds), *40 Jaar Europees Verdrag voor de Rechten van de Mens [40 Years of the ECHR]* (Leiden, NJCM, 1990) 271.

⁹ See also E Bates, *The Evolution of the European Convention on Human Rights* (Oxford, Oxford University Press, 2010).

Convention was drafted in such vague terms that the text would never have any legal impact whatsoever.¹⁰

The unfamiliarity with the Convention—in the Netherlands as well as in other High Contracting Parties to the Convention—led to inactivity in Strasbourg in these early years. Without any apparent irony, a commentator wrote in 1977: ‘The European Court of Human Rights enjoyed a busy year in 1976 and delivered judgment in five cases.’¹¹ The Registry told Wiarda—who had some doubts whether he would be able to combine his function of judge at the Dutch Supreme Court with an appointment as judge at the then part time European Court—that his appointment at the Strasbourg Court would only take two working days per year.¹² This judicial inactivity is also demonstrated by the fact that there are no Court judgments against the Netherlands in this period. The first judgment against the Netherlands was the *Engel* case in 1976 concerning military disciplinary law.¹³

The lack of interest in the Convention by legal practitioners, scholars and courts was also reflected in the level of interest taken by Dutch politicians. Few could imagine that the Convention would have a substantive impact on the Dutch legal order. A Member of the House of Representatives (Second Chamber) described the Convention as ‘a clear statement ... against those totalitarian countries in Europe, in which these rights and freedoms unfortunately are not guaranteed’.¹⁴ According to the same parliamentarian, the Dutch legal order obviously fulfilled the minimum safeguards as laid down in the Convention, making the Convention less relevant. The Dutch Government stated in a by now historical passage ‘that the aggregate of regulations laid down in Dutch law, whether criminal or other, offers

¹⁰ JCM Leijten, ‘Het fluorideringsarrest’ [‘The Fluoridation Judgment’] in *’t Exempel dwinght [Essays in Honour of Professor Kisch]* (Zwolle, WEJ Tjeenk Willink, 1975) 289, 314: ‘The Treaty of Rome is so vague and is so non-committal even within its vagueness, that we ought to be reduced to barbarism before anyone can successfully rely on it. However, once we are barbarians, we will not bother with the Treaty anyway’ (‘Het Verdrag van Rome tot bescherming van de rechten van de mens is zo vaag en houdt binnen die vaagheid nog zoveel slagen om de arm, dat wij wel volslagen tot barbarij zullen moeten zijn vervallen, voor iemand er – alle directe werking ten spijt – met succes een beroep op kan doen en zijn we eenmaal barbaren geworden, dan trekken we ons zelfs van het Verdrag niets meer aan’).

¹¹ J Andrews, ‘Council of Europe’ (1977) *European Law Review* 154.

¹² E Myjer, *Bij een vijftigste verjaardag [On the Occasion of a Fiftieth Birthday]* (Nijmegen, Wolf Legal Publishers, 2001) 7 (note 14).

¹³ *Engel v The Netherlands* [1976] ECHR 3.

¹⁴ In Dutch: ‘een duidelijke uitspraak ... tegenover de totalitaire landen in Europa, waar van de waarborging van deze rechten en vrijheden helaas geen sprake is’.

sufficient guarantees so that these principles shall be respected in our country'.¹⁵ On ratification, there was no real political debate about the compatibility of Dutch law with the standards laid down in the Convention. Only some concerns with regard to the Preamble of the Convention were expressed.¹⁶ Many Members of the Dutch Parliament regretted, for example, the fact that the Convention did not explicitly refer to Christianity with regard to European civilisation.

During the 1970s, the theoretical concept of human rights law gradually transformed into a more practical legal instrument. There are probably various reasons why society at large and the legal and parliamentary community in particular became more interested in human rights law. It is dangerous to oversimplify the complex societal changes that took place, but it is safe to say that the renewed interest in human rights law was partly due to the emancipation of society. Society was increasingly characterised by individualism and more empowered citizens. Interference with individual rights or interests by the authorities was being increasingly challenged. Human rights fitted the purposes of this new kind of activism.

In the Netherlands, the increasing interest in human rights law led to a rise in popularity of the Convention. Having a fairly weak Constitution, the human rights debate focused on the Convention.¹⁷ In the 1970s and 1980s, lawyers slowly started to realise the relevance of the Convention for their legal practice and began to invoke it in domestic proceedings. The first cases against the Netherlands were lodged with the European Court of Human Rights: the case of *Engel* (1976) concerning military disciplinary law, *Winterwerp* (1979) concerning the placement of psychiatric patients, *X and Y* (1985) concerning the need to adopt criminal law sanctions in case of serious (sexual) misconduct, *Bentham* (1985) concerning the organisation of the Dutch administrative court system, *Berrehab* (1988) concerning immigration law and *Kostovski* (1989) concerning the use of anonymous witnesses in criminal proceedings. The fact that the Court found violations in each of these

¹⁵ In Dutch: 'dat het complex regelingen van de Nederlandse wet, zowel van strafrechtelijke als van andere aard, voldoende waarborgen biedt dat deze beginselen in ons land eerbiediging zullen vinden'.

¹⁶ See more elaborately on the Dutch ratification process: YS Klerk and L van Poelgeest, 'Ratificatie à contre-coeur: de reserves van de Nederlandse regering jegens het Europees Verdrag voor de Rechten van de Mens en het individueel klachtrecht' ['Ratification with the Heart Not in it: Reservations of Dutch Government against the European Convention on Human Rights and the Individual Right of Complaint'] (1991) *Rechtsgeleerd Magazijn Themis* 220.

¹⁷ See more elaborately M Kuijer, *Wetgever en constitutie: de betekenis van het Europees Verdrag voor de Rechten van de Mens voor de nationale wetgever* [Legislator and Constitution: The Meaning of the European Convention on Human Rights for the National Legislator] (Nijmegen, Wolf Legal Publishers, 2009).

cases illustrated the factual relevance of the Convention for legal practice. Cases could actually be *won* by invoking the Convention. The period of judicial inactivity had ended. Moreover, some of the Court judgments, including cases that were not brought against the Netherlands, had a tremendous impact on the domestic legal order.

The *Van Mechelen* case (1997) can serve as an example.¹⁸ The applicants complained that their criminal conviction had been based essentially on the evidence of police officers whose identity was not disclosed to them and who were not heard either in public or in their presence. The Court concluded that Article 6 of the Convention had been violated. As a result, the then Minister of Justice, Winnie Sorgdrager, released the four applicants almost immediately after the Court's judgment.¹⁹ More importantly, the Code of Criminal Procedure was amended so as to allow requests for revision of final decisions following judgments of the Strasbourg Court. According to Article 457, § 1(3) of the Code of Criminal Procedure, a request for revision can be lodged before the Supreme Court on the ground that a judgment of the European Court of Human Rights has established that the Convention was violated in proceedings that led to the conviction of the applicant or to a conviction on account of the same fact, and based on the same evidence, if revision is necessary in order to provide reparation within the meaning of Article 41 of the Convention.²⁰

Judgments of the Court with respect to third countries concerning problems that could also arise in the Netherlands have frequently led to changes in Dutch legislation, case law and/or practice. The 1979 *Marckx* judgment against Belgium, concerning discriminatory treatment of 'illegitimate' children, for example, led to immediate changes in Dutch policy.²¹ The 1988 *Brogan* judgment against the UK, concerning pre-trial detention, had a similar impact on Dutch policy.²² The 1996 *Goodwin* judgment against the UK, concerning a

¹⁸ *Van Mechelen and others v The Netherlands*, [1997] ECHR 22.

¹⁹ This led to a parliamentary debate (see Annex Parliamentary Proceedings (*Bijlage Handelingen*) II, 1996-1997, No 1247 and 1254). This proactive attitude following a judgment of the Court was not appreciated by all; the newspaper *De Telegraaf* commented that gangsters had been released because of the European Court ('Gangsters vrij door Euro-Hof'); see *De Telegraaf* (26 April 1997).

²⁰ See on this issue more elaborately PHPHMC van Kempen, *Heropening van procedures na veroordelingen door het EHRM [Reopening of Proceedings after ECtHR Judgments]* (Nijmegen, Wolf Legal Publishers, 2003).

²¹ The Dutch Court of Cassation quickly responded to the Strasbourg Court's *Marckx* judgment (Court of Cassation, judgment of 18 June 1980, *NJ* 1980, 463) which led to a change in the Dutch Civil Code with retroactive effect (Official State Gazette (*Staatsblad*) 1982, 608).

²² Following the judgment in *Brogan*, a commission charged with the revision of the Code of Criminal Procedure was requested in January 1989 to examine the consequences of the judgment for the Dutch legal order. Already in March 1989, a report, *De inverzekeringstellingsprocedure in het licht van artikel 5 EVRM [The Rules on*

journalistic privilege of non-disclosure, led to an almost immediate change in the case law of the Dutch Supreme Court.²³ Court judgments in the field of asylum and immigration against third countries have led to immediate changes in Dutch policy and case-law: the 2011 *MSS* judgment²⁴ concerning the compatibility of Dublin transfers to Greece with the requirements of the Convention led to changes in Dutch policy.²⁵ Likewise, the Court's judgment in the leading case of *Sufi and Elmi* against the UK²⁶ concerning expulsions to Mogadishu and other parts of Somalia swiftly led to policy amendments in the Netherlands.²⁷

The increasing body of case law attracted first and foremost the interest of those involved in the administration of justice²⁸ and academia.²⁹ Domestic courts were more often confronted with legal arguments based on the Convention. They were asked to rule on the compatibility of domestic laws with the Convention and became more familiar with the Court's case law. The Academy responsible for the (initial and continuous) training of magistrates in the Netherlands (the *Studiecentrum Rechtspleging*) began offering training modules on the Convention and the Court's case law.³⁰

Convention standards also became increasingly 'mainstreamed' in the legislative process and the political domain. The Dutch legislator started to check the compatibility of draft legislation with Convention standards more systematically. Human rights concerns about the compatibility of draft legislation with Convention standards became a regular feature in parliamentary debates. One possible explanation for the increased attention to the Convention

Police Custody in the Light of Article 5 of the ECHR], was published, which concluded that Dutch law had to be amended at short notice.

²³ *Goodwin v UK* [1996] ECHR 16.

²⁴ *MSS v Belgium and Greece* [2011] ECHR 108.

²⁵ Letter of 10 February 2011 (no DDS 5684216/11).

²⁶ *Sufi and Elmi v UK* [2011] ECHR 1045.

²⁷ Letter of the Minister for Immigration and Asylum Policy to Parliament of 26 August 2011 (No DDS 5706585/11).

²⁸ See P van Dijk, 'De Houding van de Hoge Raad jegens de verdragen inzake de Rechten van de Mens' ['The Attitude of the Court of Cassation Towards Human Rights Treaties'], in *De Hoge Raad der Nederlanden; De plaats van de Hoge Raad in het huidige staatsbestel* [The Court of Cassation in the Netherlands: Its Position in the Present Constitutional System] (Zwolle, WEJ Tjeenk Willink, 1988) 173.

²⁹ The criminal law section of Leiden Law Faculty was one of the first academic institutions in the country to pay attention to the impact of the Convention standards on various parts of criminal (procedural) law, including penitentiary law. Various PhD candidates worked on a Convention-related doctoral thesis. Furthermore, in 1974 the Dutch section of the International Commission of Jurists (*Nederlands Juristen Comité voor de Mensenrechten*) was established.

³⁰ Likewise, legislative draughtsmen are trained on Convention standards in the Academy for Legislation (*Academie voor Wetgeving*), officials of the Immigration and Naturalisation Service are trained on the requirements of Articles 3 and 8 of the Convention at the Theory of Knowledge Centre of the Immigration and Naturalization Service (*Kennisleercentrum IND*) etc.

in politics may be that the main political parties realised that international human rights norms provided a powerful political weapon in parliamentary debate with the Government. Both right-wing and left-wing parties frequently used human rights-related objections to oppose a particular legislative proposal. In that sense, human rights truly became mainstream in Dutch parliamentary debate.

II. The Convention and the Dutch judiciary: some general notions

The Netherlands is divided into 11 districts, each with its own court. Appeals against judgments passed by the district court in civil and criminal law cases can be lodged at the competent Court of Appeal (there are four Courts of Appeal in total); appeals against administrative law judgements at the competent specialised administrative law tribunal (either the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal or the Trade and Industry Appeals Tribunal, depending on the type of case). Appeals in cassation in civil, criminal and tax law cases are lodged at the Supreme Court of the Netherlands. The Netherlands does not have a constitutional court. In addition, there is a Council for the Judiciary (*Raad voor de rechtspraak*) which is part of the judiciary system, but does not administer justice itself. It has taken over responsibility over a number of tasks from the Minister of Justice. These tasks are operational in nature and include the allocation of budgets, supervision of financial management, personnel policy, ICT and housing. Another central task of the Council is to promote quality within the judiciary system and to advise on new legislation which has implications for the administration of justice.³¹

Rules of international law are part of the law of the land as soon as they become binding on the Kingdom of the Netherlands. Self-executing provisions of previously published treaties have force of law in regard to natural and legal persons and have priority – in the event of conflict – over national legislation. Provisions of the Convention are considered to be such ‘self-executing’ provisions. As a result, Convention standards may be invoked by a party before *any* domestic court.

³¹ Further information is available at www.rechtspraak.nl.

According to article 94 of the Constitution, national legislation – including the Constitution, Acts of Parliament and subordinate legislation – is inapplicable if application would be incompatible with self-executing provisions of treaties and resolutions of international organizations. As a general rule every Dutch court is empowered to disapply a legal provision or declare such a provision nonbinding if it is in conflict with higher law, such as the Convention. In doing so, the Dutch judge applies the so-called ‘incorporation doctrine’, meaning that the norm (ie, a provision of the Convention) is interpreted as it has been interpreted by the Strasbourg Court. It is therefore irrelevant whether the Court judgment was against the Netherlands or against a third country (de facto erga omnes effect).

As a rule, a Convention based argument has to be brought forward by one of the parties. However, occasionally the domestic judge will assesses ex proprio motu whether Convention standards have been breached. On the basis of case-law of the Dutch Supreme Court, criminal courts for example will have to assess ex proprio motu whether the right to be heard within a reasonable time has been violated.³²

It may come as no surprise that Dutch judges (whether they work as a judge in a first instance court, a justice in a court of appeal or the Supreme Court) follow the Court’s case-law closely. Judges are used to reading Court judgments in English. It appears to be more difficult for judgments that are only available in French, since many judges do not read French sufficiently well to understand the finer nuances of these judgments. However, they are usually aided by the practice of providing Dutch-language summaries, case notes and case comments, which helps them understand the gist of the judgment. In this respect, reference may be made to *European Human Rights Cases* which publishes all relevant Court judgments

³² The Supreme Court gave two standard judgments in 2000 and 2008 providing guidelines for time limits in criminal proceedings and for the consequences of breaching the reasonable time requirement [judgment of 3 October 2000, LJN AA7309 and judgment of 17 June 2008, LJN BD2578]. The court assesses ex proprio motu whether the right to be heard within a reasonable time has been violated. With regard to the legal consequences of breaching the reasonable time requirement, it should be noted that, as a basic principle, such a breach is compensated for by means of a reduction in the penalty that would otherwise have been imposed. The degree to which the penalty is reduced depends on the degree to which the reasonable time limit has been overrun and the severity of the penalty imposed. The criteria developed by the Supreme Court are based on those of the Court. In administrative proceedings, the Administrative Jurisdiction Division of the Council of State (Afdeling bestuursrechtspraak van de Raad van State) and the Central Appeals Tribunal (Centrale Raad van Beroep) developed over the last few years a detailed case-law on time limits in administrative proceedings, including on financial compensation in case of excessive length of proceedings. This case-law is based on the guidelines developed in the case-law of the Court. In civil proceedings, the Supreme Court in a judgment of 28 March 2014 [ECLI:NL:HR:2014:736] widened the possibilities for awarding financial compensation for breaching the reasonable time requirement.

and decisions with summaries in Dutch and (almost always) case notes in Dutch. In addition, one may refer to *Nederlands Juristenblad* (Netherlands Law Journal), *Nederlandse Jurisprudentie* (Dutch Law Reports), *Administratiefrechtelijke Beslissingen* (Administrative Law Reports), *Nederlands Tijdschrift voor de Mensenrechten – NJCM-Bulletin* (Netherlands Journal for Human Rights) and Law Reports dedicated to specific branches of law, such as immigration law, criminal law, labour law, et cetera. The case law of the Court also features prominently in legal literature. One may conclude that important judgments are generally sufficiently well-known and understood. The Court's case-law is considered an integral part of Dutch legal culture.³³

For several decades now, the Training and Study Centre for the Judiciary (*Studiecentrum Rechtspleging*), which trains judges, prosecutors and support staff, has been organising courses on the Convention (including the use of HUDOC). These courses are mandatory for initial training of prospective judges. In addition, the SSR has been organising an annual visit to the European Court of Human Rights for over 20 years now. In addition, more and more courts are organising specific human rights trainings for their staff on a decentralised level. Mention should also be made of the coordinators for European law ('GCE') within each specific court who are responsible for keeping their colleagues informed about relevant developments in the case law of the European courts. Especially, the newsletter of the court of appeal of Amsterdam is distributed widely (and won 2nd prize on 17 October 2014 at the 2014 Crystal Scales of Justice Prize awarding of the Council of Europe).

III. Giving effect to Court judgments

a) Procedure for adoption of general measures

The mechanism the Netherlands has in place to ensure timely and effective execution of judgments of the Court, is not based on a legal framework, but the result of working arrangements between the ministries that developed over time.

³³ J.W.A. Fleuren and J.H. Gerards, "The Netherlands", in: J.H. Gerards and J.W.A. Fleuren, *Implementatie van het EVRM en de uitspraken van het EHRM in de nationale rechtspraak*, WODC, 2013, p. 248-249.

After the Court renders a judgment in which it finds a violation of the Convention the Dutch Government Agent to the ECHR officially informs the relevant state actors at the various ministries of that judgment and its content (both the policy and legislation departments at the responsible ministries as well as more executive services such as the Immigration Service or the Prison Service). These are usually the same state actors who were already involved in the case when it was still pending before the Court. On the day of the judgment, the relevant Ministers are informed of its content and the possible consequences. If the execution of a judgment entails individual or general measures, the Government Agent has a coordinating function. A few days after the judgment, there is usually a meeting between all relevant departments and services in the different ministries involved and, if applicable, representatives of the judiciary. These actors will decide what means must be deployed to conform to the obligations under the Convention. They will report back to the Government Agent what individual and general measures shall be taken to execute the judgment. Individual measures have, until now, not posed many problems in the Netherlands. In cases concerning aliens, they usually entail the provision of a residence permit. The possibility of requesting reopening of criminal proceedings is provided by law. As regards general measures, the relevant actors will sometimes decide that a legislative amendment is necessary. However, due to the lengthiness of the legislative process, a modification of decrees, policies or jurisprudence will be preferred where possible.³⁴ The actors involved will also propose a time table for that execution. After the relevant ministers have approved the proposed measures, they will be taken without delay. The Government Agent will follow up on the execution of the action plan and will keep the Execution Department informed accordingly. If the Court has granted the applicant just satisfaction the Government Agent assures the timely payment of the just satisfaction by paying the ordered amount to the applicant from the budget of the ministry of Foreign Affairs. After that, the expenses are recovered from the relevant ministry(ies). This construction serves to minimize the risk of delay in the payment of just satisfaction. Lastly, the Government Agent informs the Execution Department of the timely payment of just satisfaction.

³⁴ For example, adopting new policy guidelines issued by the Public Prosecutor's Office in criminal cases or by the Immigration and Naturalisation Service in asylum- and immigration cases.

b) Which body is responsible for the process?

Primary responsibility for the adoption of general measures lies with the responsible Government minister (subject to parliamentary supervision), while the Government Agent has a coordinating function and bears responsibility for submitting action plans and reports (on the basis of the substantive information provided by the ministry that is competent with regard to the subject matter).

Court judgments against the Netherlands in which a violation is found will as a rule lead to a letter sent to Parliament explaining the legislative and/or policy consequences the government envisages. In addition, as a rule parliamentary questions are put to the Government by one or more political parties. Usually, the questions require the Government to provide information about how it intends to implement the Court judgment and how similar cases may be prevented in future. These parliamentary questions necessitate a speedy reaction by the Government as to what actions are foreseen in the implementation process of a Court judgment (within three weeks). In that manner, Parliament can (and in fact does) play an effective role in the implementation process.

In addition, there is a more general instrument to assist Parliament in its supervisory role. The Government Agent before the ECHR, also on behalf of the Minister of Security and Justice, presents an annual report to Parliament concerning the Court judgments delivered against the Netherlands. These annual reports have been submitted to Parliament since 1996. Following a request from the Senate in 2006, the report also includes a summary of the individual and general measures that have been taken that year in specific cases where the Court has found a violation of the Convention. Since 2009, the annual report contains where appropriate references to judgments against other States Parties which have had a direct or indirect effect on the Dutch legal system. And since 2010, the annual report also mentions reasoned decisions of the Court in which a complaint has been declared inadmissible or has been struck out of the list of cases. It also provides statistics on pending cases and to which areas of law these cases relate (eg, criminal law and alien law). This instrument guarantees involvement of parliamentarians and facilitates their monitoring of the execution of judgments. It has proven its merits, as in general the Netherlands is quick in the execution of judgments.

c) General measures to be adopted following a Court judgment

Primary responsibility for the identification of general measures needed in response to an adverse judgment of the Court lies with the responsible Government minister. In practice, a few days after an adverse judgment of the Court a meeting is arranged between all relevant departments and services in the different ministries involved and, if applicable, representatives of the judiciary (*Raad voor de Rechtspraak*). These actors then decide what means must be deployed to conform with the obligations under the Convention:

- The judgment concerned does not call for any general measures given the fact that the violation was due to the specific circumstances of the case whereas the legislative framework offers sufficient guarantees that similar incidents may be avoided in future. If that is the case, the judgment will merely be brought to the attention of relevant departments and services (including the judiciary) and the redress if primarily of an individual character.
- The judgment concerned calls for general measures of a judicial nature rather than a legislative response (see subsection f). In that case, the issue is taken up with the judiciary via the Council for the Judiciary (*Raad voor de rechtspraak*).
- The judgment concerned calls for a legislative response. If possible, due to the lengthiness of the legislative process, a modification of decrees or policy guidelines will be preferred. New policy guidelines may be adopted by the Public Prosecutor's Office in criminal cases or by the Immigration and Naturalisation Service in asylum- and immigration cases. If need be, a formal legislative proposal is suggested.

