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Assessing the Implementation of ECtHR Judgments by Poland and Moldova[1]

1. Prologue (a brief history of joining the ECHR by Poland and Moldova)

The Council of Europe welcomed practically all Central and Eastern European countries into the system. The integration of new member states with incomplete legal frameworks posed a serious challenge to the European Court of Human Rights (hereinafter „the ECtHR" or „the Court"). For the late-ratifying states, the political legitimacy of the European Convention on Human Rights (hereinafter „the ECHR" or „the Convention") and the Court was taken for granted. The concerned countries, Poland and Moldova, were then in the race of democratisation, following long years under repressive and authoritarian rules. It is the testimony to the remarkable success of the ECHR that it managed to offer legitimate, normative standards for the states in transition into a constitutional democracy.

On 1 May 1993, Poland recognised the right of individual application and the jurisdiction of the ECtHR in all matters concerning the interpretation and application of the Convention[2]. In Poland, the ratification of the ECHR and subsequently its Protocols was one of those measures that a newly democratic state regarded as an obvious and necessary thing

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2 H. Keller, A. Stone-Sweet, *A Europe…*, p. 7.

to do in order to restore democracy and consolidate its return to the family of truly European states[3]. Poland's approach to ratification can be largely explained by the historic national will to be under European human rights standards. Poland expressed an enthusiastic attitude in accepting the Convention and its control mechanism[4]. The ratification of the ECHR was a deliberate response to the country's communist past.

The Republic of Moldova became a member state of the Council of Europe and signed the Convention on 13 July 1995, as well as several but not all additional Protocols[5]. The ECHR itself entered into force for Moldova on 12 September 1997. Since that day, Moldova has committed to respect the rights guaranteed by it and recognised the jurisdiction of the ECtHR. Nevertheless, Moldova declares that it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed „Trans-Dniester republic" within the territory actually controlled by so-called administration until the conflict in the region is finally settled[6].

3 Protocols nos 1, 4, 7, 9, and 10 were signed on 14 September 1992. A statute approving the ratification was enacted on 2 October 1992. On 20 May 1997 – Poland ratified Protocol No. 11 to the Convention („a full-time Court" was formed), and on 1 November 1998, Protocol No. 11 to the Convention entered into force. On 30 October 2000 – Poland ratified Protocol No. 6 to the Convention (the abolition of the death penalty in times of peace) and this protocol entered into force on 1 November 2000; On 4 December 2002 – Poland ratifies Protocol No. 7 to the Convention (procedural guarantees concerning the expulsion of aliens, right of appeal in criminal cases, right to compensation for wrongful conviction, right not to be tried or punished for an offence for which one has already been acquitted or convicted, equality of civil rights and responsibilities between spouses) – entered into force on 4 December 2002; On 12 October 2002 – Poland ratified Protocol No. 14 to the Convention (procedural changes to assure the Court's long-term effectiveness and 1 June 2010 – this entered into force; On 23 May 2014 – Poland ratified Protocol No. 13 to the Convention (the abolition of the death penalty under any circumstances) and it entered into force on 1 September 2014; On 10 September 2015 – Poland ratified Protocol No. 15 to the Convention (which is the result of the debate on improving the Convention system).

4 H. Keller, *Reception…*, p. 295.

5 The Convention was ratified together with Protocols No. 1, No. 4., No. 6 and 7 on 12 September 1997. The Government of Moldova signed Protocol No. 12 on 4 November 2000, but until today it has not been ratified. Protocols nos 13 and 15 were ratified respectively on 18 October 2006 and 14 August 2014. Most recently, on 17 March 2017, the Republic of Moldova signed Protocol No. 16.

6 This territory as an integral part of Moldova, illegally captured by the separatist regime due to the intervention of Russia in the period of 1991–1992. Tensions between the constitutional authorities in Chisinau and self-proclaimed authorities in Tiraspol, who are supplied from outside, have led to an armed conflict on the banks of the Dniester in the spring-summer of 1992. The external factor (namely Russia) played a key role in the development and perpetuation

The ECtHR confirmed indubitably that the secessionist territory is part of Moldova but without effective control exercised over it by the constitutional authorities. In light of this controversial situation (*de jure* territory but lack of *de facto* control), starting with the *Ilaşcu and other*s case, the Court decided to engage the test of positive obligations with the reference to the Republic of Moldova in all Transnistrian cases[7]. In most of the cases, human rights violations in the Transnistrian region have been attributed to the responsibility of Russia.

2. Poland and Moldova's experience with the ECtHR

A precedent created by the Court is a model for its future case law. Thus, if the state does not change its legislation or practice to bring them in balance with the Convention, the Court will establish a violation of human rights, each time considering similar cases[8]. It means that ideally, the member states should take the ECHR case law into account in changing their internal laws, even in a case when they are not a party to the proceedings.