Subsequently, political approval of the responsible Government minister is sought for the means suggested. In case the minister approves the suggested approach, a letter is sent to Parliament outlining the suggested general measures. Obviously, the approach taken is subject to parliamentary supervision.

Given the fact that the Netherlands has no experience with (semi-) pilot judgments revealing an underlying systemic problem nor with interim resolutions of the Committee of Ministers, I am unable to share any Dutch experiences in this regard.

d) Execution of decisions of other international human rights bodies

The working arrangements described above apply *mutatis mutandis* also to the execution of decisions of other international judicial or quasi-judicial bodies in the field of human rights

law. However, as a rule domestic authorities do make a distinction between on the one hand instruments of a legally binding character (ie judgments of the European Court of Human Rights) and on the other hand authoritative yet not legally binding decisions or views (such as views of various UN treaty bodies or the ECSR). With regard to the latter category, the executive ordinarily allows itself greater leeway as to the manner in which the view or decision is implemented in domestic policies. At the same time, it should be stressed that certain non-legally binding decisions may create such political pressure exerted by parliament that far-reaching policy changes are made. Equally, domestic courts use such non-legally binding views or decisions as a source of inspiration and guidance when interpreting domestic law.

e) The role of courts of first instance when confronted with non-conformity of domestic law with Convention standards

In case a domestic court of first instance is faced with a problem of compliance with a Court judgment which requires the adoption of general measures, the court has various possibilities.

One would be to disapply the conflicting domestic rule. In this regard, a distinction should be made between acts of parliament and subordinate legislation. It happens quite frequently that a court will disapply subordinate legislation or annul a decision of a public body due to a conflict with the ECHR or its Protocols. Cases in which a court actually disapplies an act of parliament in order to avoid – or to remedy – a violation of the Convention are relatively rare. In practice, whether or not the courts are prepared to rectify any discrepancies between the law embodied in an act of parliament, on the one hand, and a self-executing treaty provision on the other, depends on whether there is a possible solution that fits in with the history and system of the law in question and whether the consequences of the solution are foreseeable. When several solutions are possible and none of them meets this test, the courts tend to refrain from choosing between them. But should the legislature continue to do nothing about the problem, then there may be a point when the courts themselves will provide a solution.³⁵ Consequently, the courts are *empowered* to remove any inconsistencies between Dutch law

³⁵ Supreme Court 12 May 1999, *BNB* 1999, no. 271 (*Arbeidskostenforfait*).

and self-executing provisions of the ECHR and its Protocols, but may sometimes consider it prudent to leave a solution to the legislature, at least pro tempore.³⁶

Another possibility for the domestic court would be to apply a Treaty-consistent interpretation of national law. This is a frequently used technique in Dutch courts, especially when an act of parliament is at issue.³⁷

f) The role of the Supreme Court in determining and/or initiating general measures

Courts (including the Supreme Court) do not consider themselves competent to order the State to adopt an act of parliament or other legislative measures requiring the cooperation of the people's representatives, regardless of whether the claim is based on a self-executing provision of treaty law. Hence, in that sense there is no formal competence to determine or initiate general measures needed following an adverse judgment of the Court.

In practice, however, the following nuances need to be taken into account:

- Some adverse judgments of the Court can only be remedied by a judicial response rather than a legislative response. Take for example, the violation found in the case of *Van der Velden v. the Netherlands*.³⁸ The case concerned the competence to decide on the extension of a 'TBS order', which would allow psychiatric confinement of a dangerous convict. According to the Strasbourg Court, the Dutch judicial approach to the issue in question had not been in accordance with domestic law (especially in light of the parliamentary debate on the legal provision concerned) and therefore in violation with Article 5 of the Convention (the right to habeas corpus). In order to avoid similar violations in future, a judicial response to the adverse Court judgment is needed since in essence judicial practice developed over time in a manner inconsistent with the intention of the national legislator. Following the Court judgments the issue was raised on a number of occasions in the National Consultative Committee of

³⁶ Cf. S.K. Martens, 'De grenzen van de rechtsvormende taak van de rechter' [The limits of the law making task of the courts], 75 *Nederlands Juristenblad* (2000), pp. 747-758.

³⁷ See J.C. de Wit, *Artikel 94 Grondwet toegepast. Een onderzoek naar de betekenis, de bedoeling en de toepassing van de woorden 'vinden geen toepassing' in artikel 94 van de Grondwet* [Applying Article 94 of the Constitution. A study of the meaning, the intention and the application of the words 'shall not be applicable' in Article 94 of the Constitution], The Hague, Boom Juridische uitgevers 2012.

³⁸ ECtHR 31 July 2012, appl. no. 21203/10.

Criminal Law Sector Chairpersons for the appeal courts (gerechtshoven) and district courts (rechtbanken). Thereafter, procedures have been adapted and specific 'building blocks' for judgments have been drawn up. The Court's judgment also led to national case law setting out the implications for the administration of justice by the national courts (see the Supreme Court, 12 February 2013, LJN: BY8434). In addition, the State Secretary for Security and Justice asked the Council for the Judiciary to identify any cases similar to Van der Velden's. A TBS Task Force was established for this purpose, its members drawn from the Public Prosecution Service and from among the ranks of judges, in-house lawyers and judge's clerks. The TBS Task Force then examined almost 2,400 case files, producing a list of 111 cases that require further attention. By letter of 30 January 2013 (ref. 337028) the State Secretary of Security and Justice presented the results of the survey to the House of Representatives of the States General (Tweede Kamer) (see also replies to parliamentary questions, published as *Aanhangsel van de Handelingen*, 2012-2013, 1381 & 1473). This example clearly demonstrates that the involvement of the judiciary following an adverse judgment of the Court can be substantial.

- Sometimes, a particular Court judgment is understood as containing an obligation to change national policy in the Netherlands. Primary responsibility for initiating such a change in general policy and/or legislation lies with the responsible Government minister (subject to parliamentary supervision). However, the process of amending the law can be rather lengthy, depending *inter alia* on whether a formal act of parliament needs to be amended, financial implications as a result of the policy change and political support (i.e. sense of urgency). By way of example, changing formal legislation will in the Netherlands (taking into account all consultations that need to be conducted) take on average 1.5 to 2 years. It is obvious that domestic courts will in daily legal practice be confronted with the alleged non-conformity of the legal rule in question long before the legislator has been able to solve the issue via the proper means (ie amendment of the legal provision after parliamentary approval). In the meantime, domestic courts need to take up their own responsibility. Let me again give one example. In its *Salduz* judgment³⁹, the Court held that Article 6 ECHR required

³⁹ *Salduz v. Turkey*, ECtHR (GC) 27 November 2008, appl. no. 36391/02.

that a suspect be assisted by a lawyer during police interrogation. Since such assistance during the police interrogation is not common practice in the Netherlands, the Minister of Justice announced that Dutch law would be amended accordingly. While draft legislation was being prepared, the Supreme Court already had to rule on the subject matter.⁴⁰ Following the judgments of the ECtHR and the Dutch Supreme Court, the Public Prosecutor's Office issued new policy guidelines in April 2010 in anticipation of the new legislation to be adopted by parliament. Again, the involvement of the judicial authorities is substantial in such a scenario.

- Thirdly, adoption of new legislation following an adverse judgment of the Court is rendered unnecessary as a result of Convention-consistent interpretation of national law. On occasion, it is not the legal rule as such that causes doubts concerning the compatibility with Convention standards. Instead, it is the *interpretation* of that legal rule. In these circumstances, adoption of new legislation is not always necessary (and given the time consuming nature of the legislative process not always desirable). For example, following the Court's judgment in the case of Al-Khawaja and Tahery versus the United Kingdom concerning a criminal conviction based on statements by absent witnesses⁴¹, the Dutch Supreme Court aligned its jurisprudence with the Court's standards.⁴²

g) Conflict between Constitutional and Conventional standards

Potential conflicts between the constitutional and conventional requirements are resolved by means of Article 94 of the Constitution itself: the self-executing provisions enshrined in the Convention have a higher standing than domestic legal norms, including the Constitution. Furthermore, on the basis of Article 120 of the Constitution domestic courts are prohibited from checking the constitutionality of Acts of Parliament.

In practice therefore, the ECHR is used much more often than the constitution as a basis for judicial review in fundamental rights cases, although the courts regularly mention both the ECHR and the constitution (and also international human rights treaties) as relevant sources

⁴⁰ Supreme Court 30 June 2009, LJN BH3079.

⁴¹ ECtHR (GC) 15 December 2011, appl. nos. 26766/05 and 22228/06.

⁴² Supreme Court 29 January 2013, ECLI:NL:HR:2013:BX5539.

of law.⁴³ The main explanation for this is that the ECHR contains more, and more specific fundamental rights norms than the Constitution, and the Dutch courts can readily rely on interpretations given by the Strasbourg Court. The Dutch constitution contains only a limited number of fundamental rights clauses, which are clearly addressed to the legislature and are not easily applicable by the courts.

⁴³ J.H. Gerards, 'Oordelen over grondrechten – rechtsvinding door de drie hoogste rechters in Nederland' [Deciding fundamental rights cases – legal reasoning by the three highest courts of the Netherlands], in: H. den Tonkelaar and L. de Groot, *Rechtsvinding op veertien terreinen* [Legal reasoning in fourteen fields of law], Deventer: Kluwer 2012, pp. 9-51, at p. 31.

Expert opinion on national experience of the implementation of ECtHR judgments in the Russian Federation

1. What is the procedure for the adoption of general measures following the ECtHR judgments in your country? Is there any such procedure established by law or another text (e.g. Government's regulations, internal ministerial instructions, etc.)? What triggers the process of adoption of general measures once the judgment becomes final?

Russia as the state party of the Convention for the Protection of Human Rights and Fundamental Freedoms undertakes obligations to ensure rights and freedoms defined in the Convention and the Protocols thereto for everyone being under its jurisdiction. In case when the European Court of Human Rights (ECtHR) finds the breach of the Convention it is imposed on the respondent State a legal obligation not only to make reparation for consequences of the breach and to restore the violated right as far as possible. It seems quite logical to understand the need to eliminate the causes that led to the possibility of such breaches in order to avoid the repetition of similar situations in the future.

It can be stated that to date, Russia has developed and used the legal mechanism of execution of the ECtHR judgments the basis of which are constitutional and legal guarantees for the protection of universally recognized rights and freedoms including those provided by the Convention and legal recognition of the compulsory jurisdiction of the ECtHR regarding the interpretation and application of the Convention and Protocols thereto. Such mechanism involves the complex of provided by the national law procedures and measures for the introduction and implementation of the ECtHR acts in the Russian legal practice.

However, at the moment there is no special Federal law, which regulate the issues of implementation of judgments of the ECtHR (including general measures), such, for example, the Italian law of 2006 «On the decisions of the European

Court of Human Rights», aimed at the timely provision of authorities with the information on the decisions of the ECtHR for necessary actions. . Nevertheless the Russian legislation sufficiently settled issues relating to elimination of the violations of the Convention stated by the ECtHR in the concrete cases concerning taking measures of an individual character. It, in particular, received expression through introduction into the procedural legislation the procedure of the review of decisions of national courts with the resumption of proceedings in a case.

In turn, general measures, being focused on prevention in the future new violations similar to those identified by the ECtHR judgments, is distinguished by the fact that such measures go beyond the particular case, assuming the extension of the ECtHR judgments to all similar situations, and cover a wide range of persons, essentially providing a generally-binding character to such acts. In this regard, general measures assume greater freedom discretion of the state in relation to their determination and use in each specific case.

On the secondary legislation level the adoption of special measures to prevent breaches of the Convention in the Russian legal practice after the entry into force of the ECtHR judgments is provided by the Decree of the President of the Russian Federation «On Representative of the Russian Federation at the European Court of Human Rights - the Deputy Minister of Justice of the Russian Federation¹. The Representative of the Russian Federation at the European Court of Human Rights has a duty to study the legal consequences of the Court's judgments made in respect of member States of the Council of Europe and to prepare the necessary recommendations for improvement of the Russian legislation and law enforcement practices with regard to Court jurisdiction and the practice of the Committee of Ministers of the Council of Europe as well as the recommendations on participation of the Russian Federation in international treaties and the development of international law in the interests of the Russian Federation. Also the Representative of the Russian Federation at the European Court of Human

¹ The Decree of the President of the Russian Federation of March 29, 1998 № 310 «On Representative of the Russian Federation at the European Court of Human Rights - the Deputy Minister of Justice of the Russian Federation»

Rights provides interaction between federal state bodies, regional state bodies and local self-government bodies during the execution of Court's judgments and resolutions of the Committee of Ministers of the Council of Europe in connection with complaints on violation the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms by the Russian Federation including the restoration of the violated rights of the applicants, the payment of pecuniary compensation awarded by the Court and the adoption of general measures aimed at elimination and (or) the prevention of violations the provisions of the said Convention by the Russian Federation.

The adoption of general measures (including including initiation of procedure of correction of legal practice) is also the task of other government bodies responsible for the matters following the relevant ECtHR judgment. At the present time according to the Decree of the President of the Russian Federation «On the monitoring of law enforcement in the Russian Federation»² there is the monitoring system to ensure the execution of the ECtHR judgments which require adoption (issuance), amendment or repeal (annulment) of legislative and other normative legal acts of the Russian Federation. With the participation of state authorities of the Russian Federation and subjects of the Russian Federation the operational monitoring for assessment of the implementation of the ECtHR judgments is carried out. The functions for coordination and conduction of such monitoring are entrusted to the Ministry of Justice of the Russian Federation. The monitoring is conducted in accordance with the monitoring plan and in accordance with the method of its execution. The monitoring plan, which, inter alia, take account of the necessity of the execution of the ECtHR judgments is developed annually by the Ministry of Justice and approved by the Government of the Russian Federation³. According to the results of monitoring, for the purposes of taking general measures following the ECtHR judgments, public authorities can formulate proposals

² The Decree of the President of the Russian Federation of May 20, 2011 № 657 «On the monitoring of law enforcement in the Russian Federation»

³ For example, the Decree of the Government of the Russian Federation of 28 August, 2014 № 1658-p «The plan of monitoring of law enforcement in the Russian Federation for 2015»

concerning: the necessity of adoption (issuance), amendment or repeal (annulment) of legislative and other normative legal acts of the Russian Federation; measures for the improvement of the legislative and other normative legal acts of the Russian Federation; measures for the improvement of the effectiveness of law enforcement. The Ministry of Justice of the Russian Federation on the basis of the reports of state authorities on results of monitoring prepares the draft of the report to the President of Russia about results of monitoring and offers suggestions to the plan of lawmaking activity of the Government of the Russian Federation. Following the results of the analysis of such offers the instructions to the government bodies and organizations, and also officials for the elaboration of legislative and other regulations of the Russian Federation and acceptance of other measures for realization of such offers can be given.

2. How the measures required by the judgments are identified in your legal system? Would the process be different depending on the type of the ECtHR judgment to be enforced (e.g. a judgment limited to individual circumstances or revealing an underlying systemic problem, a semi-pilot or a pilot judgment)? How are the measures identified when a judgment does not specify any? Would a specific indication by the Court about general measures be helpful for the definition of such measures? What is the legal status and practical effect of the interim resolutions of the Committee of Ministers calling for specific general measures to be adopted?

The adoption of general measures in connection with the ECtHR judgments is a quite complexly structured and multistage process that requires the active and consistent participation of the state bodies of all branches of state power.

The Federal Parliament as the supreme legislative body due to its powers is a key state body in the process of improvement of legislation (introduction of amendments and additions to the relevant regulations, the abolition of the former laws or the adoption of new laws) in accordance with European human rights

standards. Recently there is a discussion about the possibility of enhancing the role of Parliament in the process of implementation and adherence to the European human rights standards. In particular, one can speak about the introduction of the procedure of examination of draft laws with respect to their correlation with these standards for the purposes of preventing the occurrence of contradictions between law regulators and such standards when referring to them in law enforcement practice; the organization of parliamentary control over the execution of the ECtHR judgments, which has the «pilot judgment» status.

It should be noted that the initiator of the draft law, required to execute the judgment of the ECtHR, can be any public authority having the right of legislative initiative. At the same moment the parliament and its members, as practice shows, are involved in the process of initiating general measures in connection with the ECtHR judgments to a lesser degree, rather than the executive bodies or the President of the Russian Federation. At the same time the initiatives of parliamentarians have a fairly significant character, as, for example, in the case of introduction of the draft law on the publication of the ECtHR judgments.

In Russia the control and coordination activity in the sphere of ensuring the fulfillment of international obligations of Russia in general and judgments of the ECtHR in particular is entrusted to the executive bodies. So, par. 2 art. 32 of the Federal law «On international treaties of the Russian Federation»⁴ authorizes federal executive bodies to ensure execution of obligations of Russia under international treaties and exercise of the rights of the Russia following from these treaties.

Thus, the Ministry of Justice of the Russian Federation is intended to monitor law enforcement in the Russian Federation for the execution of ECtHR judgments, which may require adoption (issuance), revision or annulment (abolition) of the legislative and other legal acts of the Russian Federation.

Traditionally since 1998 the Representative of the Russian Federation at the European Court of Human Rights - Deputy Minister of Justice of the Russian

⁴ The Federal law of July 15, 1995 № 101-FZ «On international treaties of the Russian Federation»

Federation is a special state body in Russia which is empowered to study the legal consequences following the ECtHR judgments, to initiate and coordinate the process of adoption of general measures in connection with the ECtHR judgments made in respect of Russia. This state body acts on the basis of the Regulation approved by the Decree of the President of the Russian Federation of March 29, 1998 №310 and Decree of the President of the Russian Federation of March 20, 2007 №370 «On matters of ensuring activity of the Representative of the Russian Federation at the European Court of Human Rights».

In Russia the structures of inter-agency cooperation are established which act in order to meet international obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms, with the participation of various government agencies, including representatives of the legislative and executive branches of government. Their activities in cooperation with the representative of the Russian Federation at the ECtHR allows to ensure the development of recommendations on the implementation of judgments of the ECtHR into national law in efficient and timely manner. In particular, since 1996 the Inter-Agency Commission of the Russian Federation on Affairs of the Council of Europe acts on the basis of the Decree of the President of 28.12.1996 №1783 «Matters of the Interdepartmental Commission of the Russian Federation on Affairs of the Council of Europe», the last composition of which was approved by the Decree of the President of the Russian Federation №698 of 2013. The Commission is authorized to coordinate the activities of federal state bodies to ensure the participation of the Russian Federation in the Council of Europe, the promotion of national interests and the fulfillment of obligations arising from the membership in the Council of Europe; to promote cooperation with the Council of Europe and its member States in order to improve the Russian legislation and law enforcement practice in accordance with Council of Europe standards, the creation of legal state and deepening of democratic reforms in Russia. Also on the basis of the Order of the President of the Russian Federation of May 8, 2013 №185-r the interagency working group acts to prepare proposals specifically aimed at ensuring the

effective use of the international legal acts and decisions of the ECtHR in the judicial practice.⁵

3. How the measures required by the judgments are identified in your legal system? Would the process be different depending on the type of the ECtHR judgment to be enforced (e.g. a judgment limited to individual circumstances or revealing an underlying systemic problem, a semi-pilot or a pilot judgment)? How are the measures identified when a judgment does not specify any? Would a specific indication by the Court about general measures be helpful for the definition of such measures? What is the legal status and practical effect of the interim resolutions of the Committee of Ministers calling for specific general measures to be adopted?

The place and legal status of judgments of the ECtHR in the Russian legal system is largely determined by the legal bearing of the Convention as an international treaty in the sphere of protection of rights and freedoms, the constitutional regulation and legal guarantees of the enforcement of these acts, as well as existing legal traditions (e.g., related with the correlation of judicial acts with the sources of law).

The Russian Constitution of 1993 defines the legal basis of the perception of international legal instruments and, in particular, decisions of the ECtHR in Russian law. Firstly, par. 4 of Article 15 of the Constitution recognizes the universally-recognized norms of international law and international treaties and agreements of the Russian Federation as 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. This formulation constitutionally opens up the possibility of the

⁵ Working groups have been created in connection with the execution of specific pilot judgments of the ECtHR. A wide range of specific measures taken by them (legal, organizational, educational and others) included in the analyzed mechanism can be illustrated, for example, on the execution of the ECtHR judgment №42525/07 and 60800/08 « Ananyev and Others v. Russia» // <http://europeancourt.ru/2013/04/02/11713/>

implementation of international instruments into national law. Secondly, the Constitution regards the generally recognized principles and norms of international law and the international treaties of the Russian Federation as integral parts of its legal system but does not include the decisions of international organizations, despite the constitutional guarantee of the right to appeal to interstate bodies for the protection of the rights (par. 3 of Article 46 of the Constitution). In this regard the ECtHR judgments as acts of interpretation and application of the Convention are interpreted as acts of international law, mainly derived from the Convention as an international treaty and have secondary character against it. Thirdly, the Constitution recognizes and ensures the fundamental rights and freedoms according to the generally recognized principles and norms of international law (par. 1 of Article 17) and in accordance with the Constitution. This regulation determines the high potential of applicability of European human rights standards in the Russian legal order even in spite of the current domestic legal practice and they get almost the same legal significance as the acts of the constitutional nature in making an assessment of the content and limits of permissible restrictions of fundamental rights and freedoms.