Until 31 December 2019, the ECtHR delivered 1,179 judgments against Poland[9]. For instance, in 989 judgments, the Court found at least one violation of the Convention, in 130 other judgments – no violation, and other 49 cases were friendly settlements or striking-out judgments. The decreasing number of judgments has been visible in the last years. In 2018, the Court delivered 21 judgments, in 20 of which it found at least one violation of the ECHR, and in 2019 only 12 judgments were pronounced against Poland (in 11 at least one violation of the Convention was found, in one judgment – no violation). However, in the period of 2011–2019, Poland was obliged to pay over EUR 6.7 million (EUR 307.709 in 2019 – the smallest amount in the last three years)[10].

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of the conflict, by different means: maintaining a foreign military presence, constantly providing a financial and material support, facilitating the maintenance of barriers to free movement of goods and people etc. The conflict over Transnistria is both a conflict over territory and sovereignty, and a conflict in international relations between Moldova and Russia.

7 *Ilascu and others v.Moldova and Russia,* application no. 48787/99, judgement of 8 July 2004.

8 A. Cherviatsova, *The European…*, p. 112.

9 Statistics of the ECtHR, *Violations by Article and by State 1959–2019*, < https://www.echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf >, accessed: 20 March 2020.

10 Statistics, *Poland – Country factsheet*, < https://rm.coe.int/168070975d >, accessed: 4 April 2020.

Since the Convention entered into force, the ECtHR has delivered over 450 judgments in Moldovan cases, finding violations in more than 90% of them. Moldova is far ahead of Germany, Spain or the Netherlands, countries that joined the ECHR long before Moldova or have a much larger population. According to the latest ECtHR activity Report, there were 814 applications registered against Moldova in 2019[11]. In relation to the country's population, the number of applications filed with the ECtHR against Moldova is very high. Moldova ranked 5th out of 47 member countries of the Council of Europe. Among the most common violations that could be found in judgments referring to the Republic of Moldova are non-enforcement of national judicial decisions, improper investigation of ill-treatment and death, poor detention conditions, illegal detention, irregular annulment of an irrevocable judicial decision, ill-treatment or the use of excessive force by state representatives etc[12]. Under all the ECtHR judgments and decisions issued until January 2020, Moldova was obliged to pay over EUR 17.1 million[13].

3. The implementation of ECtHR judgments by Poland and Moldova

An ECtHR judgment declaring the violation of the Convention is the final act in the court proceedings, which, at the same time, opens another – not less important for both parties to the proceedings – stage of the execution of ECtHR judgments, namely its implementation by the national authorities. In accordance with art. 46 par. 2 of the ECHR, execution of the final judgments is supervised by the Committee of Ministers of the Council of Europe (hereinafter „the Committee"). The Committee is not an institution that guarantees and/or executes the ECHR judgments. It is subsidiary, which means that the tasks related to the execution still remain a primary obligation of the concerned state. Finally, when looking into the roots of non-execution, the distinction between general

11 European Court of Human Rights, *Annual Report,* January 2020, < https://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf >, accessed: 4 April 2020.

12 V. Gribincea, D. Goinic, P. Grecu, *Summary*…, p. 2.

13 V. Gribincea, D. Goinic, E. Popsoi, *Analytical*…, p. 7.

and individual execution measures must be taken into account. This classification is the pillar of the whole enforcement process[14].

Since 2011, the Polish Government has managed to complete the procedure of enforcement for more than 800 judgments delivered by the ECtHR. The number of judgments on Poland executed under the supervision of the Committee of Ministers has decreased significantly during the last 9 years and dropped from 924 to the record low 95 as of the end of 2019[15]. Poland is below the top ten countries with the largest number of cases with pending execution and is positioned 11th out of 47 countries in terms of the number of cases with pending execution under the supervision[16].

Moldova has not yet implemented 45% of the leading judgments handed down against it by the ECtHR in the last ten years. At the end of 2019, there were 52 leading judgments pending overall. Each leading case represents a structural or significant problem that, despite being identified by the ECtHR, has not been resolved.

Due to the large number of issues related to the implementation of ECtHR judgments in Poland and Moldova, I have analysed more closely only some of them, namely those which fall within my professional field.

4. The Polish examples of the implementation of judgments

The most widespread illness of the Polish judiciary is the excessive length of court proceedings. In this regard, the ECtHR stated in the case of *Kudła v. Poland* that the applicant should be able to have access to a separate (independent) remedy against the excessive length of court proceedings at

14 For the details on the difference between general and individual measures, see: *CM Rules and Procedures: Rules of the Committee of Ministers for the supervision of the execution of judgments and the establishment of the terms of friendly settlements* (adopted by the Committee of Ministers on 10 May 2006 at its 964th meeting and amended on 18 January 2017 at its 1275th meeting) and iGuide CM Procedures and working methods (15 February 2017).

15 *Poland – Country factsheet*, < https://rm.coe.int/168070975d >, accessed: 15 May 2020.