Since 1998 after the assumption of the obligations under the Convention by Russia and recognition as compulsory the jurisdiction of the ECtHR regarding the interpretation and application of the Convention, the significant work on the development of ideas about the place and legal force of the acts of the ECtHR in domestic law had done, in particular at the level of the legal positions of the supreme Russian courts. Currently, according to the conclusions of the supreme courts the ECtHR judgments insofar as it refers to interpretation of the Convention, as well as the Convention itself, are recognized as an integral part of the Russian legal system, endowed with the properties of finality, obligatoriness and direct applicability.⁶ It is pointed out the need to ensure the priority of the requirements

⁶ See: the Judgment of 5 February 2007 № 2-P «In the case concerning the review of the constitutionality of the provisions of Articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Civil Procedure Code of the Russian Federation, in connection with a request of the Cabinet of Ministers of the Tatarstan Republic, complaints of Nizhnekamskneftekhim OJSC, Khakasenergo OJSC, and a number of citizens»; the ruling of the Plenary session of the Supreme Court of the Russian Federation of October 10, 2003 №5 «On the application by the

of the Convention and application of national legal acts in a consistent unity with them, as well as the insufficiency of measures to eliminate violations of the Convention exclusively in respect of the applicant to the ECtHR at the execution of judgments of the ECtHR, and importance of extension of such measures to other persons in similar situations.⁷

In making an assessment of the legal significance of the ECtHR judgments in Russian legal practice it is not customary to focus on the categories of matter of judgment, allowing this judgment to be considered as a limited judgment or pilot judgment. At the same time the character of the judgment made by the ECtHR, undoubtedly, has impact on the adoption of measures for its implementation (their character, urgency, form of expression). In particular, the institute of «pilot judgments» of the ECtHR, which was introduced in 2004, is aimed at identifying and remedying the systemic or structural violations of rights guaranteed under the Convention or other violations that have led or may lead in the future to the emergence of a whole series of similar appeals. Such the ECtHR judgments contain improvement notice to the respondent state to adopt specific general measures in the specified period, that the state cannot ignore because of the multiple applications to the ECtHR on this issue and the emergence of «clonal cases» effect. The ECtHR may make such judgment in order to prevent further admission of applications to the ECtHR, having specified the general measures required to adoption, which may involve institutional and legal reforms and systemic changes. Undoubtedly, pilot judgments reinforce the need of acceptance of general measures in connection with increase of risks of negative consequences.

courts of general jurisdiction of universally recognized principles and norms of international law and international treaties of the Russian Federation»; the ruling of the Plenary session of the Supreme Court of the Russian Federation of June 27, 2013 №21 «On the application by the courts of general jurisdiction of the Convention on the protection of human rights and fundamental freedoms of 4 November 1950 and the Protocols thereto»

⁷ See: the Judgment of 25 January 2001 No. 1-P « In the case concerning the review of constitutionality of the provision of Paragraph 2 of Article 1070 of the Civil Code of the Russian Federation in connection with complaints of I.V.Bogdanov, A.B.Zernov, S.I.Kalyanov and N.V.Trukhanov»; the ruling of February 8, 2001№ 43-O «On the complaint of O.T.Salomatova concerning the review of constitutionality of Paragraph 2 of Article 1070 of the Civil Code of the Russian Federation»; the Judgment of 26 February 2010 № 4-P «In the case concerning the review of the constitutionality of Section 2, Article 392 of the Civil Procedure Code of the Russian Federation in connection with complaints of A. A. Doroshok, A. Ye. Kot, and Ye. Yu. Fedotova»

Russia has the positive experience of effective response to pilot judgments of the ECtHR. In 2009, the ECtHR made its first pilot judgment in respect of Russia in the case of «Burdov v. Russia» (№2)⁸, where, inter alia, it pointed out the violation of Article 13 of the Convention as the result of the absence of effective domestic remedies in case of failure or delay the execution of judicial judgments. The ECtHR stated the systemic nature of the violation and ordered the state within six months to create an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress, including compensation, for non-enforcement or delayed enforcement of domestic judgments.. As a result for the purposes of enforcement of this judgment the Federal law of April 30, 2010 №68-FZ «On compensation for violation of the right to fair trial within a reasonable time or the right to the execution of an enforceable judicial decision within a reasonable time» was promptly prepared and adopted.⁹ The joint ruling of the Plenary Sessions of the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation «On some issues arising in cases of compensation for violation of the right to fair trial within a reasonable time or the right to the execution of an enforceable judicial decision within a reasonable time» was prepared to ensure proper application of the law of 23 December 2010. Now also measures for execution of other pilot judgments concerning Russia like «Ananyev and others v. Russia» (January 10, 2012) and «Gerasimov and others v. Russia» (July 1, 2014) are being taken.

It should be noted that the determination of concrete measures and methods of the execution of judgments of the ECtHR is reasonably carried out by the states parties of the Convention in a specially established form and procedure. This

⁸ The Judgment of the ECtHR of January 15, 2009 «Burdov v. the Russian Federation (№. 2)» / <http://hudoc.ECtHR.coe.int/>

⁹ Within the scope of this law only for the period from 4 may to 31 December 2010 more than 3 thousand applications for award of compensation were filed to the courts of general jurisdiction. The judicial practice started being formed. During this period, thanks to the efforts of the Ministry of Justice of the Russian Federation, where the office of the Representative of the Russian Federation at the European Court is situated, about a thousand of friendly settlements with applicants who file complaints to the ECtHR in connection with the non-enforcement of court judgments were reached. The state acknowledged the violation of the reasonable time and paid compensation, similar to that it generally awards by the ECtHR in such cases / Zimnenko B.L. Voprosy realizacii sudami obshej jurisdikcii Federal'nogo zakona ot 30 aprelja 2010 goda № 68-FZ «O kompensacii za narushenie prava na sudoproizvodstvo v razumnyj srok ili prava na ispolnenie sudebnogo akta v razumnyj srok» // Sud'ja. 2011. № 3. P. 17.

corresponds to the subsidiary nature of the Convention's control mechanism to ensure human rights and the «rule of result», according to which states are given wide discretion in choosing the means of fulfillment of legal obligations, provided that these means will be compatible with the conclusions contained in the relevant judgment of the ECtHR.

Due to the entry into force an judgment of the ECtHR the specifically authorized body carries out its assessment and analysis for possible legal consequences and identifies the need for a change in legislation or law-enforcement practice. Whereby a variety of factors can be considered including real divergence of such judgments with the Russian legal acts, the existence of a legal need for such measures to prevent the recurrence of similar situations, the conceptual justification of the undertaken measures in the light of socio-cultural conditions and political and legal traditions, etc.

Despite their advisory nature such acts of soft law as the preliminary resolutions of the Committee of Ministers of the Council of Europe have significant practical effect at the stage of execution of the ECtHR judgments. First of all, such resolutions are focused on providing information about the execution of the ECtHR judgment and, if necessary, express concern or even criticism of the failure process of its implementation that allows to objectively and comprehensively evaluate the effectiveness of this process and, if necessary, correct it in a timely manner. Also such resolutions have largely orientation importance in connection with information contained in these recommendations on ways and variants of solutions, as well as indicators that can be used to determine the satisfiability of the ECtHR judgments.

There are no special legal acts establishing the legal status of the preliminary resolutions of the Committee of Ministers of the Council of Europe in Russia. However the Representative of the Russian Federation at the European Court of Human Rights is entitled to provide interaction between federal state bodies, regional state bodies and local self-government bodies during the execution of Court's judgments by obtaining from them information on the measures taken to

ensure the execution of Court's judgments aimed at elimination the violations of the Convention for the Protection of Human Rights and Fundamental Freedoms in order to submit such information to the Committee of Ministers of the Council of Europe thereafter. In 2013, the Institute of Legislation and Comparative Law under the Government of the Russian Federation has elaborated the draft federal law «On normative legal acts in the Russian Federation»¹⁰, which determine the status of the international advisory acts without special preliminary allocation of the resolutions of the Committee of Ministers. However, this initiative has not yet received legislative recognition.

4. Does your country's domestic procedure for adoption of general measures apply to the execution of decisions of other international judicial or quasi-judicial bodies or it is only limited to the execution of the ECtHR judgments?

International judicial bodies have different functions, but mainly their role is to resolve disputes between states and adopt the advisory opinions. Sometimes they perform the functions of administrative tribunals resolving disputes between the administration of an international organization and its employees (personnel).

They are created on the basis of international treaties, which, depending on the status of such bodies (judicial body of an international organization or international conventional body) may act as constituent treaties of international organizations (the UN Charter and the Statute of the International Court of Justice UN) or other international treaties that regulate the sphere of international relations (United Nations Convention on the Law of the Sea of 1982). There is no principal difference between these international treaties because all of them according to the Constitution of the Russian Federation are a component part of its legal system.

International criminal ad hoc tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) are given very controversial assessments in the Russian legal literature. They unlike

¹⁰ The draft federal law «On normative legal acts in the Russian Federation» (initiative draft law). M., 2013.

other international jurisdictions were not established by concluding an international treaty between states, but on the basis of resolutions of the UN Security Council¹¹. Due to the fact that the UN Charter does not provide the powers of the Security Council to establish any judicial bodies, a number of experts expressed doubts about the legitimacy and legality of the resolutions of the Security Council, and, respectively, and the legitimacy of international criminal tribunals.

Along with it, currently there is a significant group of international bodies, which are called quasi-judicial bodies (International bodies on human rights, conventional bodies on human rights, international bodies on claims and compensations, procedures for determining compliance with international environmental treaties, the inspection teams of international banks, international bodies settling international economic disputes, etc.).

The obligation of states to execute the decisions of international judicial bodies is envisaged in the international treaties on the basis of which the relevant judicial bodies were created. Accordingly, the Russian Federation is a party to the treaties establishing the following international judicial bodies:

The International Court of Justice (the UN Charter, the Statute of the International Court of Justice, both treaties ratified by the USSR in 1945, the Russian Federation is the legal successor of the USSR under these treaties);

The International Tribunal for the Law of the Sea (Russian Federation ratified the UN Convention on the Law of the Sea on 12 March, 1997);

The Court of the Eurasian Economic Union (Russian Federation ratified the Treaty on the Eurasian Economic Union on October 5, 2014, 1 January, 2015 the Treaty entered into force).

The UN Charter and the Statute of the International Court of Justice impose obligations on States in general terms.

Paragraph 1 of Article 94 of the UN Charter provides that «each Member of the United Nations undertakes to comply with the decision of the International

¹¹ Mihajlov N. G. Problemy zakonnosti Mezhdunarodnogo Tribunala po byvshej Jugoslavii // Mezhdunarodnoe pravo. -2006. - № 2. - P. 59- 82.

Court of Justice in any case to which it is a party». According to Article 59 of the Statute of the Court «the decision of the Court has no binding force except between the parties and in respect of that particular case» and according to Article 60 «the judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party». But the USSR and Russia did not make any declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice, therefore, the jurisdiction of this Court for Russia is optional.

According to Article 296 of the UN Convention on the Law of the Sea of 1982 any decision rendered by a court or tribunal having jurisdiction under this Convention shall be final and shall be complied with by all the parties to the dispute. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

Upon the ratification of the UN Convention on the Law of the Sea of 1982 the following declaration was made in the Federal law of February 26, 1997 № 30-FZ: «The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations». In other cases, not specified in this declaration, the Russian Federation recognizes the binding nature of decisions of the International Tribunal for the Law of the Sea and arbitration under the Convention.

The legislation of the Russian Federation doesn't provide any special procedures for the execution of the decisions of the International Court of Justice or the International Tribunal for the Law of the Sea.

The Court of the Eurasian Economic Union performs numerous functions. Among them the consideration of disputes upon application of a member state concerning observance by another member state (other member states) Founding Treaty of the Eurasian Economic Union, international treaties within the Union and (or) decisions of the bodies of the Union, as well as certain provisions of these international treaties and (or) decisions as provided in subparagraph 1 of paragraph 39. According to paragraph 99 of the Statute of the Court, following the consideration of these disputes, the Court renders a decision that is binding on the parties of a dispute. The Court's judgment cannot go beyond matters specified in the application. The Court's judgment does not amend and (or) does not repeal the existing Union law, legislation of member states and does not create new ones. The parties of a dispute independently determine the form and means of execution of the judgment (paragraph 103). At the moment there are no any regulations and procedures for the execution of the judgments of the Court of the Eurasian Economic Union in Russia.

As for the decisions of quasi-judicial international bodies they have advisory nature, so there is no need for detailed consideration. The Russian Federation did not participate in proceedings of the UN Compensation Commission.

In respect of conclusions (views) of United Nations Treaty bodies the following practices of consideration their resolutions have developed.

Extracts from the ECtHR judgments made in respect of Russia, as well as extracts from the views adopted international Treaty bodies in the sphere of the protection of human rights and freedoms acting under the auspices of the UN are published in periodic codes of practice of the Supreme Court of the Russian Federation. (see, e.g., codes of practice of the Supreme Court of the Russian

Federation for the second¹², third¹³, fourth¹⁴ quarter of 2013, Code of practice of the Supreme Court of the Russian Federation for January-July of 2014¹⁵, Code of practice of the Supreme Court of the Russian Federation № 1 (2015)¹⁶)). This allows lower courts to take into account the practice of quasi-judicial bodies established on the basis of the human rights conventions of the UN.

As concerns to the dispute settlement mechanism of the WTO, according to the Article III of the Marrakesh Agreement the WTO performs administrative functions in respect of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which is contained in the Annex to this Agreement, adopted in 1994. The dispute settlement mechanism of the WTO includes the Dispute Settlement Body (the DSB), whose functions are performed by the Secretary-General of the WTO.

The DSB have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. The Understanding on Rules and Procedures Governing the Settlement of Disputes provides the immediate execution of the recommendations and decisions of the DSB, which is a prerequisite to ensure effective settlement of disputes in the interests of all members. No other obligations on the member states of the WTO in connection with the necessity of execution of decisions of the DSB are not vested.

In Protocol on the Accession of the Russian Federation to the WTO Agreement of 16 December, 2011 Russia declared its accession to the WTO Agreement in accordance with article XII of this Agreement, which, in turn, provides that such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto. Although the Understanding on Rules and

¹² http://www.vsrfru/Show_pdf.php?Id=8949

¹³ http://www.vsrfru/Show_pdf.php?Id=9098

¹⁴ http://www.vsrfru/Show_pdf.php?Id=9288

¹⁵ http://www.vsrfru/Show_pdf.php?Id=9449

¹⁶ http://www.vsrfru/Show_pdf.php?Id=9865

Procedures Governing the Settlement of Disputes of 1994 doesn't apply to the Multilateral Trade Agreements, it serves as Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization and, therefore, may be considered as its integral part. However, neither the Protocol of Accession, nor the Report of the working party on the accession of the Russian Federation to the World Trade Organization does not contain any special obligations in respect of the Understanding. In Russia special procedures for the execution of the decisions and recommendations of the DSB are not established.

5. Which way do the national-level courts of the first instance work in the case of the necessity to comply with the ECHR Resolution which requires to take the measures of the common character (for example, to make changes to the provision of the national legislation, which led to violation of the Convention)? Is there a possibility or specially established procedure for the consideration of such situation in the Supreme and/or in the Constitutional Court?

At the present time Russian legal system contains necessary legal norms to guarantee the application of the ECHR judgments by the national court's practices. According to the Federal Constitutional Law "On the Court system of the Russian Federation"¹⁷ the courts shall apply the treaties of Russian Federation (art. 3), and in the case of the national-level legal act contradicting the treaty, courts shall make decisions according to the legal provisions of treaties which have the greater legal force (art. 5).

The Plenary Meeting of the Supreme Court of Russian Federation in its resolutions pays the attention to the necessity of taking to account the legal positions of the ECHR during the consideration of legal cases.

The Plenary Meeting Ruling of 2003¹⁸ has underlined that treaties having

¹⁷ The federal constitutional law of December 31, 1996 No. 1-FKZ "About judicial system of the Russian Federation" / SZ Russian Federation, 06.01.1997, No. 1, art. 1

¹⁸The resolution of Plenum of the Supreme Court of the Russian Federation of 10.10.2003 No. 5 "On the application by courts of the conventional principles and norms of international law and

the direct effect in Russian legal system, are applicable by the courts (incl. military courts), in the settlement of civil, criminal and administrative disputes . The incorrect application of the Russian Federation treaties by the court (the non-application of the provision of the international law or the application of such a provision while it was not to be applicable in the concrete circumstances, or when the court wrongfully interprets the provisions of international law) can be the legal basement for the repeal or change of the court`s act. The application of the Convention by the courts is to be made concerning the ECHR practice to avoid any kind of the violation of the said Convention.

The exercising of the judgments concerning the Russian Federation means the duty of the State, if necessary, to take concrete measures directed to the elimination of the violation of human rights, provided by the Convention, and to the elimination of the results of these violations affecting the applicant, as well as to take measures of the common character to prevent the recurrence of such violations. The courts in accordance with their competence are to provide the execution of the fulfillment of the duties of the State, which result from the participation of the Russian Federation in the Convention for the Protection of Human Rights and Fundamental Freedoms.

If during the consideration of the case by the court, the last has find out the circumstances, which promote the violation of rights & freedoms of the citizens, guaranteed by the Convention, the court has the right to make a private definition (decision), which points out to the circumstances and facts of the violation of the said rights & freedoms for the organizations and authorities which require the application of the necessary measures.

Nevertheless, providing the direct application of the ECHR-acts by the ordinary court`s practice does not means the possibility and necessity for the application only of the acts and positions of the ECHR , which are in fact not in contradiction with the Russian legislation which is to apply in the seeing case. At

the same time such a case is always the most favorable, because it allows to enforce the arguments and the value of the national-level legal instruments.

The activity of court admits the legal dispute, resolution of which demands application of the provisions of the Russian law or other legal regulator which in essence led to violation of the Convention, determined by ECHR.

This situation makes the pattern question – can the ordinary court extrapolate by its own will the conclusions made by the ECHR concerning the another applicant (firstly, in the judgments made against Russia) to the similar situation, which appears in the hearing case.

It is notable, that higher-level courts took numerous attempts to solve this question which consists in the ways of the direct application of the European human right standards by the courts, concerning the fact of these standards are uncoordinated with current Russian legislation and with the practice of its interpretation, and of the methods for avoiding of the contradictions between the applicable norms of national and international law. The Constitutional Court of the Russian Federal Soviet Socialist Republic at the time of its existence in its Judgment of 1992 has pointed out to the duty of the courts to appraise the applicable law due to its compliance with the principles and provisions of the international law¹⁹. The Supreme Court of the Russian Federation in its Ruling of 1995 has pointed out the noncompliance of the application of the norms of the law applicable in the current situation, if the treaty being in force for the Russian Federation, if the official agreement of its binding force was made in the form of federal law, is under other rules which are provided by the law²⁰. According to the judgment of the Constitutional Court of the Russian Federation of 2001 all national

¹⁹ The resolution of 04.02.1992 No. 2-P "On the case of check of constitutionality of law-enforcement practice of cancellation of the employment contract on the basis provided by point 1.1 of the article 33 Labour Code RSFSR" / Sheets of SND and Russian Armed Forces, 26.03.1992, No. 13 art. 669

²⁰ The resolution of Plenum of the Supreme Court of the Russian Federation of October 31, 1995 No. 8 "About some questions of application by courts of the Constitution of the Russian Federation at justice implementation" / the Bulletin of the Supreme Court of the Russian Federation, 1996 No. 1

level acts are to be applied in non-contradiction with the terms of the Convention.²¹ The Supreme Court of the Russian Federation in its Ruling of 2003 also specified that courts are to perform its functions to prove the performance of state duties which results from the participation of Russia in the Convention, including its participation in the taking of the measures common character²². By the above mentioned provisions the constitutional -level priority of the international duties of Russia to the national legislation as it is applied by the courts was provided. At the same time at 2013 the Supreme Court of the Russian Federation in its Ruling has allowed the possibility of the application of the national legislation by the courts despite of the standards guaranteed by the Convention as it understood in the interpretations of the ECHR, if the former provides better level of the defense of the rights & freedoms to compare with the mentioned standards.²³ Thanks to these positions Russian judge has a broad list of national-level instruments to appraise the possibility and validity of the European legal defence standards in the hearing case.

At the same time, despite the absence of the specially stipulated procedure of the solving the problem of the execution of the ECHR's resolutions concerning Russia by the courts of the ordinary jurisdiction, in the case when such resolutions are to avoid the provisions of Russian legislation, which are in non-compliance with the positions of the ECHR, or to correct its interpretation to bring them in compliance with European legal defense standards, this work is processed firstly in the level of the Supreme Court of Russian Federation during hearing the cases in the first instance. At the same time the courts of ordinary jurisdiction and

²¹ The resolution of 25.01.2001 No. 1-P "On the case of check of constitutionality of provision of point 2 of article 1070 of the Civil code of the Russian Federation in connection with complaints of citizens I.V. Bogdanov, A.B. Zernov, S. I. Kalyanov and N. V. Trukhanov"

²² The resolution of Plenum of the Supreme Court of the Russian Federation of 10.10.2003 No. 5 "On the application by courts of law of the conventional principles and norms of international law and international treaties of the Russian Federation"//the Bulletin of the Supreme Court of the Russian Federation. 2003 No. 12

²³ The resolution of Plenum of the Supreme Court of the Russian Federation of June 27, 2013 No. 21 "About application by courts of law of the Convention on protection of human rights and fundamental freedoms of November 4, 1950 and Protocols to it" / the Bulletin of the Supreme Court of the Russian Federation", 2013 No. 8

arbitration courts when solving the question of the application of the ECHR`s acts which are in conflict with the provisions of Russian legislation, are commonly taking into account the position of the higher courts, concerning their practice of application of the European law standards and are less initiative in applying the “conflict” international acts .

The preamble to the Resolution of The Supreme Court of Russian Federation in it`s Resolution of 24.02. 2005 № 3 «On the court practice for the cases of the protection of the honor and dignity of citizens, and also business reputation of citizens and legal entities» specifies for the courts that realization of the freedoms mentioned in the art. 10 of the Convention can be burdened by certain formalities, terms, restrictions or sanctions which are stipulated by the law and are necessary in the democratic community by the interests of national security or public order for prevention of disorders or crimes, for health and moral protection, protection of reputation or the rights of other persons, prevention of disclosure of information received confidentially or ensuring authority and impartiality of justice.

The provisions of this rule have to be interpreted according to the position of the ECHR expressed in it`s resolutions .

The Supreme Court of Russian Federation regularly sends to the lower level courts the ECHR Resolutions concerning Russian Federation . The texts of the said resolutions arrive in Russian language to Supreme Court of Russian Federation from the Representative of the Russian Federation in ECHR .

The database «International law» was established In the Supreme Court of Russian Federation, it contains the system of the texts of the ECHR Resolutions concerning Russian Federation, and other member-states of the Council of Europe.

Along with resolutions of the European Court of Human Rights the mentioned database also places other international documents which contain matters for appropriate realization by courts of the Russian Federation of the conventional principles and norms of international law and international treaties of the Russian Federation (for example, recommendations of Committee of ministers of the Council of Europe, documents of the European commission for

democracy through the right, the European commission on efficiency of justice, documents of the international treaty bodies operating under the auspices of the United Nations). The specified system is available to all courts of ordinary jurisdiction.

The material and procedural criteria caused by category of the protected rights and freedoms, and of the structure of Civil procedure and Criminal procedure Codes of the Russian Federation have become the basis for the systematization.

Information on the current practice of the European Court of Human Rights as concerning the Russian Federation, and other member states of the Council of Europe brought regularly to the attention of judges and other workers of the office of the Supreme Court of the Russian Federation.

Extraction from the resolutions of the European Court of Human Rights concerning the Russian Federation are published in periodic reviews of court practice of the Supreme Court of the Russian Federation. In case of need any judge of the Russian Federation has an opportunity to use to the text of the resolution of the European Court and the legal positions of the European Court reflected in this resolution as well.

Excerpts from the judgments including those connected with application of the Convention on protection of human rights and fundamental freedoms of 1950 and additional Protocols to it, and answers to the questions arising at courts are published in periodic reviews of court's practice of the Supreme Court of the Russian Federation.

The Supreme Court of the Russian Federation systematically prepares the thematic reviews of practice of the European Court of Human Rights. Examples of such reviews are: The review of practice of the European Court of Human Rights for 2009 - 2010 on affairs in the relation of the Russian Federation in connection

with violation of the right for reasonable terms of judicial proceedings and/or execution of the judgment in reasonable time"²⁴,

The review of practical and legal positions of the European Court of Human Rights on awards of fair compensation in connection with violation of provisions of article 3 of the Convention on protection of human rights and fundamental freedoms of 1950 by the Russian Federation²⁵, the review of the European Court's of Human Rights legal positions concerning the application of point 3 of article 5 of the Convention on protection of human rights and fundamental freedoms of 1950, the reviews of legal positions of the European Court of Human Rights and the international treaty bodies of the UN concerning spheres of criminal legal proceedings, the civil law procedure and civil procedure relations, and the hearings of the administrative cases²⁶.

The texts of the above mentioned reviews go to lower level courts and/or are placed in the "International law" database.

By hearing the cases, the courts of Russian Federation consider legal positions of the European Court of Human Rights as the arguments to prove the made decisions.

The Supreme Court of the Russian Federation has the right to revise the judgments (resolutions) by the force of establishment by the European Court of Human Rights of violation of provisions of the Convention on protection of human rights and fundamental freedoms by consideration of concrete case by the court, in connection with decision-making on which the applicant addressed to the European Court of Human Rights.

²⁴ Bulletin of the Supreme Court of the Russian Federation, 2011, N 3. http://www.vsrfr.ru/Show_pdf.php?Id=9849

²⁵ The text of the mentioned Review has been directed to the lower level courts, been placed in the database "International Law" and has been brought to attention of the judges and the Supreme Court of Russian Federation Apparatus workers.

²⁶ The texts of the mentioned Review have been directed to the lower level courts, been placed in the database "International Law" and have been brought to attention of the judges and the Supreme Court of Russian Federation Apparatus workers.

From 01.01. 2006²⁷ to 20.04 2015 the Presidium of the Supreme Court of the Russian Federation has considered 238 cases initiated by the Chairman of the Supreme Court of the Russian Federation and concerning 292 persons with regard to the violations of provisions of the Convention on protection of human rights and fundamental freedoms of 1950 and/or Protocols to it as established by the European Court of Human Rights:

- judgments repealed (incl. partially) supplemented by the transfer of criminal case to new judicial proceedings respectively in the court of the first, cassation or supervising instances on 73 criminal cases;
- judgments repealed (incl. partially) without transfer of criminal case on new judicial proceedings on 14 criminal cases;
- judgments changed without transfer of the hearing of the case for new consideration on 2 criminal cases;
- judgments on a measure of restraint in the form of detention repealed on 110 criminal cases;
- judgments made by results of consideration of complaints to decisions on extradition repealed on 34 criminal materials;
- the judgments passed as article 125 of the Criminal procedural code of the Russian Federation repealed on 28 criminal materials;
- judgments on 10 criminal cases (materials) are left.²⁸

If a subject of consideration of the European Court of Human Rights were the judgments made within criminal legal proceedings, as implementation of

²⁷ From the start date of consideration of the Supreme Court of the Russian Federation of nominations of the Chairman of the Supreme Court of the Russian Federation by Presidium in connection with establishment by the European Court of Human Rights of violation of provisions of the Convention on protection of human rights and fundamental freedoms of 1950 and/or Protocols to it (article 413 of the Code of criminal procedure of the Russian Federation

²⁸ Meaning the criminal cases, when the ECHR has established the fact of the violation of the Convention on protection of human rights and fundamental freedoms of 1950 and/or the Protocols to it. in court decisions, excluding the cases of the violation of the right to the fair judicial proceedings concerning the reasonable periods of court hearings. The criminal cases which hearing was renewed according to the nomination of the President of the Supreme Court are also mentioned here, However, *all* of the cases being under examination were left without change.

provisions of article 413 of the Code of criminal procedure of the Russian Federation (further – the Criminal Procedure Code of the Russian Federation) texts arrived from the Representative of the Russian Federation at European Court on human rights of resolutions of the European Court are transferred to judicial structure of rapporteurs of Presidium of the Supreme Court of the Russian Federation for the solution of a question of the necessity of renewal of the hearings of the criminal case concerning the new circumstances taking into account that according to point 2 of part 4 of article 413 Criminal Procedure Code of the Russian Federation “new circumstance” is the violation of provisions of the Convention on protection of human rights and fundamental freedoms established by the European Court of Human Rights by consideration by court of the Russian Federation of criminal case connected with: a) application of the federal law which isn't corresponding to provisions of the Convention on protection of human rights and fundamental freedoms; b) other violations of provisions of the Convention on protection of human rights and fundamental freedoms.

Briefly the special order for consideration of a situation of providing the resolutions of ECHR is defined in the Resolution of the Constitutional Court of the Russian Federation of December 6, 2013 No. 27-P on the case of the constitutionality of the provisions of article 11 and points 3 and 4 of part of the fourth article 392 of the Code of civil procedure of the Russian Federation in connection with inquiry of the presidium of the Leningrad district military court. The constitutional court of the Russian Federation in the mentioned Resolution developed the mechanism by means of which it is possible to prevent within the Russian jurisdiction the conflict between the contradicting decisions of the Constitutional Court of the Russian Federation and the European Court of Human Rights on condition of obligation both. The Constitutional Court of the Russian Federation in essence specified in this Resolution to the Russian courts, properly to arrive in a similar situation.

When while the analysis of the application of the citizen directed to the revision of the court's resolution which entered into legal force owing to

establishment by the European Court of Human Rights which allowed the case of the applicant, violation of provisions of the Convention concerning it on protection of human rights and fundamental freedoms there exists a decision of the Constitutional Court of the Russian Federation passed earlier which contains a conclusion about non-violation of constitutional rights in the case of the same applicant by the provisions of the legislation of the Russian Federation which application, according to the European Court of Human Rights, leads to restriction of the rights of persons, incompatible with requirements of the Convention on protection of the human rights and fundamental freedoms falling under action of these statutes, the court is obliged to begin according to the petition from the citizen which complaint in the Constitutional Court of the Russian Federation, on violation of its constitutional rights and freedoms was recognized the admissibility which isn't answering to criterion earlier, revision production on new circumstances of the judicial resolution which entered into force in connection with establishment by the European Court of Human Rights of violation of provisions of the Convention on protection of human rights and fundamental freedoms concerning this citizen by consideration of the corresponding civil case by court of law. In case the court of ordinary jurisdiction comes to a conclusion of the impossibility to perform the resolution of the European Court of Human Rights without recognition as not corresponding to the Constitution of the Russian Federation the statutes concerning which earlier Constitutional Court of the Russian Federation stated lack of violation of constitutional rights of the applicant by them in concrete cases, he is obliged to suspend the hearings of the case and to appeal to the Constitutional Court of the Russian Federation with request for the review of constitutionality of these provisions of law.

In such cases that fact that Constitutional Court of the Russian Federation has recognized earlier the non-compliance of the complaint of the citizen with the admissibility criterion due to the lack of violation of its constitutional rights the statutes applied in its case, can't serve as an obstacle for acceptance of it by the court which according to the statement of the same citizen carries out the revision

of the decision of the court which entered into force based on these statutes which by the European Court of Human Rights were given an assessment as the human rights attracting violation of the Convention on protection and fundamental freedoms as point of 4 parts of the fourth article 392 GPK of the Russian Federation. At the same times, if during the constitutional legal proceedings the considered statutes are recognized not contradictory to the Constitution of the Russian Federation, the Constitutional Court of the Russian Federation - meaning that for court of ordinary jurisdiction the refusal of revision of the judicial resolution which entered into force is anyway excluded as the procedural stage caused, in particular, by pronouncement of the resolution of the European Court of Human Rights - within the competence defines possible constitutional ways of implementation of the resolution of the European Court of Human Rights.

This mechanism was apprehended later by the legislator who has made changes to the Federal constitutional law of July 21, 1994 No. 1-FKZ "On the Constitutional Court of the Russian Federation", in particular, having obliged courts in the Russian Federation to put in connection with acceptance by interstate body for protection of the rights and freedoms of the person of the decision in which violation in the Russian Federation of the rights and freedoms of the person at application of the law or its separate provisions, during the revisions in the cases established by the procedural legislation if they come to a conclusion is stated that the issue of possibility of application of the relevant law can be resolved only after confirmation of its compliance of the Constitution of the Russian Federation, make an inquiry in the Constitutional Court of the Russian Federation about check of constitutionality of this law (part second of article 101 of the Federal constitutional law above mentioned).

The circumstance that earlier the Constitutional Court of the Russian Federation has issued the resolution concerning the case and it is keeping the force? Can not form the basis for refusal in taking of the appeal to consideration. This also applies in case of the appeal to the Constitutional Court of the Russian Federation of the President of the Russian Federation, the Federation Council, the

State Duma, 1/5 of members (deputies) of the Federation Council or deputies of the State Duma, Government of the Russian Federation, the Supreme Court of the Russian Federation, bodies of legislative and executive power of subjects of the Russian Federation with request for review of the constitutionality of the legal acts of the state power and contracts between them specified in article 125 (part 2) of the Constitution of the Russian Federation if the applicant considers them subject to action contrary to officially accepted interstate body for protection of the rights and freedoms of the person to the decision in which violation in the Russian Federation of the rights and freedoms of the person at application of the relevant statutory act or contract is stated and need of introduction of changes in them eliminating noted violations.

6. What is the role played by the Supreme Court(s) and the Constitutional Court in determining and initiating general measures? What is the procedure they follow in that regard?

Special responsibility for a timely response to the ECtHR decisions, the specification and adoption of general measures rests with the Russian courts of highest resort by virtue of their institutional and legal nature, functions and powers enable them to exercise a wide range of activities for the implementation of the European human rights standards and to influence on the emerging Russian legal practice.

The Russian courts of highest resort as the Constitutional Court and the Supreme Court²⁹ can take a variety of general measures not only related to the execution of specific judgment of the ECtHR made in respect of Russia as the respondent state but also measures for the implementation of European human rights standards in the national legal practice (no matter in respect of which country the ECtHR judgment was made), the development of domestic remedies

²⁹ The Supreme Court of the Russian Federation (which doesn't belong to the system of federal courts of general jurisdiction) is created as a result of reform of the Russian judicial system on the basis of the Supreme Arbitration Court of the Russian Federation and the Supreme Court of the Russian Federation Russian and it is their successor / the Law of the Russian Federation on amendment to the Constitution of the Russian Federation of 5th February, 2014 №2-FZ «On the Supreme Court of the Russian Federation and Public Prosecution of the Russian Federation»

and mechanisms for the protection of rights guaranteed under the Convention, and measures to improve the information and legal support of implementation of the ECtHR acts as a whole.

At the resolution of legal disputes the Supreme Court of the Russian Federation as the highest judicial body intended to ensure the rule of law in civil cases, cases for the resolution of economic disputes, criminal, administrative and other cases and the Constitutional Court of the Russian Federation as the principal judicial body of constitutional control can provide the immediate adoption of general measures implied by the judgments of the ECtHR. The Supreme Court of the Russian Federation while resolving cases as the court of first instance to a greater extent can ensure the non-application of provisions of the Russian legislation, contrary to the requirements of the Convention, and (or) adoption of a new practice of understanding and interpretation of the law in the light of the legal views of the ECtHR. The approach to the resolution of legal issues is a guide to the judicial practice of all courts of general jurisdiction and arbitration courts in the resolution of similar cases.

At reviewing constitutionality of certain legal provisions and their interpretation in law enforcement practice the Constitutional Court of the Russian Federation enforces the adoption of general measures when formulating final conclusions places special emphasis on position of the ECtHR, which is expressed in its judgment on a complaint against Russia, and provides its priority in relation to the provisions of the Russian legislation. As a rule, the Constitutional Court of the Russian Federation uses the legal positions of the ECtHR, together with its own findings, thereby increasing the value and argumentativeness of its own judgments.

The Constitutional Court of the Russian Federation while examining the constitutionality of normative legal acts and detection of the violation of constitutional rights and freedoms of citizens considers the practice of the ECtHR on protection of the similar conventional rights. However it is not under rigid obligation of any legal positions and judgments of the ECtHR by way of its subordination, obeying only the Constitution of the Russian Federation and the

federal law according to Article 120 of the Constitution of the Russian Federation.

After the detection of defects of national legal regulation the destiny of the law, i.e. review of its constitutionality, becomes an exclusive prerogative of the Constitutional Court of the Russian Federation. According to above mentioned, it is possible to conclude that the review of constitutionality of the law carried out by the Constitutional Court is an efficient and effective mean of detection of the existing problems of legal regulation and, as a result, possible systematic violations of the human rights protected at the national and international levels. The Constitutional Court as a control body which functions in direct contact with legal reality of the country, has access to all necessary resources and sources of information, a priori is in more advantageous situation, than supranational body (in this case - the ECtHR) from the point of view of search of possible decisions and elimination of the arisen problem of legal regulation. Therefore, the Constitutional Court of the Russian Federation is capable and competent to offer possible general measures for overcoming of the arising problems.

Actively making references to the provisions of the Convention and their interpretation made by the ECtHR, the Chairman of the Constitutional Court V.D. Zorkin numerously declared that the Constitutional Court thereby implements them directly into the Russian legal space. It is often easier and more habitually for the Russian law-enforcement officials to refer to the judgments of the Constitutional Court, than to jurisprudence of the ECtHR in the ordinary course of their activities, and, besides, there are also stronger legal grounds for this purpose.

The approach mentioned above is illustrated by numerous examples from the practice of the Constitutional Court. So, on November 20, 2007 the Constitutional Court adopted the Judgment №13-II on provision of the Criminal Procedure Code which weren't allowing persons to whom coercive measures of medical character (according to the conclusion of psychiatrists) are applied, to participate in criminal trial and court session personally, to get acquainted with case papers, to declare petitions and to appeal against the made decisions. The Constitutional Court recognized that these provisions of the Criminal Procedure Code are not in line

with the Constitution to the extent to which they - in the meaning attributed to them by established law-enforcement practice - didn't allow citizens to exercise their procedural rights.

As a matter of fact this Judgment of the Constitutional Court can be considered as an execution of the Judgment of ECtHR in the case "Romanov vs. Russia". It was stated that the presence of the applicant in the hearing is a necessary condition in order that the judge could see his mental state and to make a fair decision. This legal position was reproduced by the Constitutional Court. Thus, the Constitutional Court, considering a question of constitutionality of a number of standards of the Criminal Procedure Code, at the same time resolved a question of bringing it to the compliance with the European standards.

The role played by the Constitutional Court in acceptance of general measures after adoption of the Judgment of ECtHR in the case "Shtukurov vs. Russian Federation" is also important. On February 27, 2009 the Constitutional Court considered the case in connection with complaints of Yu. K. Gudkova, P. V. Shtukurov, and M. A. Yashina. The Constitutional Court recognized the provision of Section 1, Article 284 of the Civil Procedure Code of the Russian Federation, establishing that the person whose legal capacity is being examined by the court is to be summoned to the court hearing if his health condition permits his attendance, as non-conforming to the Constitution of the Russian Federation. This provision is unconstitutional to the extent that within the meaning attributed to it in the current judicial practice it permits the court to declare a person incapable only on the basis of a forensic psychiatric expert examination, without giving the person concerned the possibility to present his case to the court in person or through representatives of his own choosing, provided that his presence in the hearing creates no danger to his life or health or to the life or health of others (Judgment of 27 February 2009 № 4-II). In paragraph 2 of the resolute part of this Judgment the Court recognized the interrelated provisions of Section 5, Article 37, Section 1, Article 52, Subsection 3, Section 1, Article 135, Section 1, Article 284 and Subsection 2, Section 1, Article 3791 of the Civil Procedure Code of the Russian

Federation as non-conforming to the Constitution of the Russian Federation and its Articles 19 (Sections 1 and 2), 45 (Section 2), 46 (Section 1), 55 (Section 3), 60 and 123 (Section 3), to the extent that these provisions, within the meaning attributed to them by the current judicial practice and in the system of the existing legal regulation of the cassation and supervisory review proceedings, do not allow a person declared incapable by the court to appeal against the court decision on cassation and supervision where a first instance court failed to provide the person concerned with the possibility to present his case in person or through representatives of his own choosing, and given that his presence in the hearing was not considered dangerous to his life or health or to the life or health of others.

The Federal law of April 6, 2011 № 67-FZ «On amendments to the Law of the Russian Federation «On Psychiatric Care and Guarantees of Citizens' Rights during its Provision» and the Civil Procedure Code of the Russian Federation» was adopted in order to implement legal positions containing in of the Judgment of ECtHR in the case «Shtukaturov vs. Russian Federation» and the above-mentioned Judgment of the Constitutional Court of the Russian Federation. As a result of amendments Article 116 of the Civil Procedure Code of the Russian Federation provides the order of delivery of the summons. If the person whose legal capacity will be examined by the court is summoned to the court, the summon need to be noted about the necessity of delivery of such summon to the addressee personally. Service of summon in this case to other persons is not allowed.

Significant role in the implementation of the European human rights standards and the adoption of general measures plays expository activity of the Supreme Court of the Russian Federation on issues of judicial practice to ensure consistency of understanding and application of the Russian legislation in the light of European human rights law. The Plenary session of the Supreme Court of the Russian Federation is actively working on the review and collation of issues of the application of European human rights standards in judicial activity, including the explanation of the meaning and nature of such standards. Thus, first of all, the most significant legal positions of the ECtHR which contained in its judgments against

Russia and are required the fastest implementation in the legal practice and the adoption of necessary measures in this regard are considered. For example, in the Ruling of the Supreme Court of the Russian Federation № 5 of 2003 «On the application of international law», it is presented a brief review of case-law of the ECtHR on articles 3, 5, 6 и 13 of the Convention (on the reasonableness of time of administration of justice; on extension of the detention; and so on). Analysis of the legal positions of the ECtHR contained in the various «thematic» rulings of the Plenary session of the Supreme Court of the Russian Federation: «On certain issues arising during the examination by courts of action for the protection of the honour and dignity of citizens, and also the professional reputation of citizens and legal entities»; «On the length of examination by courts of the Russian Federation criminal, civil cases and cases on administrative offenses»; «On the practice of examination by courts the issues related to extradition of persons for criminal prosecution or execution of sentence, as well as the convey of persons to serve a sentence»; . Such rulings promote to facilitate the activities of the courts in identifying the «necessary» of European standards for the purposes of resolution of a case, ensuring their application and, accordingly, preventing the violations of the Convention in situations similar to those that have been viewed in practice of the ECtHR.

It's important to emphasize as the most important direction of the adoption of general measures by the Russian courts of highest resort their every assistance promoting the effective protection and restoration of the rights guaranteed by the Convention, primarily by ensuring the effectiveness of article 6 of the Convention («right to a fair trial») and acts of its interpretation of the ECtHR in the domestic legal practice.

For example, the Constitutional Court of the Russian Federation justified the need to introduce in the procedural legislation the mechanism of restoration of the rights of stakeholders and the execution of the ECtHR judgments, similar to that which operates for the purpose of execution of judgments of the Constitutional Court. It pointed out that the existence of a certain procedure for reconsideration of

judicial decisions which have entered into legal force, if violations of the Convention for the Protection of Human Rights and Fundamental Freedoms were established, is a general measure for purposes of implementing the Convention. Taking general measures is an obligation of the State under Article 46 of the Convention together with Articles the Constitution of the Russian Federation and it is required to establish a statutory mechanism of executing final judgments delivered by the European Court of Human Rights, which would allow securing the adequate restoration of rights found to be violated .

The emergence in Russia of internal mechanism concerning compensation for violation of the right to a trial within a reasonable time required by the ECtHR judgments was also the result of active work of the superior courts, which adopted several rulings that directly deals with the issues of ensuring a reasonable time of judicial proceedings with regard to the assessment criteria of this reasonableness and procedure for calculating the relevant terms.

General measures for the purposes of the execution of the ECtHR judgments in a broad sense suppose the establishment of appropriate legal and methodological support for the implementation of the ECtHR acts. The legal positions of the Supreme Court and the Constitutional Court of the Russian Federation exercise a decisive influence on this process. The courts have worked out the issues of legal status and application in the national legal practice of international law as a whole and European human rights law in particular. Among such issues: the legal status of the Convention and the practice of its interpretation, the ways of perception and application of acts of the ECtHR in the activity of the courts; the legal force of the ECtHR judgments made in respect of Russia, and measures of their implementation; ways and means of overcoming the contradictions between the norms of the Russian legislation and the provisions of international legal instruments applicable to instant cases..

The Supreme Court is distinguished by the number of acts which are specially focused on an assessment of the role and importance of international law in the domestic legal system, and on definition of the legal status of the Convention and

acts of the European Court. Thus, the Plenary session of the Supreme Court adopted the ruling «On the application by the courts of general jurisdiction of universally recognized principles and norms of international law and international treaties of the Russian Federation» of 2003, the ruling of 2013 «On the application by the courts of general jurisdiction of the Convention on the protection of human rights and fundamental freedoms of 4 November 1950 and the Protocols thereto», which became the first of its kind the Russian legal document devoted to the issues of implementation of the Convention and the execution of ECtHR judgments.

Equally important in the adoption of general measures and creation of conditions for independent enforcement of the effectiveness of the Convention law in the law enforcement practice is carrying out the information and educational activity to improve the qualification and competence of judges in the field of European human rights law, that facilitate the acquisition of sufficient knowledge and skills to apply European human rights standards. In this regard the Supreme Court is involved in providing information to judges about the practice of the ECtHR, adopts the recommendations on the organization in this direction of appropriate training, retraining and raising of qualifications of the judges and personnel of the courts .

Also the courts of highest resort may participate in the initiation of the law-making process in connection with the necessity of taking general measures on the basis of the ECtHR judgments in virtue of the fact that they have the right of legislative initiative and the legal possibilities to monitor the current legislation with respect to compliance with the European human rights standards.