16 Pending cases are those in which the execution process is ongoing. As a consequence, pending cases are at various stages of execution and must not be understood as unexecuted cases. In the overwhelming majority of these cases, individual redress has been provided, and the cases mainly await the implementation of general measures, some of which are very complex and require considerable time. In many situations, cooperation programs or country action plans provide, or provided, support for the launched execution processes.

the national level[17]. In the context of a claim for the excessive length of judicial proceedings, a remedy may be considered effective if it results in either the proceedings being sped up, or provides adequate compensation for the damage that occurs as a result of the delay. In Poland, it led to the adoption in 2004 of the new law against excessive judicial proceedings[18]. When assessing this law, it is necessary to specify that this was a typical measure used to fight against the symptoms of the excessive length of proceedings but not their root causes. Awarded damages barely compensate for the nuisance caused by the excessive length of proceedings, they do not eliminate root causes and they do not result in reducing the problem. As a consequence, it led to the appearance of the case of *Rutkowski and others*[19]. The applicants complained that the length of the proceedings before the Polish courts had been excessive and the remedy at the national level for the excessive length of court proceedings was defective. The Court concluded that this situation had to be qualified as a practice incompatible with the Convention and decided to apply the pilot-judgment procedure[20].

The Court deemed that the systemic problem leading to a practice incompatible with Article 6 § 1 and Article 13 of the Convention required Poland to implement a comprehensive, large-scale legislative action. The Polish Government proposed three principal actions: the simplification and acceleration of the proceedings, the transfer of some responsibilities from judges to non-judicial officers, and where appropriate, the transfer of some cases traditionally examined by the courts to other legal professions, for instance public notaries[21]. However, the Court and Committee were still not

17 *Kudla v. Poland,* application no. 30210/96, judgement of 26 October 2000.

18 *The Act of 17 June 2004 on complaint about breach of the right to have a case examined in judicial proceedings without undue delay* [ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki – „the 2004 Act"]. Dz.U. (Journal of Laws) from 2004 No. 179 Item 1843).

19 *Rutkowski and others v. Poland*, (application nos 72287/10, 13927/11, and 46187/11), judgment of 7 July 2015.

20 The Court deemed that it was justified to apply the pilot-judgment procedure since the facts of the applicants' case revealed the existence of a systemic issue giving rise to many similar applications. I would like to note that so far four pilot judgments have been given against Poland in the cases of *Broniowski, Hutten-Czapska, Orchowski and Rutkowski*. They concern issues like a compensation mechanism for property left behind the former border of Poland, the operation of the rent control scheme, restricting property rights of landlords; overcrowding in Polish penitentiary facilities and excessive length of judicial proceedings.

21 K. Drzewicki, *Experiences…*, p. 131.

persuaded by the Polish Government's argument that the legislation and mainly judicial case law had put an end to the previous defective practice as regards compensation for the unreasonable length of proceedings because, despite these actions, there had been an increased inflow of repetitive cases before the Court involving the length of proceedings and insufficient compensation at the national level.

The second issue is related to the rights of persons in Polish detention facilities. In the case of *Orchowski v. Poland,* the Court stated the violation of Article 3 of the Convention by inhuman and degrading treatment of applicants in connection with their detention in inadequate living conditions, in particular due to overcrowding[22]. The ECtHR specified that overcrowding in Polish prisons and detention centres was a systemic issue[23]. Violation of art. 3 of the Convention was constituted by the fact that in detention facilities, the detainees had less than the required, guaranteed by Polish legislation 3 m² of space per person[24].

In 2007, the Polish Supreme Court for the first time recognised a prisoner's right to bring proceedings against the State based on the Civil Code with a view to securing compensation for infringement of his fundamental rights caused by prison overcrowding and general conditions of detention. The Supreme Court reaffirmed this principle in 2010 and laid down additional guidelines on the manner in which civil courts should verify and assess the justification of restrictions of the legal minimum space in a cell. The Strasbourg Court consequently considered that the remedy allowing awards of compensation was an effective one[25].

Moreover, the Court acknowledged that solving the systemic problem of overcrowding in Poland could call for the mobilisation of significant financial resources but stressed that it is incumbent on the respondent government to organise its penitentiary system to ensure respect for the dignity

22 *Orchowski v. Poland,* application no. 17885/04, judgment of 22 October 2009.

23 See the cases of *Latak v. Poland* and *Lominski v. Poland*, applications nos 52070/08 and 33502/09, decisions of 12 October 2010, subsequent to the pilot judgments given by the Court in the cases *Orchowski v. Poland* and *Norbert Sikorski v. Poland*, nos 17885/04 and 17559/05, judgments of 22 October 2009.

24 Pursuant to the applicable rules expressed in Article 110 of the Criminal Enforcement Code, J.L. 1997, no. 90, item 557, the cell area per inmate may not be lower than 3 sq.m.