7. Has any judgment of the ECtHR ever required an amendment of a constitutional provision or a change in its interpretation? If yes, what measures have been taken? How was a (potential) conflict between the constitutional and conventional requirements or divergent interpretations eventually resolved?

Among the most sensitive issues of implementation of the international obligations under the Convention for the Protection of Human Rights and

Fundamental Freedoms is the problem of implementation of the ECtHR judgments and legal positions contained in them, which conflicting or competing with national constitutional regulators - the Constitution of the Russian Federation and acts of its interpretation made by the Constitutional Court of the Russian Federation. The high probability of the emergence of such «conflict» is caused by the broad approach of the ECtHR to the possible objects of the conventional control, which may include a national constitution³⁰.

For a long time the problem of collision of constitutional and international legal regulators in connection with the need of fulfillment of obligations under the Convention was only the subject of theoretical discussion. However, for the last time, the ECtHR has made several judgments, which take stock the provisions of the Russian constitutional acts. The judgment in the case «Markin v. Russia»³¹ made by the ECtHR in 2010 contains negative assessment of the Russian legislation regarding refusal to grant male military personnel parental leave. At the same time the Constitutional Court of the Russian Federation confirmed the constitutionality of the current legal regulation. This situation for the first time underlined the conflict of acts of interpretation of the Convention and the Constitution of the Russian Federation at the intersection of European and constitutional jurisdictions. In addition, in 2013, the ECtHR adopted the judgment in the case «Anchugov and Gladkov v. Russia»³², stated the violation of the Convention by the Russian law-enforcement practice which developed on the basis of provisions of the Constitution of the Russian Federation provided that 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 (par.3 of Article 32).

In its judgment of 4 July, 2013 in the case «Anchugov and Gladkov v. Russia» the ECtHR for the first time indicated incompatibility of the particular

³⁰ As the ECtHR noted «Article 1 makes no distinction as to the type of rule or measure concerned, and does not exclude any part of the member States' «jurisdiction» from scrutiny under the Convention which is often exercised in the first place through the Constitution» / The judgment of ECHR of October 6, 2005 in the case of «Hirst v. the United Kingdom» / <http://hudoc.ECtHR.coe.int/>

³¹ The Judgment of the ECtHR of October 7, 2010 in the case of «Markin v. Russia » / <http://hudoc.ECtHR.coe.int/>

³² The Judgment of the ECtHR of July 7, 2013 in the case of «Anchugov and Gladkov v. Russia» / <http://hudoc.ECtHR.coe.int/>

provisions of the Constitution of the Russian Federation (par. 3 of Article 32) containing the general restrictions on electoral rights of all prisoners serving their sentences in detention with the Convention on protection of the rights and fundamental freedoms and requested to amend the Constitution of the Russian Federation through a political process or official interpretation that removes this incompatibility.

This judgment of the ECtHR has received a mixed assessment among Russian political and legal community, and to date it has not been executed by authorities. The main problem is the constitutional impossibility of execution of the ECtHR judgment. The Constitution of the Russian Federation does not allow revision of those provisions which, in the Court's view, are subject to change (provisions of Chapter 2. «Rights and Freedoms of Man and Citizen»). Moreover, **these** provisions clearly establish that citizens kept in places of confinement by a court sentence are deprived of the right to elect and be elected. This general ban that does not contain criteria to restrict the rights of certain groups of prisoners is imperative, leaving no room for different interpretation.

Thus, the location of the above-mentioned legal provision and the certainty of its content are legal barriers to the execution of the judgment of the ECtHR.

At the same time the approaches developed by the ECtHR to the assessment of restrictions on voting rights of persons brought to trial, were taken into account by the Constitutional Court of the Russian Federation in deciding on the constitutionality of provisions of the electoral legislation establishing that citizens of the Russian Federation having ever been convicted to deprivation of liberty for the commission of grave and (or) particularly grave crimes have no right to be elected.

In its Judgment of 10 October, 2013 № 20-II the Constitutional Court of the Russian Federation came to the conclusion that principle of proportionality, realized by means of differentiation and individualization of application to a citizen of such a measure as restriction of passive electoral right, determined by the commission of a grave or particularly grave crime, within the meaning of Articles

3, 15 (Section 4), 17 (Section 3), 19 (Sections 1 and 2), 32 (Sections 1 and 2) and 55 (Sections 2 and 3) of the Constitution of the Russian Federation in the interconnection with Article 3 of Protocol № 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms in its interpretation by the European Court of Human Rights, contemplates that the terms of such restriction must be established by the Federal Law “On Fundamental Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation” with consideration of the provisions of the criminal law defining criminality of an action, as well as its punishability and other criminal-law consequences.

Thus the judgments of the ECtHR relating to restriction on voting rights of convicted persons, were executed in the Russian legal system through interpretation of the provisions of the Constitution of the Russian Federation made by the Constitutional court of the Russian Federation in relation to the constitutional criteria of restrictions of passive electoral rights of persons, determined by the commission of a grave or particularly grave crime.

In some cases, the Constitutional Court of the Russian Federation used the legal positions of the ECtHR, revealing the content of conventional rights, to interpret provisions of the Constitution of the Russian Federation in the framework of specific legal situation being in place on the basis of the legal provision reviewed for its conformity to the Constitution of the Russian Federation.

Through the interpretation of constitutional norms, the Constitutional Court of the Russian Federation appealed to the content of conventional rights established by the ECtHR as to the minimum, which must be guaranteed in any case.

For example, in its Judgment of 7 June, 2012 No. 14-II the Constitutional Court of the Russian Federation reviewed the constitutionality of the provisions of Sub-Item 1 of Article 15 of the Federal Law “On the Procedure of Exit from the Russian Federation and Entry into the Russian Federation” and Article 24 of the Law of the Russian Federation “On State Secret” that provide the restriction on the right to leave the Russian Federation for a citizen of the Russian Federation having an access to especially important data or top secret data

constituting a state secret and concluded a labor agreement (contract) stipulating a provisional restriction of the right to leave the Russian Federation.

The Constitutional Court of the Russian Federation basing on the jurisprudence of the ECtHR (Judgment of 21 December, 2006 in the case «Bartik v. Russia» stated that above-mentioned provisions within their constitutional-law meaning in the system of legal regulation with regard to the provisions of Article 2 of Protocol №. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms and legal propositions of the ECtHR formulated on its basis mean the following. The authorized bodies and the officials making the decision on temporary restriction of the citizen to the right of exit from the Russian Federation, and the courts in assessing the legality of such decisions cannot be guided by only one formal criterion as existence of a given citizen's right of access to especially important data or top secret data classified as a state secret. Such decision in any case requires clarification of the nature of the specific information to which a citizen had access during his professional activity, and the degree of secrecy, including at the time of applying to the competent authorities in connection with the proposed travel outside of the country and the purposes of exit and other circumstances, which allows to make a conclusion about the necessity of using the specified restrictions.

The question of finding ways of coordination «conflicting» provisions of the Convention and the Russian legal acts of constitutional value essentially became a subject of consideration of the Constitutional Court of the Russian Federation in connection with the request of the Presidium of the Leningrad district military court on the examination the constitutionality of provisions of the Code of Civil Procedure, which allow to review of entered into force judgment in respect of the decisions of the ECtHR and the Constitutional Court when there are the opposing legal positions in the same case. By consideration the case, the Constitutional

Court of the Russian Federation issued the Judgment of 2013 № 27-P³³, which pointed to the ways and possibilities of implementation of the «conflict» ECtHR judgments made against the Russian Federation, and the direct applicability of the specified standards in judicial activity.

Thus, the Constitutional Court confirmed the need for unconditional execution of final judgments of the ECtHR adopted by results of consideration of the complaint of the person claiming to be a victim by violation of his rights by the Russian Federation, in the part stating the specified violation concerning this person and adjudging fair compensation if required. However, the Constitutional Court acknowledged the possibility of emergence of situation in which the «absoluteness» of the ECtHR judgment can be questioned in the case, when such execution is impossible without practical rejection of the application of legal provisions, the constitutionality of which was confirmed by the Constitutional Court, and, accordingly, the actual acts of constitutional level. In this situation, the Constitutional Court referred to the obligation of the court of general jurisdiction, which intended to use the «disputed» legal regulation, to request for a review of its constitutionality to the Constitutional Court of the Russian Federation, which can specify possible constitutional methods of implementation of the ECtHR judgments. Thus, the Constitutional Court of the Russian Federation, in fact, reserves the right of «final statement» at the emergence of the conflict between constitutional and international legal regulators. Another approach, on the opinion of the Constitutional Court, call into question the supremacy of the Constitution of the Russian Federation which has the highest legal force in relation to any legal acts in the territory of the Russian Federation.

On the basis of the mentioned judgment of the Constitutional Court and to prevent a situation of uncertainty in the implementation of international obligations under the Convention in the case when an ECtHR judgment diverge with the Russian legal acts of the constitutional value, the law on constitutional

³³ The Judgment of the Constitutional Court of the Russian Federation of December 6, 2013 №27-P «On the constitutional compatibility of the provisions of article 11, paragraphs 3 and 4 of chapter 4 of article 392 of the Code of Civil Procedure in connection with the request of the Presidium of the Leningrad district military court»

proceedings³⁴ was amended. The amendments concern the determination of opportunities and procedures for resolving such issues in constitutional proceedings. . So, according to art. 85 of the Law on the Constitutional Court of the Russian Federation, a request to the Constitutional Court of the Russian Federation in the procedure of constitutional norm control is admissible if the applicant deems the legal acts proposed to verify the constitutionality enforceable notwithstanding to the decision, officially adopted by an inter-State body for the protection of human rights and freedoms, in which violation of human rights and freedoms by the Russian Federation in the course of application of a respective normative act. Art. 101 of the Law on the Constitutional Court of the Russian Federation provides the possibility of request to the Constitutional Court of the Russian Federation by courts reconsidering a case in connection with adoption of a decision by an inter-State body for the protection of human rights and freedoms, in which violation of human rights and freedoms in the course of application of a law or its individual provisions by the Russian Federation is ascertained, if it comes to the conclusion that the question of the possibility of application of the respective law may be resolved only after confirmation of its conformity by the Constitution of the Russian Federation.

The analysis of the experience of the ECtHR seems to be useful for the Russian legal system. Except theoretical value, it allows to analyze the limits of the impact of international treaties, including the Convention on the provisions of the Russian law, including the possible impact on the constitutional provisions and its limits. Considering the fact that in contemporary reality the relationships of the legal orders of various levels cannot be described solely in hierarchical categories, the settlement of this problem requires a comprehensive approach, taking into account the integration of Russia into the European legal space. In particular, it is worth looking at the emerging in the European legal doctrine points of view on the constitutional provisions that constitute the constitutional identity of a state, as well

³⁴ The Federal constitutional law from 04.06.2014 №9-FKZ «On amendments to the Federal constitutional law «On the Constitutional Court of the Russian Federation»

as the essence of fundamental rights, which cannot be changed under any circumstances. Also a matter for the future is a continuation of the discussion on the limits of the impact of international treaties in the field of protection of human rights on other constitutional provision.³⁵

The judgments of the European Court contain references to «general principles» or «the application of general principles in a particular case». If the content of the first part is copied from one judgment to another, sometimes hundreds of times, in the second part there are the grounds upon which the Court concludes that a violation of the Convention had or had not taken place. The Constitutional Court of the Russian Federation applying the judgments of the European Court, as a rule, refers only to the general principles, but does not use the specific motivations of the Strasbourg judges.

The references to the general principles of the European judicial practice are taken into account by the Russian constitutional judges in the interpretation of the Constitution of the Russian Federation. For example, in the case on questioning the legislation which provided the censorship of correspondence of an accused person with his lawyer, the Constitutional Court of the Russian Federation outlined the principles of assessment on the level of compliance with article 8 of the Convention, developed by the European Court in the cases concerning the censorship of correspondence. In particular, the Strasbourg court has declared admissible the inspection of postal correspondence if it contained unauthorized attachments or its contents could threaten the security of a detention facility or even national security³⁶. The Constitutional Court confirmed the constitutionality of the questioned provisions, provided that they should not be applied automatically and that the duty to prove the existence of the circumstances referred to in the European judicial practice, must lie on the administration of a detention facility. But the Constitutional Court practically has no opportunities to control

³⁵ Filatova M.A. Konflikty konstitucionnyh i nadnacional'nyh norm: sposoby preodolenija (na primere Evropejskogo sojuza i pravovyh sistem gosudarstv - chlenov ES)/ *Mezhdunarodnoe pravosudie*, 2013, № 4)

³⁶ Application №13590/88, *Campbell v. the United Kingdom*, Judgment of 25 March 1992, Series A №233; Application №38321/97, *Erdem v. Germany*, Judgment of 5 July 2001, Reports 2001-VII; Application №62936/00, *Moiseyev v. Russia*, Judgment of 9 October 2008.

over compliance by other courts with the interpretation of the Constitution made by it. It implies that the administration of the penitentiary institution will always be able to refer to its suspicions about the threat to the security of the prison or place of detention. Even if it will not be able to prove the existence of this threat by certain items of evidence in a judicial procedure and its decision will be cancelled, at the time of cancellation a letter will be already opened, and its content will be known to the administration.

Similar problems arise in the regulation of investigative activity. It includes, in particular, the wiretapping that requires a court decision, which, obviously, is not announced to the persons whose conversations are electronically surveilled. After detailed references to the principles of the Grand Chamber's decision in the case «Bykov v. Russia»³⁷, which admitted the insufficiency of safeguards the individuals whose phones are being tapped in carrying out investigations, the Constitutional Court confirmed the constitutionality of provisions allowing special services to get authorization to wiretap from a judge of the district court in the court of the other subject of the Russian Federation.³⁸ According to the Constitutional Court, such authorization may be given only in exceptional cases and with the threat of the disclosure of obtained information, and in compliance with the procedural safeguards formulated by the European Court in the case «Bykov v. Russia». The Constitutional Court itself isn't capable to take under control the observance of these requirements.³⁹

8. Other comments.

The analysis of practice of implementation of the ECtHR judgements in the Russian Federation allows to conclude that that Russia has gained a positive national experience to settle issues, which are recognized as having steadily

³⁷ Application №4378/02, Bykov v. Russia [GC], Judgment of 10 March 2009, Reports 2009

³⁸ The Judgment of the Constitutional Court of the Russian Federation of June 9, 2011 № 12-P

³⁹ Koroteev K.N. Mesto Evropejskoj konvencii o zashhite prav cheloveka i osnovnyh svobod v argumentacii reshenij Konstitucionnogo Suda RF: ot perezda v Sankt-Peterburg do dela Konstantina Markina/ Sravnitel'noe konstitucionnoe obozrenie, 2013, № 4.

repeating or systemic character, including through the establishment of effective domestic remedies against the violations. In the legal system of the country every necessary condition is provided for a broad account of the practice of the ECtHR. This is done by the widest possible dissemination of judgments of the ECtHR and by the study of its elaborated legal positions as well as by making necessary amendments to the Russian legislation and law enforcement practice.

For example, timely and proper execution of the pilot judgment (in the case «Burdov v. Russia» (2)) and the establishment in the Russian Federation effective domestic remedies relieve the European Court from the necessity to review thousands of complaints about the non-execution of judicial acts and the extensive length of court procedures. The burden of citizens' protection on this category of cases is transferred to the national level.

According to the ECtHR at the time of the delivery of the «pilot» Judgment there were more than 1,500 complaints on allegedly lengthy non-compliance with court decisions on pecuniary obligations before the Court that were settled by the authorities in the framework of the "pilot" Judgment.

After the adoption of the "pilot" Judgment more than 500 complaints were lodged to the ECHR and the Court, due to the establishment of an effective national remedies, declared these complaints inadmissible. The ECHR has applied the same approach in respect to about 200 complaints on allegedly lengthy judicial proceedings which were lodged against Russia in the same period, because the established remedy was extended to the above-noted legal relations.

The achievement of positive, concrete results, however, does not exclude the problems of further improvement of legislation and law enforcement practice, however, do not eliminate the task of further improvement of legislation and law enforcement practice. Currently the Russian authorities taking into account the findings of the ECHR are elaborating the draft Federal law «On amendments to certain legislative acts of the Russian Federation» in order to expand the scope of the Federal Law on Compensation to the cases of allegedly lengthy non-

compliance with court decisions involving the execution of government obligations in kind.

In addition to legislative amendments other measures for the improvement of law enforcement practice are used. For example, under the Concept of the development of Penal Enforcement System of the Russian Federation until 2020 and the implementation of the «pilot» Judgment in the case «Ananyev and others V. Russia», the Ministry of Justice with the participation of other competent state bodies prepared and is currently realizing the comprehensive Action Plan to settle the problems of inadequate conditions of detention in remand prisons.

The Action Plan is based on comprehensive and long-term strategy and aimed at transferring burden of protection of the Russian citizens in the considered area of the relations to the national level. It provides not only reduction of conditions of keeping in remand prisons in compliance with the international standards, but also ensuring more weighed approach to election and extension of a measure of restraint in the form of detention, broader application of alternative measures of restraint, and also improvement of interstate remedies.

All in all it can be concluded that in the Russian Federation a full-fledged mechanism for the execution of judgments of the ECtHR has formed, which in practice allows to eliminate the revealed defects of legislation and law enforcement practice. Analysis of the functioning of this mechanism shows that it continues to develop as the opportunities for its improvement are not exhausted.

RENFORCEMENT DES MECANISMES NATIONAUX DE MISE EN ŒUVRE DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME : EVALUATION DE L'EXPERIENCE NATIONALE SUISSE

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Considérations préliminaires

Le droit international est appliqué en Suisse selon le système moniste. Cela signifie que les garanties de la Convention européenne des droits de l'homme (CEDH)¹ sont applicables dans l'ordre juridique suisse au même titre que le droit national et qu'elles engagent l'ensemble des organes de l'Etat, c'est-à-dire le parlement, le gouvernement, l'administration et le pouvoir judiciaire, à tous les échelons de la Confédération et des cantons.² Contrairement à ce qui se passe dans un système dualiste, il n'est donc pas nécessaire de transposer une norme internationale dans le droit suisse par un acte supplémentaire, par exemple une loi spéciale. Une norme internationale qui lie la Suisse est valable d'elle-même en droit interne.³ En cas de conflit avec une norme du droit interne suisse, elle a en règle générale la primauté sur cette dernière.⁴ En outre, les droits découlant de la CEDH sont aujourd'hui, sans exception, directement applicables (*self-executing*), c'est-à-dire justiciables en Suisse.⁵

Le Tribunal fédéral, instance judiciaire suprême de la Confédération, a joué un rôle déterminant lors de la réception de la CEDH dans l'ordre juridique suisse. Peu après l'entrée en vigueur de la Convention, il a reconnu dans son arrêt *Diskont- und Handelsbank*⁶ que les garanties de la Convention ont un caractère constitutionnel et a donc placé celles-ci, d'un point de vue procédural, sur un pied d'égalité avec les droits constitutionnels⁷. Par ailleurs, le Tribunal fédéral n'admet pas que des lois fédérales

¹ Recueil systématique du droit fédéral suisse, ch. 0.101 (RS 0.101).

² 40 ans d'adhésion de la Suisse à la CEDH: Bilan et perspectives, Rapport du Conseil fédéral du 19.11.2014, Feuille fédérale suisse n° 1 du 13.01.2015, p. 353 ss. (FF2015.01.00353). Voir également art. 5, al. 4 de la Constitution fédérale suisse (Cst.), art. 189, al.1, lit. b Cst. et art. 190 Cst., in RS 101. Cf. aussi La relation entre droit international et droit interne, Rapport du Conseil fédéral du 05.03.2010, FF2010.13.02105. Voir enfin in RS 101 l'art. 35 Cst., aux termes duquel « les droits fondamentaux doivent être réalisés dans l'ensemble de l'ordre juridique » (al. 1) et « quiconque assume une tâche de l'Etat est tenu de respecter les droits fondamentaux et de contribuer à leur réalisation » (al. 2).

³ La relation entre droit international et droit interne, op. cit., FF2010.13.02067.

⁴ Cela découle notamment de la jurisprudence du Tribunal fédéral, qui reconnaît néanmoins des exceptions. Cf. La relation entre droit international et droit interne, op. cit., FF2010.13.2106-7. Cf. également Chiffres 5 et 6 (d) infra.

⁵ 40 ans d'adhésion de la Suisse, op. cit., FF2015.1.00380.

⁶ Arrêt du 19 mars 1975, in Recueil officiel des arrêts du Tribunal fédéral suisse, n° 101 (1975), Vol. II p. 67 (ATF 101 Ia 67), consid. 2c. Cf. également Heinz AEMISEGGER, Zur Umsetzung der EMRK in der Schweiz, in Jusletter 20. Juli 2009, p. 3, www.jusletter.ch.

⁷ Pour les autorités cantonales, cela signifie que lorsqu'une violation d'un droit constitutionnel par un acte législatif ou par une décision est alléguée, une violation de la CEDH peut toujours également (ou exclusivement) être invoquée. Cf. 40 ans d'adhésion de la Suisse, op. cit., FF2015.1.00380.

puissent avoir la primauté sur des règles de droit international antérieur, lorsqu'il s'agit d'obligations internationales en matière de droits de l'homme (jurisprudence dite *PKK*)⁸. En d'autres termes, les garanties de la CEDH priment en règle générale sur les règles internes suisses⁹.

1. Procédure d'adoption de mesures de caractère général en Suisse en exécution d'un arrêt de la Cour européenne des droits de l'homme (CrEDH)

Il n'existe pas en Suisse de procédure particulière, formalisée dans une loi ou dans un autre texte, pour l'adoption de mesures générales tendant à la mise en œuvre d'un arrêt de la CrEDH. L'approche suivie en Suisse est essentiellement pragmatique. Cela vaut aussi bien pour les mesures générales visant une modification législative que pour celles qui consistent en une modification de la pratique administrative ou de la jurisprudence sur la base d'une loi qui reste inchangée. Dans ce dernier cas, les tribunaux – notamment le Tribunal fédéral – jouent un rôle central.

Le processus est déclenché lorsque l'agent du gouvernement suisse auprès de la Cour envoie copie de l'arrêt aux autorités concernées, que ce soit au niveau de la Confédération et/ou d'un canton, en indiquant les raisons principales de la violation constatée par la Cour.