25 Council of Europe, *Guide to good practice in respect of domestic remedies*, 2015, p. 31.

of detainees, regardless of financial or logistical difficulties[26]. The structural nature of the problem was noted by the Polish Government and current statistics confirm that overcrowding has been reduced. According to the Central Board of Prison Service's information about prison population dated 31 January 2020, there were 72,204 inmates and 81,125 available places in penitentiary facilities, which translated into the general prison population rate of 92.4%[27]. However, the statistic is based on the Polish legal standard of 3 m2 space per prisoner. The Polish Government was warned about the difference between the national and international legal standards in that respect by various international institutions, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment („CPT") after its last visit to Poland in 2017. The CPT noticed that minimum standards for personal living space in prison establishments should be 6 m² for a single-occupancy cell and 4 m² per prisoner for a multiple-occupancy cell (excluding sanitary facilities)[28].

Nevertheless, the problem of prison overcrowding has been reduced, which should be considered a positive change. However, the official capacities of all prisons have to be regularly reviewed. According to the Government's consolidated action report, the legislative and organisational measures for the elimination of overcrowding have brought some expected results[29]. In parallel, measures were taken to improve conditions in penitentiary facilities and to monitor the prison population rate. Moreover, the Polish authorities started making more frequent use of alternatives to detention, including an electronic surveillance system, as well as undertook to improve sanitary and living conditions[30].

The Committee noted the decrease in the occupancy rates in penitentiary institutions via reinforcement of the legal framework on the minimum accommodation area per detainee and creation of new accommodation

26 *Norbert Sikorski v. Poland*, application no. 17599/05, judgment of 22 October 2009, para. 153.

27 Central Board of Prison Service of Poland's statistics, < www.sw.gov.pl >, accessed: 27 April 2020.

28 *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* from 11 to 22 May 2017, p. 31, < https://rm.coe.int/16808c7a91 >, accessed: 5 April 2020.

29 Consolidated action report – *Communication from Poland in the Orchowski group of cases against Poland* for 1265 meeting (20–22 September 2016) (DH), < https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680684b60 >, accessed: 5 April 2020.

30 G. Mayer, *Execution…*, p. 140.

units. The Committee has closed the examination thereof, assessing positively the measures taken by Poland[31].

A lack of medical care in prisons is another problem that resulted in numerous ECtHR judgments in the past. The most significant of these is *Dzieciak v. Poland*, in which the Court highlighted the lack of appropriate medical infrastructure, lack of coordination between prison health services and the penitentiary court, as well as negligence by prison services that failed to react appropriately to the deteriorating health of the applicant[32]. In *Sławomir Musiał v. Poland*, it held similarly that the respondent state had to secure, at the earliest possible date, adequate conditions of the applicant's detention in a specialised institution capable of providing him with the necessary psychiatric treatment and constant medical supervision[33].

In this regard, after the *Kaprykowski group of cases* concerning the lack of adequate medical care in detention, it was important for the Committee to observe the improvement of the legal framework governing the provision of healthcare for persons deprived of liberty, as well as the general improvement of the conditions in the Polish penitentiaries[34]. For instance, the medical entities for imprisoned persons operate in every penitentiary unit. All of the 155 penitentiary units have outpatient clinics with infirmaries[35]. Within the aforementioned medical entities operate hospital wards, surgeries, diagnostic labs, dental surgeries, rehabilitation and physiotherapy labs and pharmacies.

These substantive provisions of prison law relating to the medical care of prisoners and the internal administrative rules were designed to ensure that such care is provided by the prison authorities or other state agents. There are various legal avenues prisoners can pursue to ensure that they are given adequate medical treatment. They may complain directly to the prison authorities enforcing the sentence at different levels

31 Resolution CM/ResDH (2016)254 on *Execution of the judgments of the European Court of Human Rights. Seven cases against Poland,* adopted by the Committee of Ministers on 21 September 2016 at the 1265th meeting of the Ministers' Deputies.

32 *Dzieciak v. Poland*, application no. 77766/01, judgment of 9 December 2008.

33 *Sławomir Musiał v. Poland*, application. no. 28300/06, judgment of 20 January 2009.

34 *Kaprykowski v. Poland*, application no. 23052/05, judgement of 3 February 2009.

35 For more details see the updated action report: *Communication from Poland in the Kaprykowski group of cases against Poland for 1265 meeting (20–22 September 2016) (DH)*, < https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680684aeb >, accessed: 15 May 2020.

in the bureaucracy and also to the penitentiary judge, the Ombudsman, the prosecutor, or courts.

Last but not least, I would emphasise the issues with freedom of expression due to a conviction for critical opinions. The relevant case is *Wizerkaniuk v. Poland*[36], in which one journalist was criminally convicted (by fine) for publishing an interview with a politician without his consent. There was no issue regarding the veracity of the article, the problem was that the interviewee had not given its authorisation. The Court found that the criminal proceedings and sanction imposed on a journalist constituted a disproportionate interference with the right to freedom of expression. National courts did not have any regard to the substance of the interview and did not examine whether or not the publication actually distorted the original statements of the politician and presented them in a false or manipulated context. Also, Polish courts completely disregarded the status of the interviewee, who at the time was an active politician, a Member of the Polish Parliament. The case law of the Court consistently emphasises that protection granted to politicians against criticism is much narrower than that protection applicable to all other persons.

Kaperzynski v. Poland concerned a journalist's criminal conviction for not having published a reply by a mayor to an article which criticised the authorities' dealing with deficiencies of the local sewage system[37]. Domestic courts sentenced the journalist for 80 hours of community service with a two-year probation period. Moreover, the criminal court prohibited Mr Kaperzyński from pursuing his profession for two years and ordered the judgment to be displayed at the premises of the municipality office.

Obviously, these cases were emblematic of a wider problem: journalists in Poland would be criminally charged and prosecuted for publishing quotes without prior authorisation, and the domestic courts would have no regard to whether the published statements corresponded to what had been said during the interview. Subsequently, the Polish Press Act was amended. The obligation to obtain authorisation and the related procedures with time-limits were clarified. According to the Helsinki Foundation for Human Rights, the efficient implementation of the Court's

36 *Wizerkaniuk v. Poland*, application no. 18990/05, judgment of 5 July 2011.

37 *Kaperzynski v. Poland*, application no. 43206/07, judgment of 3 April 2012.

judgments requires advocacy at the domestic level[38]. Journalists started a whole campaign to amend the Press Act which dated back to the Communist times. They were supported in their advocacy by NGOs and other activists, who reached out to the lawmakers to raise their awareness of the need for legislative changes. Although the Court does not require in its jurisprudence the abolition of criminal defamation in the domestic legal systems, due to the extensive use of such mechanism in Poland the decriminalisation and turning to the civil remedies should be viewed as an appropriate measure to protect people's reputation.

5. The Moldovan examples of the implementation of judgments

Torture and ill-treatment were major problems in the Republic of Moldova. From the vast case law, I have selected examples that seem particularly illustrative. Until 31 December 2019, the ECtHR found about 150 violations of art. 3 of the ECHR. The first conviction for ill-treatment and inadequate investigation of ill-treatment was issued in the *Corsacov* judgment[39]. At the implementation level, the *Corsacov* group of cases comprised of 26 judgments which mainly concerned: the ill-treatment and torture inflicted on the applicants while in police custody, the authorities' failure to carry out effective investigations of ill-treatment and, as a result of a deficient investigation, the lack of an effective compensatory remedy[40]. The ECtHR found that in several cases there were used classic and extremely harsh methods of torture (such as falaka, Palestinian hanging, usage of electric shock, sexual abuse).

All cases of ill-treatment in Moldova are investigated by the prosecutors and not by the police. Nevertheless, the ECtHR found that the procedural obligations were not met concerning the competence of the body

38 Notes from the multi-stakeholder workshop organised jointly by the European Implementation Network (EIN), the Helsinki Foundation for Human Rights (HFHR), and the Open Society Justice Initiative (OSJI). *Implementation of Strasbourg Court judgments: a shared responsibility*, November 2019, < http://www.einnetwork.org/blog-five/2019/11/14/implementation-of-strasbourg-court-judgments-a-share-responsibility >, accessed: 2 April 2020.

39 *Corsacov v. Moldova*, application no. 18944/02, judgment of 4 April 2006.

40 *Corsacov group*, application no. 18944/02, and *Levinta*, application no. 17332/03, v. Republic of Moldova, Supervision of the execution of the European Court's judgments.

investigating the case, neither were they met regarding its independence or impartiality, as well as thoroughness and promptness of investigation, and the level of the involvement of the victim[41]. In the *Boicenco* judgment, the fact that ill-treatment was investigated by the prosecutor responsible for carrying out criminal investigation against the applicant was criticised[42]. Also, though it was alleged that the applicant was in a bad condition, the prosecutor did not examine the applicant's medical file and did not interrogate the doctors who treated the applicant. Following this judgment, the General Prosecutor issued the decision, under which territorial prosecutors were obliged to designate a special prosecutor who would carry out urgent measures aimed at investigating ill-treatment cases.

Thoroughness of ill-treatment investigation was criticised in about ECtHR 50 judgments. In the *Ciorap* case, the Court found that the prosecutors hesitated before opening criminal cases to investigate ill-treatment and the opened investigations were not thorough or prompt. At the same time, many opened investigations were discontinued by the prosecutors despite the clear evidence of ill-treatment[43]. In the judgments *Valeriu and Nicolae Roșca* and *Paduret*, the ECtHR found that the failure to apply sanctions or application of too lenient sanctions for torture was contrary to the obligation to prevent ill-treatment[44]. The cases refer to the sentencing for the excess of power to three years' imprisonment with suspension and banning from working in law enforcement for two years when during the investigation process, the person who applied torture was not suspended from his/her office. This was the minimum punishment provided by the law and the judges did not consider evident aggravating circumstances at all. The qualification of the acts as the excess of power instead of torture was also criticised by the Court. The case of *Paduret* refers to non-application of sanctions for ill-treatment due to the lapse of the limitation period provided by the law. In those cases, suspension from office was also not applied.