Il peut arriver qu'une réforme législative ait déjà été initiée lorsque la Cour rend son arrêt¹⁰. Il va sans dire que dans ce cas, l'arrêt de la CrEDH sera dûment pris en compte dans le processus de réforme¹¹.

2. Rôle des autorités exécutives et législatives

Aucune autorité particulière en Suisse n'est chargée d'initier ou de coordonner le processus d'adoption de mesures générales suite à un arrêt de la CrEDH. Sur le plan international, c'est évidemment le Conseil fédéral (gouvernement fédéral de la Confédération) qui est l'interlocuteur de la CrEDH dans la mesure où c'est lui, par l'intermédiaire de son agent, qui défend la position de la Suisse devant la Cour et qui reçoit notification de ses arrêts, même si la violation trouve sa source dans le droit cantonal et non dans le droit fédéral. Pour le surplus, conformément à la structure fédérale de la Suisse, ce sont les cantons qui sont responsables en premier lieu de

⁸ ATF 125 II 417. Cf. également : 40 ans d'adhésion de la Suisse, op. cit., FF2015.1.00380. Voir en outre : La relation entre droit international et droit interne, op. cit., FF2010.13.2113 et AEMISEGGER, op. cit., p. 4.

⁹ Cf. également Michel HOTTELIER, La Convention européenne des droits de l'homme et la Suisse : quarante ans d'enrichissement au service de la dignité humaine, in Revue trimestrielle des droits de l'homme, N° 103, juillet 2015, p. 563 et 575-6 + n. 102.

¹⁰ Cf. arrêts *Wettstein c. Suisse* du 21.12.2000, *Gsell c. Suisse* du 08.10.2009 et *Howald Moor et autres c. Suisse* du 11.03.2014 (cf. n. 11 infra).

¹¹ On citera comme exemple actuel la modification en cours des règles sur la prescription dans le Code suisse des obligations, réforme qui avait déjà été initiée lorsque l'arrêt *Howald Moor et autres c. Suisse* du 11.03.2014 (décès suite à une exposition à l'amiante ; droit d'accès à un tribunal) a été rendu, mais qui sera influencée par cet arrêt.

l'application du droit fédéral et du droit international aussi bien que du droit cantonal. Dans cette mesure, les possibilités pour le Conseil fédéral d'influer sur une modification de la législation et de la pratique cantonales sont limitées. La Constitution fédérale donne certes à son article 49, alinéa 2 la compétence à la Confédération de surveiller la mise en oeuvre du droit fédéral par les cantons, ce qui au sens de cette disposition inclut le droit international¹². Mais les possibilités d'intervention fondées sur cette compétence, restreintes en soi, n'ont encore jamais trouvé d'application dans ce contexte¹³. Le Conseil fédéral se limite à transmettre l'arrêt au gouvernement cantonal concerné, le plus souvent sans l'assortir de directives ou de recommandations¹⁴.

S'agissant en particulier de la compétence d'initiative, c'est au gouvernement (fédéral ou cantonal) concerné qu'il appartient généralement de lancer le processus d'amendement de la loi incriminée par l'arrêt¹⁵. Comme indiqué sous Chiffre 1 ci-dessus, il peut arriver que la modification requise soit combinée avec une réforme d'ores et déjà en cours de la loi en question¹⁶, ce qui peut signifier que le processus de modification de la loi prendra davantage de temps jusqu'à son entrée en vigueur. L'initiative peut également venir du parlement (fédéral ou cantonal) sur la base d'une intervention parlementaire se référant expressément à l'arrêt de la Cour.

L'Unité de l'Agent du Gouvernement suisse auprès de la CrEDH est à la disposition de l'administration gouvernementale ou parlementaire qui prépare le projet d'amendement législatif. Cela est vrai tout particulièrement au niveau fédéral¹⁷.

3. Identification des mesures requises par les arrêts de la CrEDH

Il incombe aux autorités fédérales ou cantonales compétentes d'identifier les mesures requises, notamment s'agissant de modifications législatives. Souvent, l'arrêt lui-même donne suffisamment d'indications sur les mesures à prendre pour assurer son exécution, par exemple si la violation réside dans l'absence d'une base légale

¹² RS 101. Cf. Giovanni BIAGGINI, *Kommentar zur Bundesverfassung*, Zurich, Orell Füssli Verlag, 2007, N 23 ad art. 49 Cst. Cf. également *Considérations préliminaires*, supra, p. 1.

¹³ Cf. Frank SCHÜRMAN, *Die Kantone und die Umsetzung der Urteile der EGMR : Die Sicht des Bundes*, in Samantha Besson / Eva Maria Belser (éd.), *La Convention européenne des droits de l'homme et les cantons*, Journée BENEFRU de droit européen de l'Institut de droit européen, Fribourg, 2014, p. 161 ss.

¹⁴ Cette notification se faisait autrefois également aux autres gouvernements cantonaux. Depuis 2008, l'Office fédéral de la justice publie ces arrêts dans ses rapports trimestriels sur les « Arrêts et décisions choisis de la Cour européenne des droits de l'homme » (notamment <https://www.bj.admin.ch/dam/data/bj/staat/menschenrechte/egmr/ber-egmr-2013q3-f.pdf>). Il en va de même pour la publication des arrêts dans le recueil de la « Jurisprudence des autorités administratives de la Confédération » (JAAC, cf. http://www.vpb.admin.ch/homepage_fr.html). Ces rapports, qui contiennent également des références aux arrêts et décisions de la CrEDH concernant d'autres Etats, sont transmis aux Tribunaux fédéraux (Tribunal fédéral, Tribunal pénal fédéral, Tribunal administratif fédéral, etc.), à plusieurs Offices de l'administration fédérale, aux Directions cantonales de la justice ainsi qu'aux Tribunaux supérieurs des cantons.

¹⁵ Cf. notamment le droit d'initiative du Conseil fédéral défini à l'art. 181 Cst. : « Le Conseil fédéral soumet à l'Assemblée fédérale des projets relatifs aux actes de celle-ci. » (RS 101).

¹⁶ Cf. n. 10 et 11 supra. Voir également Chiffre 3 infra sur l'effet des résolutions intérimaires du Comité des Ministres.

¹⁷ Cf. notamment l'affaire *Glor c. Suisse* du 30.04.2009 (non-admission au service militaire et devoir de payer la taxe d'exemption de l'obligation de servir), où l'agent du gouvernement suisse a participé au groupe de travail qui a procédé à l'élaboration de l'amendement législatif.

suffisante en droit suisse (telle qu'elle est prévue par exemple à l'art. 8 CEDH). Dans un tel cas, il apparaît clairement que la loi doit être modifiée afin de créer la base légale requise¹⁸. Dans le cas de la Suisse, relativement peu d'affaires – une dizaine – ont donné lieu à l'adoption d'une modification de la législation interne, fédérale ou cantonale¹⁹.

Du point de vue du processus d'exécution de l'arrêt, le fait que la décision de la Cour consiste en un arrêt ordinaire limité à un cas individuel, en un arrêt pilote ou encore en un arrêt semi-pilote ne fait aucune différence dans le système suisse. On notera toutefois qu'à ce jour, la Suisse n'a pas encore été confrontée à un arrêt pilote ou semi-pilote.

Le fait pour la Cour de donner dans son arrêt une indication spécifique de la mesure générale dont l'adoption est requise pourrait effectivement s'avérer utile en ce sens qu'elle permettrait le cas échéant d'éviter des discussions au Comité des Ministres sur la question de savoir si des mesures de caractère général sont nécessaires ou non – et, dans l'affirmative, lesquelles. Certes, une telle façon de procéder pourrait être perçue selon le cas comme un empiètement de la Cour sur la marge d'appréciation de l'Etat. La CrEDH parle d'ailleurs à ce sujet d'une « obligation de résultat, non pas de moyens »²⁰. Mais la Cour a déjà donné un début d'application à cette proposition, puisqu'elle indique dans ses arrêts pilotes les mesures qui doivent être adoptées par l'Etat concerné. Cette pratique pourrait être étendue aux arrêts importants dont on peut supposer qu'ils donneront lieu à discussion, au Comité des Ministres, sur le point de savoir quelles mesures de caractère général doivent être prises. Cela dit, l'expérience faite en Suisse tend à montrer que les considérants de l'arrêt permettent en général de déterminer assez clairement si des mesures de caractère général s'imposent ou non²¹. La question n'a donc pas donné lieu en Suisse à une réflexion de principe. L'approche consiste à définir de cas en cas les mesures à prendre en fonction de la violation constatée par la Cour, des considérants y relatifs et de la réglementation ou de la pratique fédérale et/ou cantonale applicable.

S'agissant des résolutions intérimaires du Comité des Ministres, elles n'ont pas de statut particulier dans l'ordre juridique suisse. Quoi qu'il en soit, les autorités suisses ont pour pratique d'en assurer le respect, dans le sens de leur mise en œuvre selon une

¹⁸ Cf. l'arrêt *Kopp c. Suisse* du 25.03.1998 (respect de la vie privée ; écoutes téléphoniques ; absence de base légale).

¹⁹ Au niveau fédéral, on mentionnera les arrêts *F.* du 18.12.1987 (interdiction de remariage : modification du Code civil) ; *Burghartz* du 22.02.1994 (nom des époux : modification du Code civil) ; *P. et L.* (responsabilité pénale des héritiers pour soustraction d'impôts du défunt : modification de la loi sur l'impôt fédéral direct) ; *J.B.* du 03.05.2001 (obligation de collaborer dans une procédure pour soustraction d'impôt : modification de la loi sur l'impôt fédéral direct) et *Glor* du 30.04.2009 (taxe d'exemption du service militaire : modification de la loi en question). Au niveau cantonal, il faut citer les affaires *Plumey* du 09.09.1996 (examen de la détention par le procureur : modification de l'ancien Code de procédure pénale du canton de Bâle-Ville) ; *Belilos* du 29.04.1988 (procédure en matière de contravention, absence d'examen judiciaire : modification de la loi vaudoise sur les sentences municipales et, par ricochet, de plusieurs lois cantonales similaires) ; *Weber* du 22.05.1990 (publicité de la procédure : modification de l'ancien Code de procédure pénale du canton de Vaud) ; *Wettstein* du 21.12.2000 (incompatibilités de fonctions : modification de la loi cantonale zurichoise sur la justice administrative) et *Gsell* du 08.10.2009 (atteinte à la liberté d'expression ; absence de base juridique : modification de l'ordonnance cantonale grisonne sur la police, puis de la loi sur la police du canton des Grisons).

²⁰ Cf. l'arrêt *Belilos c. Suisse* du 29.04.1988. Voir également SCHÜRMAN, op. cit., n. 14.

²¹ Cf. n. 19 supra.

approche, ici encore, pragmatique. C'est ainsi que l'exécution de l'arrêt *F.* déjà cité ayant entraîné une modification du Code civil suisse qui a pris plusieurs années, la ministre suisse de la justice s'est adressée aux gouvernements et aux tribunaux de l'ensemble des cantons pour appeler leur attention sur le fait que si la disposition incriminée du Code civil devait être appliquée dans l'intervalle entre l'adoption de l'arrêt et l'adoption de la législation révisée, la Suisse risquait une nouvelle condamnation à Strasbourg. Les autorités cantonales semblent en avoir dûment tenu compte dans la mesure où le Tribunal fédéral n'a plus été saisi d'un recours à ce sujet.

A propos, plus généralement, de la surveillance par le Comité des Ministres de l'exécution des arrêts de la Cour, on relèvera qu'au-delà des affaires qui appelaient une modification de la législation ou de la pratique fédérale ou cantonale, le Comité des Ministres s'est borné à constater dans la majorité de ses résolutions clôturant la procédure de surveillance à l'égard de la Suisse a) que l'arrêt de la Cour avait été transmis aux autorités internes concernées, b) qu'il avait été publié et c) que les autorités suisses avaient déclaré que les arrêts de la CrEDH lient la Confédération et les cantons et sont en Suisse directement applicables.

4. Application de la procédure d'adoption de mesures de caractère général aux décisions d'autres instances judiciaires ou quasi-judiciaires internationales

La même procédure – c'est-à-dire une procédure définie de cas en cas selon une approche pragmatique telle qu'exposée ci-dessus – est appliquée en Suisse pour l'exécution des décisions d'autres instances judiciaires ou quasi-judiciaires internationales.

Pour ce qui est en particulier des instances qui peuvent être saisies de requêtes individuelles, il s'agit essentiellement en l'espèce des décisions prises par le Comité de l'ONU contre la torture (CAT) suite aux communications qui lui sont adressées à l'encontre de la Suisse, soit environ 150 communications à ce jour. Tous les cas ont trait au principe du non-refoulement. Les autorités fédérale (le Secrétariat d'Etat aux migrations) et cantonales (les différents offices cantonaux des étrangers) assurent le respect et la mise en œuvre des décisions des instances onusiennes compétentes (mesures intérimaires et décisions finales). A noter que dès la première décision du CAT concernant la Suisse, dans l'affaire Mutombo en 1993, le ministre suisse de la justice a pris la décision de principe que les décisions du CAT seraient respectées au même titre que les arrêts de la CrEDH, quand bien même leur portée juridique est différente.

5. Réaction des tribunaux de première instance

Comme on l'a vu, les arrêts de la CrEDH sont directement applicables en Suisse et les juridictions de tous les niveaux sont en principe dans l'obligation de les respecter

(principe de l'effet utile). Elles sont également tenues d'appliquer le principe dit de l'interprétation conforme, selon lequel toute réglementation interne doit être élaborée et interprétée en conformité avec le droit international, en l'occurrence avec les arrêts de la CrEDH²². Cela ne pose pas de difficulté particulière lorsque la disposition en question laisse une marge d'interprétation au juge. En revanche, la situation est plus complexe lorsque la disposition incriminée par un arrêt de la Cour ne peut pas être interprétée selon ce principe, c'est-à-dire d'une manière conforme audit arrêt. C'est surtout au niveau du droit fédéral que le cas pourrait se présenter, tout particulièrement si l'arrêt de la Cour s'avère être en conflit avec la Constitution fédérale²³, un cas de figure qui ne s'est encore jamais présenté. S'agissant d'un conflit entre un arrêt de la Cour et une loi fédérale, on a observé dans les Considérations préliminaires que selon une jurisprudence aujourd'hui bien établie, le Tribunal fédéral n'admet pas que des lois fédérales puissent avoir la primauté sur des règles de droit international antérieur lorsqu'il s'agit d'obligations internationales en matière de droits de l'homme²⁴.

Les tribunaux de première instance n'ont pas la possibilité en droit suisse de référer au Tribunal fédéral la question de la compatibilité d'une norme interne suisse avec la CEDH. En revanche, si l'autorité compétente d'un canton refuse ou omet de prendre une mesure de caractère général (par exemple une modification de la législation cantonale) suite à un arrêt de la Cour, tout justiciable lésé peut, dans un cas d'espèce, recourir au Tribunal fédéral contre une telle omission pour violation du droit international et d'une norme constitutionnelle, dès lors que, comme on l'a vu dans les Considérations préliminaires, le Tribunal fédéral a reconnu un caractère constitutionnel aux garanties de la CEDH²⁵.

6. Rôle de la Cour suprême et de la Cour constitutionnelle

Le rôle du Tribunal fédéral est ici très important, à divers égards:

- (a) Le Tribunal fédéral applique la jurisprudence de la CrEDH non seulement dans les affaires dirigées contre la Suisse, mais en général, c'est-à-dire aussi dans les affaires qui sont dirigées contre d'autres Etats et ont une incidence indirecte sur le droit suisse. Un exemple connu est celui de l'arrêt *De Cubber c. Belgique* du 26 octobre 1984, à la lumière duquel le Tribunal fédéral a jugé qu'il est contraire à l'article 6 CEDH que, dans une procédure criminelle, une seule et même personne assume tout d'abord la fonction de juge d'instruction, puis celle de juge du fond²⁶. En conséquence

²² Cf. Chiffre 1 supra et Chiffre 6 infra, y compris n. 28.

²³ Compte tenu notamment de l'art. 192 Cst., qui fixe les règles applicables en cas de révision de la Constitution (RS 101).

²⁴ Voir notamment l'arrêt *PKK* in ATF 125 II 417. Cf. Considérations préliminaires supra, n. 6. On observera qu'en vertu de l'art. 190 Cst., « le Tribunal fédéral et les autres autorités sont tenus d'appliquer les lois fédérales et le droit international » (RS 101). Sur le pouvoir du Tribunal fédéral d'examiner la conformité des lois fédérales avec la Constitution et avec le droit international (à ne pas confondre avec le pouvoir de juger ces questions), cf. Chiffre 6 (d) infra.

²⁵ Art. 189, al. 1, lit. a et b Cst. (RS 101).

²⁶ Cf. ATF Ia 294.

de cette décision du Tribunal fédéral, plusieurs cantons ont été amenés à amender leur Code de procédure pénale²⁷.

- (b) Dès lors que le Tribunal fédéral, suivant la jurisprudence de la CrEDH (concernant également d'autres Etats), adopte l'interprétation établie par celle-ci, il va de soi que le traitement réservé par la plus haute juridiction à la jurisprudence de la CrEDH détermine également la façon dont les instances inférieures l'appliquent à leur tour.

- (c) Comme on l'a déjà relevé, le Tribunal fédéral a pour pratique constante de chercher avant tout à interpréter les dispositions du droit suisse de manière conforme à la CEDH et à la jurisprudence de la CrEDH, selon le principe dit de l'interprétation conforme²⁸. Les exemples de cette pratique sont très nombreux²⁹.

- (d) Il arrive également, quoique rarement, que le Tribunal fédéral doive constater qu'il n'est pas possible d'interpréter une règle de droit fédéral d'une manière conforme à la CEDH, dans la mesure où cette règle ne laisse aucune marge d'interprétation. A moins que dans un tel cas, le Tribunal fédéral ne fasse prévaloir la norme CEDH, c'est-à-dire l'arrêt de la Cour³⁰, il arrive qu'il doive appliquer la règle interne en vertu des dispositions constitutionnelles³¹, tout en constatant que dite règle interne pose problème par rapport à la CEDH. Un jugement de ce type, de la part du Tribunal fédéral, peut être compris comme un appel implicite au législateur, invitant ce dernier à se saisir de la question.

- (e) Comme on le sait, un arrêt de la CrEDH a un effet déclaratoire et non pas cassatoire. Lorsque la CrEDH constate qu'un arrêt du Tribunal fédéral n'est pas conforme à la CEDH, ce dernier arrêt ne s'en trouve donc pas invalidé pour autant. C'est pourquoi la loi fédérale sur le Tribunal fédéral prévoit à son article 122 que la révision d'un arrêt du Tribunal fédéral pour violation de la CEDH peut être demandée aux conditions suivantes: a) la CrEDH a constaté, dans un arrêt définitif, une violation de la CEDH ou de ses protocoles; b) une indemnité n'est pas de nature à remédier aux effets de la violation et c) la révision est nécessaire pour remédier aux effets de la violation. L'admission d'une demande de révision sortit un effet *ex tunc* et non *ex*

²⁷ Berne, Valais, Fribourg et Grisons.

²⁸ A noter que « l'obligation d'interpréter le droit interne de manière conforme au droit international peut être déduite de l'art. 5, al. 3 et 4, de la Constitution (RS 101). Il s'agit du pendant, en droit interne, des obligations internationales consacrées aux art. 26 et 27 de la Convention de Vienne sur le droit des traités selon lesquelles tout traité doit être exécuté de bonne foi nonobstant le droit interne. Concrètement, cela veut dire que les autorités compétentes doivent, dès le processus législatif, veiller à dépister les incompatibilités potentielles du droit national avec le droit international et formuler les dispositions internes de mise en œuvre de manière à éviter, dans toute la mesure du possible, des complications supplémentaires au niveau international » (cf. La relation entre droit international et droit interne, op. cit., FF 2010.13.2108). Le champ d'application personnel de l'obligation de faire une interprétation conforme au droit international s'étend non seulement au législateur fédéral, cantonal et communal, mais à toutes les autorités étatiques qui doivent, dans les limites de leurs compétences respectives, veiller à éviter que la Confédération n'engage sa responsabilité internationale en raison de la violation de ses engagements internationaux. Sous l'angle des conséquences pratiques, le respect des obligations internationales de la Suisse implique la mise en œuvre, sur le plan interne, des moyens propres à donner à ces engagements un effet optimal, tous les organes de l'Etat pouvant et devant concourir utilement à la réalisation des objectifs fixés dans ces traités (idem, FF 2010.13. 2108-9).

²⁹ Voir en particulier l'arrêt *F.* du 18.12.1987, en lien avec l'art. 150 du Code civil (cf. supra n. 19).

³⁰ Cf. Chiffre 5 supra.

³¹ Cf. art. 190 Cst. (n. 24 supra).

*nunc*³². Dans l'esprit du législateur suisse, cette disposition est la suite logique de l'obligation faite aux Etats parties à la CEDH, à l'article 46, paragraphe 1 CEDH, de se conformer aux arrêts de la CrEDH. Cela signifie que malgré l'existence éventuelle d'une norme de droit fédéral contraire, la norme CEDH doit être appliquée. La primauté de principe des garanties de la CEDH en Suisse s'en trouve ainsi confirmée³³.

7. Amendements constitutionnels requis par un arrêt de la Cour EDH

A ce jour, aucun arrêt de la CrEDH n'a rendu nécessaire un amendement de la Constitution fédérale. Le principe de l'interprétation conforme a trouvé application jusqu'ici. On rappellera par ailleurs que selon la jurisprudence du Tribunal fédéral, les garanties de la CEDH ont un caractère constitutionnel et sont placées, d'un point de vue procédural, sur un pied d'égalité avec les droits constitutionnels³⁴.

D'un point de vue général, il est clair pour les autorités suisses que deux principes sont applicables dans un tel cas de conflit : (1) Sur le plan du droit international public : si la CrEDH constate qu'une disposition constitutionnelle d'un Etat partie à la CEDH n'est pas compatible avec cette dernière, la responsabilité internationale dudit Etat est engagée au titre de la CEDH en vertu du principe *pacta sunt servanda*. L'Etat en question doit donc amender son droit interne pour le mettre en accord avec la convention. Il ne saurait, en vue de se soustraire à une telle obligation internationale dans une procédure d'exécution relevant du droit international comme la procédure devant le Comité des Ministres, invoquer le fait que selon son droit interne, une norme constitutionnelle aurait par hypothèse un rang supérieur à celui d'une norme du droit international³⁵. (2) Sur le plan du droit constitutionnel interne: dans le cas de la Suisse, la Constitution fédérale ne peut être amendée que dans le respect de la procédure constitutionnelle prévue à cet effet. C'est ainsi qu'une modification de la Constitution fédérale ne peut valablement entrer en vigueur que si elle est acceptée par la majorité du peuple et des cantons³⁶ ; en l'absence de cette double majorité, la question doit être réexaminée jusqu'à ce qu'une solution soit trouvée qui permette à la Suisse de se mettre en conformité avec la Convention.