41 V. Gribincea, P. Grecu and others, *Execution…*, p. 58.

42 *Boicenco v. Moldova*, application no. 41088/05, judgment of 11 July 2006.

43 *Ciorap v. Moldova*, application no. 7232/07, judgment of 15 March 2016.

44 *Valeriu and Nicolae Roșca v. Moldova*, application no. 41704/02, judgment of 20 October 2009, paras 71–75; *Paduret v. Moldova*, application no.33134/03, judgment of 5 January 2010, paras 70–77.

Since 2018, the Moldovan Criminal Code has been amended and the inhuman and degrading treatment cannot be sanctioned with fine anymore. Torture is always punishable by imprisonment. The issue of the application of these provisions in practice is, however, much more salient. The sanctions ordered by courts during the last years involve imprisonment, and in almost all cases of convicted policemen also banning from working for the police as a complementary sanction[45]. That progress made in establishing the necessary investigatory structures and the improvement of criminal law was noted with satisfaction by the Committee[46]. In recent years, cases of physical abuse by the police have decreased significantly. However, attempts to psychologically influence the apprehended persons still exist.

Insufficient reasoning for arrests – the ECtHR has found more than 90 violations of art. 5 of the ECHR in cases concerning Moldova. The most frequent violation is related to the failure of domestic courts to give relevant and sufficient reasons when ordering or extending the applicants' detention on remand[47]. *Sarban* and *Becciev* were the first judgments where the insufficient reasoning for remand judgments was noted[48]. The arrests/extensions of arrests were ordered by judges based on a simple reproduction of the legal grounds provided by the Criminal Procedure Code, without the indication of specific reasons to consider as valid allegations that the applicant could hinder the investigation, abscond, or commit other crimes. The judges did not try to combat the arguments against the arrests brought by the defence.

Another example, seen in the *Buzadji* case ruled by the Grand Chamber, was typical for Moldova and „atypical" for the European community[49].

45 Moldovan Government Action Report on the execution of the European Court of Human Rights judgments delivered in *Corsacov* group of cases (no. 18944/02), < https://rm.coe.int/168072fc0f >, accessed: 15 May 2020.

46 The supervision of the *Corsacov* case was closed by the Committee of Ministries on 1331st meeting of 4–6 December 2018, but results of legal and organisational reforms adopted to prevent and combat police ill-treatment and ensure the effectiveness of investigations continue to be examined within the framework of the *Levința* group.

47 For more details, on all cases regarding violations of art. 5 of the ECHR concerning Republic of Moldova, please see: V. Gribincea, D. Goinic, P. Grecu, *Sinteza violărilor constatate de Curtea Europeană a Drepturilor Omului în privința Republicii Moldova*, February 2018, p. 5–6, < http://crjm.org/wp-content/uploads/2018/03/Violari-20-de-ani.pdf >, accessed: 15 May 2020.

48 *Sarban v. Moldova*, application no. 3456/05, judgment of 4 October 2005; *Becciev v. Moldova*, application no. 9190/03, judgment of 4 October 2005.

49 *Buzadji v. Moldova*, application no. 23755/07, judgment of 5 July 2016.

The applicant argued that he was kept in pre-trial detention and under house arrest without the necessary, strong justification. However, beyond the specific facts of the case, the *Buzadji* judgment is of general importance for the interpretation of Article 5. The Court deemed it necessary to reconsider and to clarify the established case law about the justification of detention on remand. The traditional approach was to accept that the first phase of detention could be justified by a reasonable suspicion against the person. After a certain period of time, other relevant and sufficient reasons must be shown if the detention is to remain compatible with art. 5 ECHR.

The fact that this practice still persists is a source of great concern, given that the above mentioned *Sarban* group of cases has been under pending supervision by the Committee for about 14 years. Poor justification of remand judgements poses a serious problem in Moldova. Generally speaking, it lies not in legislation, but rather in the deficient judicial practice which is influenced by the insufficient independence of judges, prosecutorial bias of many investigative judges, and by the widespread phenomenon of the frequent application of arrest in the past[50]. In Moldova, the laws are more or less in line with standards of the ECHR, the problem is their application[51]. For example, in most cases, judges use the „copy-paste" method, particularly when extending detention. Judges rely on the same grounds, repeating them without reviewing in substance. Subsequent decisions are copies or close versions of the previous ones. Judges refuse to review the new circumstances indicated in the motions. At the same time, other preventive measures, which are an alternative to arrest, are not used enough. The statistic of the Agency for Court Administration does not suggest that house arrest has been applied more frequently in recent years and bail is generally not applicable in Moldova. That is why it is recommended to amend the legislation and introduce bail and (judicial) control as standalone, non-custodial preventive measures (currently they can be ordered by a judge only if the remand request is dismissed).

Poor conditions of detention – until 31 December 2019, ECtHR found about 50 violations of the Convention relating to poor detention conditions. The first judgments for poor conditions of detention were delivered

50 Council of Europe, *Report on the Research on the application of pre-trial detention in the Republic of Moldova*, February 2020.

51 J. Scourfield McLauchlan, *The impact…*, p. 15.

back in 2005 in the cases *Ostrovar* and *Becciev*[52]. The most significant part of those judgments is related to poor conditions in the Penitentiary no. 13 of Chisinau – 25 judgments[53].

The situation in the Penitentiary no. 13 is quite worrying because the building is very old, most of it dating from the second half of the 19th century, and its reparation is problematic, if not impossible. The issues concerning the Penitentiary No. 13 may be resumed as follows: the cells were overcrowded and beds were missing, the food was insufficient or of bad quality, the cells were infested with worms and cockroaches, iron blinders were blocking the access of natural light, water and electricity were disconnected periodically which restricted the use of the toilet, passive smoking was widespread, toilets were not separated, inmates could take showers only once in 15 days etc.

According to the 2019 SPACE Report, Moldova is still in the top 7 Council of Europe countries with the highest per capita prison population, with 197 detainees per 100,000 inhabitants, while the European median is 106[54]. The problem of Chisinau's Penitentiary no. 13 seems to be acknowledged by the national authorities[55]. Besides overcrowding and poor material conditions of detention in penitentiary establishments, other problems are the lack of access to adequate medical care (including specialised medical treatment) together with the absence of effective domestic remedies in those respects.

Therefore, until the construction of the new prison is finished, the authorities must take measures to eliminate the overcrowding and to improve the hygiene conditions in the Prison No. 13. The problem of overcrowding could be mitigated through the application of non-custodial preventive measures.

52 *Ostrovar v. Moldova*, application no. 35207/03, judgement of 13 September 2005; J. Scourfield McLauchlan, *The impact…*, p. 15, note 50.

53 J. Scourfield McLauchlan, *The impact…*, p. 15, note 12, p. 3.

54 Council of Europe, *2019 SPACE I Prison Populations Report*, p. 30, < http://wp.unil.ch/space/files/2020/04/200405_FinalReport_SPACE_I_2019.pdf >, accessed: 15 May 2020.

55 On 14 June 2013, the Moldovan Government concluded an agreement with the Council of Europe Development Bank and received a loan for construction of a new prison in an amount of almost EUR 40 million. The authorities shall invest about 6 million EUR as well. In order to build the penitentiary, about 44.6 hectares of land near Chisinau were allocated and it is foreseen to hold about 1,600 detainees. Despite that, the construction works have not started yet.

6. Conclusions

The reason for a comparative study of the implementation of the ECHR judgments by Poland and Moldova is manifold. Most importantly it is the similarity of those countries, in that they are both referred to as countries of Central Europe, with a soviet (communist) past. However, the differences are evident at this stage. One country is already a member of the European Union, while another one is still considered as a „transition country". The latter one has to accumulate experiences of progressive practice existing within the European Union.

From the author's perspective, the ECHR is the most effective human rights mechanism ever devised. This paper tries to explore the extent to which the ECtHR has improved the level of human rights protection within both countries. The overview of the case law concerning Poland and Moldova shows some characteristic features. Firstly, in Poland there is no sign of very serious human rights violations which has occurred during the last years in Moldova (allegations of torture and ill-treatment, unlawful detentions and arrests). Secondly, there is no indication that in some areas the written law is in vital contrast to the Convention's requirements, despite the poor practice.

Both countries have a history of violations of the ECHR, which are broader in the case of Moldova. The lack of human rights protection stems from the judiciary and state administrative bodies' failures. This *inter alia* has given rise to mistrust in decisions provided at the domestic level and explains why many Polish and Moldovan people place their hope in Strasbourg.

Indeed, Poland and Moldova, both tried to overcome two thresholds of Europeanisation in the following ways: by adjusting to the statute-based requirements of the membership in the Council of Europe and by accepting the strict requirements of the procedure of human rights protection, including the right for individual applications. But the Court's case law has to be considered with the historical and socio-political context of the specific country in mind. The Republic of Poland was one of the first states from Central and Eastern Europe which ratified the ECHR. Furthermore, in Poland, the ECHR has become immensely popular and gained the status of an instrument for individuals to seek justice. It is generally accepted by the Polish courts that it is not sufficient

to refer only to the text published in the Polish Journal of Laws but also to the Court's case law.

In Moldova, even after 22 years of ECHR ratification, human rights matters are profoundly affected by the post-communist „manner of thinking". The relationship between those in power and the general public could not be turned completely just overnight. Most of the violations found in recent years are repetitive, i.e. are similar to violations established by the ECtHR in Moldovan cases many years ago. This is a clear indicator that the Moldovan Government has not taken sufficient measures to comply with the ECtHR judgments. As a result, the trust in public authorities is poor, while the ECtHR is overwhelmed with a high number of Moldovan applications and cases.