Conclusion

On peut dire en conclusion que jusqu'ici, l'exécution des arrêts de la CrEDH n'a pas posé en Suisse de problèmes particuliers. Cela vaut sur le plan cantonal aussi bien que fédéral. Relativement peu d'affaires ont appelé des modifications législatives. Aucune

³² Cf. HOTTELIER, op. cit., p. 571-2 : « Le Tribunal fédéral et les parties sont par conséquent replacés dans la situation où ils se trouvaient au moment où l'arrêt annulé a été rendu. La cause est alors tranchée comme si cet arrêt n'avait pas existé. »

³³ Cf. AEMISEGGER, op.cit., p. 4 ss.

³⁴ Cf. Considérations préliminaires supra, notamment l'arrêt *Diskont- und Handelsbank* du 19 mars 1975, ATF 101 Ia 67, consid. 2c.

³⁵ Cf. La relation entre droit international et droit interne, op. cit., FF2010.13.02091.

³⁶ Cf. art. 192 ss. Cst. (RS 101).

affaire répétitive n'est à relever. Un examen de la pratique du Comité des Ministres vis-à-vis de la Suisse montre que dans une majorité de cas, les obligations de la Suisse au titre de l'article 46, paragraphe 1 CEDH ont été considérées par le Comité comme remplies, sans modification de loi ou de pratique, par le seul fait que les autorités concernées avaient été informées de l'arrêt de la Cour, que celui-ci avait été publié et que la Suisse avait déclaré que les arrêts de la CrEDH sont directement applicables en Suisse et qu'ils lient les autorités chargées d'appliquer le droit.

Pour ces raisons, la Suisse n'a pas ressenti le besoin de mettre sur pied une procédure formelle pour l'exécution des arrêts de la CrEDH. Elle s'en tient à cet égard à une approche pragmatique, laquelle s'est avérée être généralement dans l'intérêt de toutes les parties concernées.

**The International Conference
Enhancing National Mechanisms for Effective Implementation of the European
Convention on Human Rights
22-23 October 2015
Saint-Petersburg**

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Responses to Questionnaire: Turkey
15 September 2015

1. What is the procedure for the adoption of general measures following the ECtHR judgments in your country? Is there any such procedure established by law or another text (e.g. Government's regulations, internal ministerial instructions, etc.)? What triggers the process of adoption of general measures once the judgment becomes final?

In Turkey, there is no 'one-stop shop' procedure for the adoption of general measures. They are not established by law, rather, the Human Rights Department (which is located within the Ministry of Justice's International Law and the Foreign Affairs General Directorate) is in charge of *coordinating* their adoption. All other state institutions have implied duties towards the adoption of general measures for ECtHR violation judgments. In addition, in 2014, the Council of Ministers adopted a document entitled: "An Action Plan Concerning the Prevention of Human Rights Violations". This document identifies relevant government agencies for the adoption of general measures and lays out a general time frame for their implementation.¹

The Human Rights Department of the Ministry of Justice International Law and Foreign Affairs General Directorate² was established on 26 August 2011 by way of an amendment to the Governmental Decree No. 650 concerning the organisation and mandate of the Ministry of Justice.³

¹ Action Plan Concerning the Prevention of Human Rights Violations, Decision of the Council of Ministers of 24 February 2014, published in the Official Gazette on 1 March 2014. Full text of the action plan is available on the website of the Ministry of Justice at: <http://www.inhak.adalet.gov.tr/eylemplan.pdf>

² For limited information in English, see, <http://www.inhak.adalet.gov.tr/gorev/gorev.html>>

³ KHK/650 Adalet Bakanlığının Teşkilat ve Görevleri Hakkında Kanun Hükmünde Kararnamenin Değiştirilerek Kabulü Hakkında Kanun ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun Hükmünde Kararname. Resmi Gazete'de yayımlanma tarihi: 26 Ağustos 2011. <<http://www.resmigazete.gov.tr/eskiler/2011/08/20110826-1.htm>>

Amongst its responsibilities, decree No. 650 states that the department will carry out:

- Studies concerning the elimination of human rights violations;
- Any necessary measures for the execution of the judgments of the European Court of Human Rights;
- The communication of human rights violation judgments to the relevant authorities and;
- Follow up on the processes of elimination of the consequences of human rights violations.

In addition to these the department is also in charge of:

- The translation of human rights violations judgments against Turkey, and, where necessary, other CoE member states;
- The organisation and archive of human rights violation judgments;
- Follow up on scientific studies concerning the European Convention on Human Rights and its implementation;
- Acting as a conduit between researchers and implementors;
- Carrying out statistical analysis concerning implementation.

The duty to follow up on general measures was assigned to the Human Rights Department of the Ministry of Justice on 14th November 2011, and came into effect on 1 March 2012 by way of a protocol signed between the Ministry of Foreign Affairs and the Ministry of Justice. The same protocol entrusted the follow up of general measures concerning the implementation of inter-state cases to the Ministry of Foreign Affairs.⁴ In the Turkish context, this currently covers general measures concerning the inter-state case of *Cyprus v. Turkey*.

On 1 March 2014, the Council of Ministers of Government adopted an action plan concerning the general measures that need to be in place for a significant number of Strasbourg judgments.⁵ This action plan sets out: a) continuous; b) short-term (0-1 years); c) medium-term (1-3 years) and d) long-term (3-5 years) action points that need to be taken up by various executive institutions and independent state agencies. The follow up of this action plan concerning general measures is entrusted to the Human Rights Department of the Ministry of Justice. This department should receive reports from various agencies every six months and should report to the Prime Minister's Office annually on the progress of its action plan. The first annual report to the Prime Minister's

⁴ <<http://www.mfa.gov.tr/sayin-bakanimizin-adalet-bakani-sadullah-ergin-ile-gerceklestirdikleri-ortak-basin-toplantisi.tr.mfa>>.

⁵ For the full text in Turkish, see, <http://www.inhak.adalet.gov.tr/eylemlan.pdf>

Office, which was due on 1 March 2015, is not, as of writing, available on the website of the Ministry of Justice.

Current Framework in Practice

The procedure for the adoption of general measures is co-ordinated by the Ministry of Justice Human Rights Department. This framework has been in place since 2011 and has been operational since 2012. The action plan on general measures has been in force since March 2014. The duty to follow up on the action plan on general measures is explicitly present in the mandate of the Human Rights Department of the Ministry of Justice.

Interviews with members of the Human Rights Department indicate that the department currently conceives its role primarily as being a ‘mail box’. When a violation judgment is final, the Department writes letters to relevant ministries or government agencies asking them information with regard to general measures taken or planned. Such letters are not in the public domain.

There is no clear provision with regard to procedures concerning delays in taking general measures by relevant authorities or relevant authorities taking inadequate general measures. The department does not view itself as having the duty of general oversight over general measures. When the department receives responses from relevant institutions, it passes them on to the Committee of Ministers.

Interviews have also shown that there is no dedicated staff solely specialized on the execution of general measures. Members of the department, who defend Turkey before the European Court of Human Rights as government agents, are also tasked with the execution of related work. The department has a small number of staff and admits to having a backlog with regard to communicating with relevant authorities on execution of individual judgments.

2. What are the respective roles of the executive and the legislator and how they interact in this process? Is there a particular body vested with the competence to initiate and coordinate the process of adoption of general measures?

The core institution that is vested with the competence to initiate the process of adoption of general measures is the Human Rights Department of the Ministry of Justice (with the Ministry of Foreign Affairs enjoying competence with regard to general measures concerning inter-state cases). This department initiates the process by corresponding with the relevant authorities. All relevant state authorities, however, are free to initiate general measures without being prompted by the Ministry of Justice.

There is no direct link between the Turkish Parliament and the Human Rights Department of the Ministry of Justice. The Human Rights Department corresponds with the Legislation Department within the Ministry of Justice if it deems that new legislation or a legislative change is necessary.

The legislator does not have a specialized committee or a sub-committee that deals explicitly with the execution of general measures in ECtHR judgments. There is an advisory Human Rights Investigation Commission within the parliament.⁶ The statute of the commission assigns it the task to carry out studies for ensuring the compatibility of domestic law with the Turkish Constitution and Turkey's international human rights law obligations. In 2011, the mandate of the commission was expanded to include offering advisory opinions on draft legislation.⁷ Even though there is no specific reference to ECtHR judgments or general measures, the broad remit of the commission can easily cover carrying out work on general measures - including establishing a link with the Human Rights Department at the Ministry of Justice.

In practice, however, there have not been any examples of the Parliamentary Human Rights Commission carrying out work on general measures or carrying out compatibility analysis of draft law in the light of the case-law of the European Court of Human Rights. Interviews carried out with experts of the Commission indicate that after the November 2015 elections, the Commission may be in a position to be more willing to take an active role in relation to its mandate.

3. How the measures required by the judgments are identified in your legal system? Would the process be different depending on the type of the ECtHR judgment to be enforced (e.g. a judgment limited to individual circumstances or revealing an underlying systemic problem, a semi-pilot or a pilot judgment)? How are the measures identified when a judgment does not specify any? Would a specific indication by the Court about general measures be helpful for the definition of such measures? What is the legal status and practical effect of the interim resolutions of the Committee of Ministers calling for specific general measures to be adopted?

Since 2011, the body vested with the power to identify general measures is the Human Rights Department of the Ministry of Justice staffed with government agents. The decree does not differentiate between declaratory judgments, Article 46 judgments or pilot judgments. Thus, in all instances, the task to co-ordinate with relevant agencies as to adequate general measures rests with this department.

This department is responsible for devising action plans.⁸ It devises these after it receives information from the authorities relevant to the general measures at stake. Devising action plans is a recent practice in Turkey. Action plans are not very specific and do not

⁶ Law No 3686 of 5.12.1990 concerning the establishment of the Commission for the Investigation of Human Rights.

⁷ Amendment dated 1/12/2011-6253.

⁸ For a full list of action plans submitted thus far, see, http://www.coe.int/t/dghl/monitoring/execution/Themes/Add_info/TUR-ai_en.asp

indicate timelines and the parameters of purported changes to legislation or practice.⁹ There are still cases where the general measure has not been identified and has not been implemented by the Ministry of Justice authorities. It is understood that the secretariat for the Execution of the Judgments of the European Court of Human Rights interacts with the Human Rights Department with regard to the adequacy of action plans for some cases under enhanced supervision.

There is no active mechanism within Parliament that identifies general measures that fall within its scope (also see question above).

In the Turkish context where there are a large number of unimplemented judgments¹⁰, indications concerning general measures by the ECtHR would be helpful for the Ministry of Justice Human Rights Department. The mere volume of unimplemented cases, coupled with a lack of adequate staffing in the department, suggests that indication of general measures by the ECtHR may assist both with regard to the speed and the quality of the implementation process of general measures. Article 46 judgments delivered in cases of use of tear gas unnecessarily or disproportionately in public gatherings in three judgments (*Abdullah Yaşa v. Turkey*, *İzci v. Turkey* and *Ataykaya v. Turkey*) demonstrates this point well. The Human Rights Department of the Ministry of Justice has been more responsive (e.g. frequent communication with the Committee of Ministers in 2014 and 2015) compared to other cases with regard to the general measures required in these cases.

Civil society actors that monitor the implementation of judgments would also benefit from such indications.¹¹

It should be noted that the implementation of the sole pilot judgment, *Kaplan v. Turkey*, has been smooth and within the time limit. More targeted use of pilot judgments can lead to more effective outcomes in the Turkish context.

Interim resolutions of the Committee of Ministers have no legal status in domestic Turkish law. Interim resolutions are not translated into Turkish and are not well-known by public authorities. Meaningful engagement with such interim resolutions is limited to the Ministry of Justice Human Rights Department and a handful of academics and researchers.

⁹ For an example of an action plan with regard to Article 46 judgments concerning freedom of assembly, and protection from torture, inhuman and degrading treatment, see, Action Plan of July 2014 at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2572357&SecMode=1&DocId=2169188&Usage=2>

¹⁰ Turkey currently has 606 judgment under enhanced supervision and 916 judgments under standard supervision. See, http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=TUR&SectionCode=STANDARD+SUPERVISION accessed on 15.09.2015.

¹¹ It should be mentioned that Turkey has a vibrant and well-informed civil society initiative concerning the follow up of general measures. The Turkey Human Rights Joint Platform has issued ten Rule 9 Submissions with regard to general measures. The reports (in English) can be accessed at <http://www.aihmiz.org.tr/?q=en/>

4. Does your country's domestic procedure for adoption of general measures apply to the execution of decisions of other international judicial or quasi-judicial bodies or it is only limited to the execution of the ECtHR judgments?

Turkey is a state party to the right to individual petition of the ICCPR, the CEDAW and the CRPD. There is no explicit procedure for the adoption of general measures for views delivered by these bodies.

The duty to follow up on the ICCPR and CEDAW views remain with the Ministry of Foreign Affairs and the Turkish Mission to the UN in Geneva but there is no publicly available information on how this follow up is carried out.

5. How the domestic courts of first instance react when facing a problem of compliance with the ECtHR judgments which require the adoption of general measures (e.g. a change of a domestic legal provision which led to a violation of the Convention)? Is there a possibility or an established procedure for referral of such an issue to the Supreme and/or the Constitutional Court?

Turkish first instance courts may refer a case to the Turkish Constitutional Court if they believe that the law engaged in the specific case is unconstitutional (this is also known as *concrete norm review*)¹² This is a discretionary power given to first instance courts. The request of an unconstitutionality referral by any of the parties to a case does not automatically trigger the referral.

There is no explicit procedure concerning a non-Convention compliant domestic law. Having said this, non-Convention compliant laws and unconstitutional laws are highly likely to overlap. A domestic judge, therefore, does have recourse to indirectly ask the Turkish Constitutional Court to review the compatibility of a law that is in contravention with the European Convention on Human Rights and Fundamental Freedoms provided that the demand is made by framing the incompatibility with reference to the Constitution. This possibility must also be seen in the light of the introduction of the right to individual petition to the Turkish Constitutional Court in 2012¹³ ‘for rights that are covered both by the Turkish Constitution and the European Convention on Human Rights and Fundamental Freedoms.’¹⁴

In practice, there have been some, but not widespread, instances of domestic courts referring a law deemed as non-Convention compliant by the European Court of Human Rights to the Turkish Constitutional Court.

¹² Cf Article 152 of the Turkish Constitution.

¹³ Cf. Article 148 of the Constitution and the the Law on Establishment and Rules of Procedures of the Constitutional Court (Law No: 6216), adopted in 30 March 2011, in force since 23 September 2012

¹⁴ Law No 6216 Article 45.

The referral by an Istanbul Family Court concerning Article 187 of the Turkish Civil Code is an illustrative example of this. Following the case law of the European Court of Human Rights in the case of *Tekeli v. Turkey* (2004), the domestic court asked the Constitutional Court whether Article 187 that requires women to automatically take their husband's name or to use their name hyphenated with their husband's name was constitutional. In response, the Turkish Constitutional Court declared that this was constitutional in 2011.¹⁵ In this negative example, Article 187 remains in force despite a series of European Court of Human Rights judgments and a Committee of Ministers finding that the law has to be changed to allow the right of women to choose their names after marriage.

This case shows that the Turkish Constitutional Court did not, in 2011, view general measures imposed by ECtHR judgments and subsequently by the Committee of Ministers as having an effect on the constitutional interpretation of the same rights.

6. What is the role played by the Supreme Court(s) and the Constitutional Court in determining and initiating general measures? What is the procedure they follow in that regard?

Neither the Constitutional Court nor other high courts have any explicit power to determine and initiate general measures.

The Constitutional Court has the power to quash legislation through its concrete norm review powers. If a general measure required by a European Court of Human Rights judgment for a specific law to be repealed, then, the Turkish Constitutional Court can give effect to this general measure through its concrete norm review powers. A domestic court, however, must refer a specific law to the Constitutional Court for this power to be triggered.

As discussed in the example above on women's surnames, in 2011, despite clear Strasbourg case-law on the incompatibility of Article 187 of the Civil Code with Articles 8 and 14 of the Convention, the Constitutional Court avoided the question of giving effect to general measures. It must also be noted that under the Constitution, if the unconstitutionality is rejected the same law cannot be brought by any domestic court before the Constitutional Court for 10 years. In cases where the legislature is inactive and the Constitutional Court does not find any unconstitutionality, this would mean up to ten

¹⁵ Interestingly, under its post 2012 powers of the right to individual petition, the same Turkish Constitutional Court found that the rejection of claim of a woman to keep her birthname by a first instance court was a violation in 2013. Unlike the constitutionality review Powers, however, this finding only generates individual measures. For a commentary on this case in English, see Çalı, "Third Time Lucky? The Dynamics of the Internationalisation of Domestic Courts, the Turkish Constitutional Court and Women's Right to Identity in International Law" EJIL Talk (2014) available at <http://www.ejiltalk.org/third-time-lucky-the-dynamics-of-the-internationalisation-of-domestic-courts-the-turkish-constitutional-court-and-womens-right-to-identity-in-international-law/#comment-173823>

years of delay in the implementation of general measures. Indeed, the *Tekeli v. Turkey* case remains unimplemented for 11 years at the time of writing.

The Constitutional Court acquired the power to receive individual complaints in 2012. The law on the right to individual petition is ambiguous concerning general measures.¹⁶ Article 50(1) recognizes that the Constitutional Court can declare violations and take action concerning the consequences of such violations. Article 50(2) indicates that the Constitutional Court may send the case to the relevant lower court for retrial, or it may award compensation. So far, there has not been any case where the Court has indeed demanded execution of general measures from executive authorities or the legislature. Instead, the Turkish Constitutional Court has been sending a case for retrial or awarding compensation.

The legal community in Turkey is divided on whether the Constitutional Court is entitled to be more proactive on general measures or not. The first school of thought argues that the right to individual petition cannot only concern individual measures and when the Strasbourg case-law has indicated general measures, the Turkish Constitutional Court should deliver its judgments in such ways to ensure the realization of such measures. A second school of thought argues that the statute concerning the right to individual petitions is explicitly focused on individual measures and the Court taking an active role in ensuring general measures would be *ultra vires*. The Constitutional Court can either send a case back to the first instance court if it finds Convention violation or it can award compensation.

It must be pointed out that Article 50 of Law 6216 is disappointing as it lacks clarity on the matter. Both readings are indeed plausible. My view on this relies on the implied duties doctrine concerning general measures. Under European Court of Human Rights law any authority of the state must act in order to prevent future violations of human rights. This duty extends to the Turkish Constitutional Court. Given that the Turkish Constitutional Court under its powers of concrete norm review can quash legislation, it is not coherent that it only delivers individual measures in the case of individual petitions, where the root cause of the violation is a lack of general measure.

7. Has any judgment of the ECtHR ever required an amendment of a constitutional provision or a change in its interpretation? If yes, what measures have been taken? How was a (potential) conflict between the constitutional and conventional requirements or divergent interpretations eventually resolved?

There has not been any ECtHR judgment that has directly required the amendment of the Turkish Constitution. The ECtHR judgments often concerned the interpretation of rights within the Convention and the Constitution. The 2013 judgment *Ahmet Söyler v. Turkey*

¹⁶ Cf. Article 50 of Law 6216.

is one such judgment.¹⁷ In this judgment the Constitutional provision that only allows the right to vote to prisoners who have committed non-intentional crimes is found non-Convention compliant.¹⁸

With regard to a right to individual petition before the Turkish Constitutional Court concerning an identical claim, the Turkish Constitutional Court declared the case inadmissible on the grounds that the right to vote is not a justiciable right under right to individual petition under the Constitution.¹⁹

This case shows that the Turkish Constitutional Court views its rights catalogue as being narrower than the Strasbourg catalogue. It only views cases, which are justiciable both under the Constitution and the ECHR as falling within the scope of constitutional review. This view has a knock on effects on which cases that require general measures by the ECtHR can be dealt with by the TCC.

Alongside this, ECtHR judgments have asked, on a number of occasions, for the interpretations of the Constitutional Court to be changed. Case law regarding this comes in two forms: a) case law on the closure of political parties, for which, uniquely the Constitutional Court acts as a first instance court; b) ordinary case law of the Constitutional Court.

With regard to the former category, there have been a series of political party closure cases of the Turkish Constitutional Court (see, inter-alia, *the Communist Party v. Turkey*, *DEP v. Turkey*, *Hadep v. Turkey*, *the Socialist Party v. Turkey*, *the Welfare Party v. Turkey*).

The Turkish Constitutional Court is the first instant court in political party closure and political party registration cases under Turkish law.²⁰ With the exception of Welfare Party v. Turkey, the ECtHR has found a violation in the rest of cases where the Turkish Constitutional Court decided to close down political parties. The case-law of the ECtHR has pointed out that political parties cannot be closed purely based on their programme (cf. *Communist Party v. Turkey*) and political party closures must engage the test of necessity in a democratic society as well as the test of proportionality first.

The TCC had a chance to revisit its case law of on political party closures in the closure cases against Rights and Freedoms Party (HAKPAR), the Justice and Development Party (AKP), Democratic Society Party (DTP), Turkish Socialist Workers Party (TSİP)²¹. In these cases, at times the Court has made important references to ECtHR cases, in others it referred to the necessity of democratic test, protection of freedom of assembly and

¹⁷ Ahmet Söyler v. Turkey application no. 29411/07, Judgment of 17.09.2013.

¹⁸ Cf. Article 67 of the Constitution.

¹⁹ TCC Judgment, Application No 2014/19397 of 25.03.2015.

²⁰ Cf. Article 69(3) of the Turkish Constitution.

²¹ TCC Judgment of TCC Judgment, of 29.1.2008 (Closure of HakPar) TCC Judgment 30.7.2008 (Closure of AKP); TCC Judgment of 11.12.2009 (Closure of DTP), TCC Judgment of 09.07.2009 (Closure of TSİP)

expression as the core values of the Constitution. In others it made references to Article 90 of the Turkish Constitution and the legal weight of human rights treaties corresponding to the legal weight of legislation. In the light of the reiterated interactions between the ECtHR and the TCC on this very specific issue, we find evidence that the TCC has aimed to bring its interpretation in line with ECtHR case-law.