Although the influence of the ECHR is sometimes hard to measure, it is significant. It is important to remember that the entire system of ECHR law is constructed on the foundation of domestic authorities, part of which are also domestic courts. As former President of the ECtHR, Lord Arnold Duncan McNair, stated: „The European Court is no more than 'crowns the edifice', that is this larger construction. For the Strasbourg Court to be able to play no more than a subsidiary role, the domestic authorities must be prime voters in the system of rights protection".

Therefore, the ECtHR has only few instruments with which it can assure that its case law is respected and followed by national courts, as opposed to national supreme courts which usually are adequately equipped to impose their judgements on the lower courts. This situation emphasises the necessity of cooperation based upon the understanding that all jurisdictions share a common mission to protect human rights. The ECtHR cannot function without a constant dialogue with domestic authorities. A good example might be the Constitutional Courts and Supreme Courts of Justice of Moldova and Poland, which must be the pillars of strengthening of this cooperation. When the European and the national level act in unison, the judicial protection of human rights and human dignity becomes more effective.

Implementing ECtHR judgments is a slow and difficult process. It begins with compensating the victim, which is done soon after the judgment is issued – paying money is an easier part. Systemic changes could take months, years or decades to accomplish. The above-mentioned data

indicate that Poland is constantly improving the way of fulfilling its obligation to enforce ECtHR judgments. In the process of generating systemic changes in Poland, the impact of the ECtHR is reflected also by a precise impact of addressing certain specific problems and not necessarily structural ones. In the process of generating systemic changes in Moldova, the impact of the ECtHR is necessary in view of emerging challenges, such as the existing corruption practices, lower protection of the victim of crimes or poor practices of the public bodies (the prosecutor's office, the police or tax authorities) or the increasing arbitrariness of actions and the lack of accountability of high public officials etc.

It is worth noting that the case law of the ECtHR in Polish and Moldovan cases confirms that the main problem is not the poor quality of law, but the manner in which the law is enforced, especially by judicial bodies. This is illustrated by several judgments delivered within the last years that concerned the practical application of such law. The effective implementation has as much to do with the attitudes of domestic stakeholders as it is dependent on other factors, related to elections or the real political will.

Summary

The aim of the paper is to assess the effectiveness of the activities of the Republic of Poland and the Republic of Moldova in terms of the implementation of the European Convention on Human Rights standards in some specific human rights areas. The findings make it possible to identify the positive steps and setbacks that the Committee of Ministers faced in the supervision of judgment implementation executed by the concerned countries. The paper focuses on the measures taken to enforce ECtHR judgments and describes the main problems identified by the ECHR in relation to both countries.

The paper undertakes to explore the extent to which the European Court of Human Rights has improved the situation of human rights protection within these countries. The overview of the case law concerning both countries shows some common features but also some differences. Both countries have a history of violations of the European Convention on Human Rights, which is broader in the case of Moldova. The paper argues that the lack of human rights protection stems from the judiciary and state administrative bodies' failures. This has given rise to mistrust in decisions provided at the domestic level and explains why many Polish and Moldovan people place their hope in Strasbourg.

Keywords: European Convention on Human Rights, European Court of Human Rights, Committee of Ministers, Council of Europe; human rights

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Bibliography

Cherviatsova A., *The European Court of Human Rights: Bringing Together Legal Systems*, „Baltic Journal of Law & Politics" 2012, vol. 5:1.

Drzewicki K., *Experiences of the first decade of ECHR implementation in Poland*, XII Warsaw Seminar European Convention on Human Rights – 25 years of changes to Polish law and practice, Ministerstwo Spraw Zagranicznych 2017.

Gribincea V., Goinic D., Grecu P., *Summary of violations found by the European Court of Human Rights regarding the Republic of Moldova*, [Sinteza violărilor constatate de Curtea Europeană a Drepturilor Omului în privinţa Republicii Moldova], 2018, < http://crjm.org/wp-content/uploads/2018/03/Violari-20-de-ani.pdf >, accessed: 5 June 2020.

Gribincea V., Grecu P. and others, *Execution of Judgments of the European Court of Human Rights by the Republic of Moldova for 2013–2014*, Legal Resources Centre from Moldova 2015.

Keller H., *Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 2005.

Keller Stone H., Sweet A., *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford Scholarship Online 2009.

Mayer G., *Execution of European Court of Human Rights' judgments against Poland – achievement of the last twenty years*, Representation of the Republic of Poland before the European Court of Human Rights – over 20 years of experience of the Ministry of Foreign Affairs, Ministerstwo Spraw Zagranicznych 2017.

Scourfield McLauchlan J., *The impact of the European Court of Human Rights on justice sector reform in the Republic of Moldova*, „Journal of Liberty and International Affairs" 2018, vol. 4 (2), 9–24.