When we turn to the gap between the standard interpretations of the Constitutional Court and the impact of the ECtHR on such interpretations, the picture is mixed. Given that the right to individual petition came into force only in September 2012, it is too soon to make a comprehensive assessment of the TCC under its new powers.

There are signals that the introduction of the right to individual petition in 2012 certainly made the TCC more pro-active in internalizing Strasbourg case-law. In diverse areas such as freedom of expression²², freedom of association²³, and freedom from inhuman degrading treatment²⁴, the TCC is interpreting the Convention with direct references to the Strasbourg well established case-law.

The impact of the right to individual petition can also be seen in the case of women's last names. Despite its decision rejecting that women have a right to carry the name of their choice after marriage under the Constitution in 2011 under its powers of concrete norm review (see previous section), the Turkish Constitutional Court, in 2013, under its powers of right to individual petition, decided that the inability of women to choose their names after marriage was discriminatory. The TCC, in addition, directly cited the judgments of the European Court of Human Rights to this effect.²⁵

8. Other comments

Turkey lacks a comprehensive legal framework for the effective implementation of general measures. The Human Rights Department at the Ministry of Justice is understaffed, does not have a specialized unit on the execution of judgments and is unable to do an effective follow up in cases where there are delays in the adoption of general measures by relevant authorities or where the proposed general measures are not adequate.

The Turkish Grand National Assembly does not yet have any procedure for the follow up of general measures. It lacks effective pre-compatibility analysis of legislation as well as a programme of work for the realization of general measures through legislation. There have been some initial studies with the aim of enabling the Turkish Parliament's Human Rights Commission to play a more pro-active role with regard to general measures that

²² TCC Judgment of 2/4/2014 (App No. 2014/3986) (finding the twitter ban unconstitutional)

²³ TCC Judgment of 6/1/2015 (App No 2013/3924) (finding the banning of trade unionists march and subsequent forceful intervention to marchers unconstitutional)

²⁴ TCC Judgment of 17/7/2014 (App No 2013/293) (finding violations of positive procedural obligations of prohibition of torture, inhuman and degrading treatment)

²⁵ TCC Judgment of 19.12.2013 (App No 2013/2187) AYM (First Section)

are required to be taken by the Turkish Grand National Assembly. If successful, this would undoubtedly improve the adoption of general measures in a comprehensive and timely fashion.

The Turkish Constitutional Court can address general measures through its powers under concrete norm review. This mechanism, however, has not been effectively utilized by first instance courts and, in cases where it has been utilized, it has not delivered much success for the adoption of general measures.

Under the right to individual petition, the Turkish Constitutional Court, thus far, has been cautious in contributing to the realization of general measures indicated by the European Court of Human Rights. It prefers to send cases back for retrial or award compensation. Both of these are essentially an individual measures. That the Constitutional Court sends a copy of its judgment to relevant ministries without specifying the required general measures is not a desirable policy. Considering that even the European Court of Human Rights has started to indicate general measures to states, the Turkish Constitutional Court must consider its declaratory judgment paradigm and ensure that it interprets Article 50 of Law 6216 to ensure non-repetition of violations.

Given the overall framework and the large number of pending cases requiring general measures, the Turkish authorities would improve their implementation record of general measures by:

1. Setting up an adequately resourced unit explicitly dedicated to execution within the Ministry of Justice Human Rights Department;
2. Giving more explicit powers to the Execution Department, including powers to follow up on requests from various ministries;
3. Requiring the Ministry of Justice to compile an annual report on execution;
4. Establishing, through practice or law, a unit in Parliament that monitors the execution of judgments and regularly reports on them;
5. Requiring the Ministry of Justice to annually report to the Parliament concerning the execution of judgments;
6. Requiring the Ministry of Justice maintaining a publically accessible online database on the execution of judgments;
7. Requiring both Parliament and the Ministerial Department to allow meaningful access to non-governmental organizations to the processes of adoption of general measures;
8. Requiring the execution reports to be communicated to the Turkish high courts and first instance courts

Enhancing national mechanisms for effective implementation of the European Convention on Human Rights

Constitutional Court of the Russian Federation

Saint-Petersburg

22-23 October 2015

Country Report on the United Kingdom

Murray Hunt

Legal Adviser

Joint Committee on Human Rights of the UK Parliament

Q1. There is no procedure established by law in the UK for the adoption of general measures following judgments of the European Court of Human Rights. The procedure which exists (described in more detail below) is primarily a matter of custom and practice, established mainly by the interaction between the Government and Parliament's human rights committee, the Joint Committee on Human Rights ("the JCHR").

Since it was established in 2000, the JCHR has developed a practice of scrutinising the Government's responses to judgments of the European Court of Human Rights. However, there is no law or other text which requires the JCHR to scrutinise the Government's response to judgments of the European Court of Human Rights. It is not set down in the remit of the JCHR, contained in Parliament's Standing Orders. That remit is defined very broadly as being to "consider human rights matters in the UK". Successive JCHR's in each Parliament, however, have interpreted that remit to include scrutinising the Government's response to Strasbourg Court judgments.

To the best of this expert's knowledge, there are no Government regulations, internal ministerial instructions or other internal guidance about the process that should be followed after an adverse judgment of the Court. There is an internal Government document designed to elicit the necessary information from the relevant Government department (in the form of a template for the action plan which is required to be drawn up following such a judgment, referred to further below), but this does not set out or prescribe any particular procedure to be followed. Such procedure as exists has been established, first, by the necessity of preparing for supervision by the Committee of Ministers and, more recently, by the development of the practice of parliamentary scrutiny of the Government's response by Parliament's human rights committee. In 2010, the JCHR drew up some Guidance for Departments on Responding to Judgments Concerning Human Rights, which sought to distill into writing the

practices that had grown up between the Government and the JCHR.¹ At the beginning of the 2010-15 Parliament the new JCHR decided to continue its predecessor committee's work on human rights judgments and adopted its predecessor's Guidance as the basis for that work.

There is one specific part of the UK's legal framework concerning the adoption of general measures: a provision of the Human Rights Act 1998² which gives the Government the power to introduce general measures by way of a fast-track procedure (a "remedial order") which enables an incompatibility with the Convention to be removed more quickly than would be the case if the remedying general measures were introduced by way of primary legislation. For example, following the judgment of the European Court of Human Rights in *Gillan and Quinton v UK*, that counter-terrorism powers to stop and search without reasonable suspicion were incompatible with Article 8 ECHR, the UK Government used the power to introduce the necessary general measures by way of remedial order. The JCHR's standing orders do require it to scrutinise such remedial orders, and to prioritise such work over all other work. However, the number of remedial orders introduced to remove an incompatibility with the ECHR found by the European Court of Human Rights (as opposed to incompatibilities found by the UK's own courts) is small: only about 3 out of 19 to date.

Q. 2 The UK process following an adverse judgment of the European Court of Human Rights is summarised in the Government's 2011-12 Report *responding to human rights judgments*.³ Lead responsibility for the implementation of a particular judgment rests with the relevant Government Department (depending on the subject matter of the judgment – for example if the judgment concerns police powers the lead department will be the Home Office). However, the Ministry of Justice plays a "light touch co-ordinating role". On receiving notice of an adverse judgment against the UK, the lead department completes a draft Action Plan, using a template (copy Annexed to this Report) which contains some guidance to the lead department about the information that they are required to provide. If necessary, officials from the Ministry of Justice work with officials in the lead department to fill out the information that is requested by the form, and this forms the basis of the Action Plan that is eventually transmitted to the Committee of Ministers.

The content of the guidance to the lead department contained in the template Action Plan reflects the requirements of the Committee of Ministers and also the practice of scrutiny by the JCHR. For example, departments are advised to include in their Action Plan brief references and links to any relevant reports on the general measures such as reports by the JCHR or other independent scrutiny bodies such as the Independent Reviewer of Terrorism Legislation. The inclusion of this guidance is the result of criticism by the JCHR in its reports on the Government's response to the Court's judgment in *Gillan*, in which it criticised the Government for failing to draw to the attention of the Committee of Ministers the fact that both the JCHR and the Independent Reviewer of Terrorism Legislation had expressed

¹ Annex to JCHR Fifteenth Report of 2009-10, *Enhancing Parliament's role in relation to human rights judgments* (2010), p. 69 <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf>

² Human Rights Act 1998, s. 10.

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217308/responding-human-rights-judgments.pdf p. 10.

reservations about the adequacy of the Government's general measures in response to the Court's judgment.

The trigger for the process of adoption of general measures is therefore largely internal to Government: it depends on the lead department identifying the measures which are necessary to comply with the judgment. The Ministry of Justice plays a co-ordinating role, but with a relatively light touch. The Joint Committee on Human Rights has developed a role for itself scrutinising the adequacy and timeliness of the department's response. Initially this was done largely by correspondence between the Committee and the relevant Government department, with occasional reports by the JCHR on the scrutiny it had been conducting. The practice has now evolved to the point where the Government provides an annual report to the JCHR on its response to court judgments, including judgments of the European Court of Human Rights.⁴

The JCHR's scrutiny of the Government's responses takes a variety of forms. It may ask the minister responsible for human rights oral questions about the Government's report during its roughly annual evidence session with that minister, or correspond with the relevant lead department about the response to particular judgments if necessary. The JCHR sometimes recommends amendments to Government Bills in order to comply with judgments of the European Court of Human Rights. It also reports on the Government's responses to court judgments, but less frequently than it formerly did: in the 2010-15 Parliament it published one report on human rights judgments, towards the very end of the Parliament.⁵

Q3. The lead department identifies the general measures that a judgment requires in the first instance. The process for doing this within Government depends on the nature of the judgment. A judgment which reveals an underlying systemic problem or which cuts across the responsibility of more than one department will require inter-departmental discussions and possibly negotiations, as different departments may have different views about what the judgment requires. Generally speaking, the more departments are involved in responding to a judgment, the longer it takes for the Government to bring forward a response. The JCHR chases the lead department in cases where there is unreasonable delay in informing Parliament about the Government's proposed response.

Where the judgment does not specify what general measures are required, the lead department will take the advice of its lawyers about what is required to comply with the judgment and will formulate a response in the light of that advice, to be considered by the relevant minister. Specific indications in the judgment of the measures that are required may be helpful, but in the UK both the Government and Parliament place a high value on the margin of appreciation, including in relation to the measures required to comply with a judgment, and judgments which are too prescriptive about the measures required therefore

⁴ *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2013-14* (December 2014)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf

⁵ Seventh Report of 2014-15, *Human Rights Judgments* (March 2015)

<http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/130.pdf>

risk being counterproductive by appearing to leave too little scope for the Government and Parliament to decide how best to respond.

Interim resolutions of the Committee of Ministers calling for specific general measures have no legal status in the UK. The political embarrassment of being the subject of such an interim resolution may have some practical effect, but that effect is limited in relation to issues which are politically controversial and where the Government lacks the political will to introduce the necessary measures (as in the case of prisoner voting in the UK at present).

Q4. The UK's domestic procedure for the adoption of general measures is limited to the implementation of judgments of the European Court of Human Rights. Apart from judgments of EU courts which have direct effect, there are no other international courts whose judgments have the same normative status in the UK. The recommendations of the UN human rights system, including those of the Human Rights Council in the Universal Periodic Review, the treaty bodies and the special procedures, are treated differently both within the executive and by Parliament.

Q5. UK courts do not treat judgments of the European Court of Human Rights as having direct effect in the UK legal system until Parliament has made the necessary change in the law. A lower court, for example, will treat itself as legally bound by a statutory provision which has been found to be incompatible by the European Court, or by a higher court's interpretation of that provision in a way which the Court has found to be incompatible. There is no specific procedure for fast-tracking such an issue to the Supreme Court. The Supreme Court itself may also treat itself as so bound where Parliament has not yet changed the law.

Q6. The UK Supreme Court has no role in the initiation of general measures following a judgment of the European Court of Human Rights. It would be within its powers to indicate what general measures might remedy a particular incompatibility, but respect for the constitutional role of the other branches make it extremely unlikely to express any views on the subject, even in cases where there may have been a long delay in bringing forward general measures in response to a judgment.

Q7. As for whether any judgment of the European Court of Human Rights has ever required an amendment of a constitutional provision or a change in its interpretation in the UK, it is important to distinguish between the effect of accession to the Convention and judgments of the Court under that Convention. The UK's acceptance of the obligation in Article 46 ECHR to comply with judgments of the Court amounted to a voluntary modification by the UK of the constitutional doctrine of parliamentary sovereignty, at least for as long as the UK remains a signatory to the Convention. The well known failure of the UK to implement the judgments of the Court concerning prisoner voting do not therefore involve a conflict between the UK's current constitution and the requirements of the Convention. Rather they involve a conflict between the Convention and the UK's constitution as it existed prior to the UK's acceptance of Article 46 of the Convention. Those who do not wish the UK to comply with the judgment seek to revert to the constitutional position prior to the UK's accession to the Convention.

The JCHR as a model Parliamentary monitoring mechanism

*Constitutional Court of the Russian Federation
St-Petersburg (22-23 October 2015)*

Michael O'Boyle¹

Good morning ladies and gentlemen,

I should say from the outset that I have been asked at the eleventh hour by the organisers of this Conference to take the place of the UK human rights expert, Mr. Murray Hunt, who is the legal adviser to the UK's Joint Committee On Human Rights (JCHR) and who, unfortunately, has had to withdraw from this meeting at the last moment. This, of course, is a tall order and, while I will not be able to come close to Mr. Hunt's recognized knowledge and competence about the Joint Committee, I propose to limit myself to some general remarks about the implementation of Court judgments, the parliamentary dimension of the concept of joint responsibility for the protection of Convention rights and the role of the Joint Committee in the implementation of ECHR judgments against the UK – a matter that Mr. Hunt addresses in his written contribution with greater sharpness and precision. For those that seek a crisp account of UK practice concerning the implementation of judgments it is to Murray Hunt's written contribution that you must look above all else.

We can all agree that implementation of the Court's judgments is critical to the integrity and credibility of the ECHR system as a whole. Yet when general measures are required by a Court judgment as in a certain number of cases - implementation may be a difficult and complex exercise requiring the consultation and agreement of a large number of state actors as well as much diplomatic skill and patience deployed in a process of dialogue. As the former PACE Rapporteur, Erik Jurgens, has pointed out:

“The ECHR mechanism does not operate in a legal vacuum: the Court's judgments are implemented and translated into real life

¹ Deputy Registrar, European Court of Human Rights (2006-2015).

through a complex legal and political process which involves a number of domestic and international institutions”.

When he speaks of international bodies he is referring to the Committee of Ministers but also the Parliamentary Assembly of the Council of Europe (through its Committee on Legal Affairs and Human Rights (CLAHR)). But he also refers to the role of national bodies and he does not limit himself to the executive but also includes the national parliaments which have an important supervisory role to play.

My second general point relates to the growing concern about the “implementation gap” that afflicts international human rights law: a sense that the priority is no longer standard-setting or devising adequate mechanisms for monitoring states’ performance against those standards, but finding ways to ensure that states give effect to those norms at the national level. This is the essence of the concept of subsidiarity. As Murray Hunt has observed the real challenge lies in finding the most effective levers in the national system for securing the necessary changes in law, policy or practice which will give practical effect to human rights commitments.

We must face up to the reality that, even in the highly developed ECHR system, implementation of the Court’s judgments has become problematic, when judgments concern sensitive national interests and the national authorities manifest a reticence to implement them, notwithstanding their clear international legal obligation to do so.

My third general remark relates to the concept of joint responsibility. As has been recognized by both the Court in Strasbourg, and by the States in the Brighton and Brussels Declarations, the protection of human rights involves a joint responsibility between both national and international actors. This concept encompasses not only the notions of subsidiarity and margin of appreciation but also involves an almost constant dialogue between the Strasbourg Court and national institutions, in particular the national superior courts but also the executive and legislative branches of government. But the notion of joint responsibility for the protection of Convention rights also applies at the national level where all three branches of government have a shared responsibility for ensuring the protection of human rights including the observance of adverse Court judgments. This is perhaps a dimension that international actors have paid scant attention to and one that calls for full attention at this conference on the exploration of innovative and effective national mechanisms of implementation. It involves the same requirement of

constant dialogue as at the international level and, as we can see from recent notorious examples of failure to execute Court judgments, is also intimately bound up with the essential requirement of putting the legitimacy of an international system for human rights protection on a sound footing and countering the critique that democracy is being subverted by courts and that the democratic will of Parliament is being thwarted by the decisions of unelected and unaccountable judges applying human rights laws. It is noteworthy, and perhaps a little comforting to international actors, that this critique is also directed at national superior courts.

However it is clear that for a national system of implementation to function well all three branches of Government - executive, legislative and judicial - must work towards a common goal when exercising their different but complementary functions. When the executive branch lacks political will to implement a judgment it is unlikely that this can be brought about by the other two acting in concert although they will certainly have their role to play in seeking to persuade and cajole the executive to do what is required of a rule of law state.

This brings me conveniently to the Parliamentary oversight mechanism that exists in the UK – the JCHR - that was brought into being by Parliament in 2001.

The JCHR has over the years developed into a Parliamentary human rights oversight body. It screens all Government Bills and picks out those with significant human rights implications for further examination. The Committee also looks at Government action to deal with judgments of the UK courts and the European Court of Human Rights where breaches of human rights have been found.

The work of the JCHR has become a familiar and settled part of the UK human rights landscape and has earned an excellent reputation for the quality of its reports within the legal community and beyond.

The Committee has twelve members, six from the Lords and six from the Commons. It has a permanent legal adviser. The party-political composition of the Committee mirrors broadly the party-political composition of each House, but the Chair of the Committee does not have to be a member of the governing party.

It enjoys the reputation of acting in a bipartisan fashion notwithstanding its composition. This is not the place to seek to give a full account of all

its activities. Murray Hunt's report provides an excellent account of how it interacts with Government Departments. But let me highlight some of its most important features.

The JCHR has three overarching and interrelated aims:

1. to enhance the protection of human rights within the parliamentary process and in the UK generally;
2. to increase the accountability of the Executive to Parliament for human rights issues; and
3. to improve the quality of deliberation about human rights issues during the legislative process.

The achievement of these aims involve a pre-legislative scrutiny of all Bills going through Parliament with a view to selecting and commenting on those which raise significant human rights issues. Needless to say for this work to be effective it is important that the Committee expresses its views at an early stage of the legislative process since the opportunities to affect the outcome once the Bill is introduced on the floor of the house are limited.

Alongside its ongoing scrutiny of bills which come before Parliament, the JCHR carries out broader thematic inquiries on topics with important human rights implications. It has carried out such inquiries in areas such as deaths in custody, human trafficking and counter-terrorism policy and human rights.

The Committee also monitors the Government's response to Court judgments pressing the Government to reveal how it plans to respond to ECHR judgments.

It has drawn up "*Guidance for Departments on Responding to Court Judgments on Human Rights* (that can be consulted on the Committee's web site) that reflects the good practices that have developed between Government Departments and the JCHR.

Government Departments - when they draw up an Action Plan in response to an adverse judgment - are advised by government to include brief references and links to any relevant reports on general measures such as reports by the JCHR or other independent scrutiny bodies such

as the Independent Reviewer of Terrorism Legislation. The inclusion of this guidance is the result of criticism by the JCHR in its reports on the Government's response to the Court's judgment in *Gillan v UK*², in which it criticised the Government for failing to draw to the attention of the Committee of Ministers the fact that both the JCHR and the Independent Reviewer of Terrorism Legislation had expressed reservations about the adequacy of the Government's general measures in response to the Court's judgment.

The trigger for the process of adoption of general measures is largely internal to Government: it depends on the lead department identifying the measures which are necessary to comply with the judgment. The Ministry of Justice plays a light co-ordination role. The JCHR has developed the role of scrutinising the adequacy and timeliness of the department's response. Initially this was done largely by correspondence between the Committee and the relevant Government department, with occasional reports by the JCHR on the scrutiny it had been conducting. The practice has now evolved to the point where the Government provides an annual report to the JCHR on its response to court judgments, including judgments of the European Court of Human Rights.³

The JCHR's scrutiny of the Government's responses takes a variety of forms. It may ask the Minister responsible for human rights oral questions about the Government's report during its (roughly) annual evidence session with that Minister, or correspond with the relevant lead department about the response to particular judgments if necessary.

It also actively invites representations from interested parties (NGO'S with expertise in human rights/academics/ relevant charities/ or persons who may be affected by a bill).

The JCHR sometimes recommends amendments to Government Bills in order to comply with judgments of the European Court of Human Rights. It also reports on the Government's responses to court judgments, but less frequently than it formerly did: in the 2010-15 Parliament it published one report on human rights judgments, towards the very end of the

² *Gillan and Quinton v UK*, ECtHR, judgment of 12 January 2010.

³ *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2013-14* (December 2014)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf

Parliament.⁴

Some legal commentators have noted that the Committee is in fact seeking to develop in Parliament a “culture of rights” (sometimes referred to as “human rights mainstreaming”) and a culture of justification. A culture of rights in the sense that Parliament must take into consideration the human rights dimension when formulating policy and enacting legislation and a culture of justification in that ministers and governments should give reasons for their policies and legislative proposals and, in particular, be willing to justify them in terms of human rights. This is the requirement that the Government should demonstrate its ‘human rights reasoning’ against the background not just of the ECHR and its jurisprudence but international human rights law in general. Both of these aims are instrumental to the ultimate aim of enhancing the protection of human rights within the UK parliamentary process.

I conclude with an observation that I mentioned earlier about the necessity of political will in all branches of government for such oversight mechanisms to function effectively. It is clear from research that has been carried out in the UK that there has been a dramatic increase in reference to the reports of the JCHR by parliamentarians and that its reports are playing an increasingly important role in parliamentary debates. This is a healthy sign that the level of human rights awareness in Parliament is on the increase.

As a Parliamentary human rights monitoring body the JCHR is worthy of study and perhaps emulation by other states and PACE has consistently recommended that some form of supervisory body should be set up in all member states in accordance with their legal and constitutional traditions.

On the issue of prisoner voting the JCHR has consistently pressed the Government to introduce legislation giving effect to the Court’s judgment in the *Hirst* case⁵. However neither the executive nor Parliament have been prepared to give weight to its arguments. But, as we can all appreciate, this is not a failing of the JCHR but of Government policy generally - proving the old adage that “you can bring a horse to water but you cannot make it drink”.

⁴ Seventh Report of 2014-15, *Human Rights Judgments* (March 2015)

<http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/130.pdf>

⁵ *Hirst v UK* (no.2), ECtHR, 6 September 2005.

Thank you for your attention.