

ABHANDLUNGEN

Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland

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A. Preliminary Remarks

This article presents the results of a pilot project, which is part of a larger research program about the reception of the European Convention for the protection of human rights and fundamental freedoms (the “Convention”, ECHR) in different countries. Seen from the point of view of international law, the Convention's control system is unique: the Parties agree to subject themselves to international judicial supervision of their obligation to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention.¹ However, to exam-

Abkürzungen: AJP = Aktuelle Juristische Praxis; Amtl. Bull. = Amtliches Bulletin; AS = Amtliche Sammlung des Bundesrechts; BBl. = Bundesblatt; BGE = Bundesgerichtsentscheid; BJM = Basler Juristische Mitteilungen; BStP = Bundesgesetz vom 15. Juni 1934 über die Bundesstrafrechtspflege (Federal Statute on criminal procedure, SR 312.0); DR = decisions and reports; Dz. U. = Dziennik Ustaw; EuGRZ = Europäische Grundrechte Zeitschrift; FF = Feuille fédérale; MStP = Bundesgesetz vom 23. März 1979 über den Militärstrafprozess (Federal Statute on military criminal procedure, SR 322.1); NR = Nationalrat; NZZ = Neue Zürcher Zeitung; OG = Bundesgesetz vom 16. Dezember 1943 über die Organisation der Bundesrechtspflege (Federal Statute on the organization of the Federal Administration of Justice, SR 173.110); OTK = Orzecznictwo Trybunału Konstytucyjnego; RJN = Recueil de jurisprudence Neuchâteloise; SJIR = Schweizerisches Jahrbuch für Internationales Recht (seit 1991 Schweizerische Zeitschrift für Internationales und Europäisches Recht, SZIER); SR = Systematische Sammlung des Bundesrechts; StR = Ständerat; VPB = Verwaltungspraxis der Bundesbehörden; VwVG = Bundesgesetz vom 20. Dezember 1968 über das Verwaltungsverfahren (Federal Statute on administrative procedure, SR 172.021).

¹ For the historical development of the Convention, see for example R. Bernhardt, *The International Protection of Human Rights: Experiences with the European Court of Human Rights*, in: *International Law in the Post-Cold War World*, London 2001, 388 et seq. For an appraisal of the Convention and of its control mechanism, see A. Z. Dżemczewski, *La prévention des violations des droits de l'homme*, in: *Revue trimestrielle des droits de l'homme* 11 (2000), 402 et seq. For the in-

ine the real impact of the Convention on the national legal order it is indispensable to research into the national reception process more closely. The idea of the pilot project was to gather the experiences of two Member States of the European Council that are confronted with the ECHR in a different historical, political and social context. Poland is a “new” Member State with a communist past, a large country with a centralized structure in Central Europe, whereas Switzerland is an “old” Member State, with a strong democratic tradition, a small country with a confederal structure in Western Europe. Poland can look back on about 10 years of experiences with the ECHR, Switzerland on about 30.

This article aims to reveal the wide range of problems the countries are faced with in the reception process. Analysis of the reception process must be done on different levels: First, on a historical basis we look at the question of what hopes and fears were connected with the ratification of the ECHR. Second, what theoretical underpinnings have been developed in order to integrate the ECHR in the constitutional order? Third, which practical hurdles hampered the reception of the ECHR? Forth, how did the political actors, the administration and in particular the courts cope with unpleasant judgments from Strasbourg?

The comparison of the reception process in Poland and Switzerland is not simple. However, the analysis of the reception process in different countries is interesting from both the national and the international point of view. Dealing with questions concerning the ECHR on the national level it can be of great help to know whether these questions are also of interest elsewhere and what approaches exist in other countries. With regard to the international level, it is important to know whether the system of the Convention or the case law of the Court causes problems that a whole number of Member States – or even all – are faced with.

B. Poland and Switzerland *vis-à-vis* the ECHR

1. Historical Context and Development

Key Note

Dealing with the question of when and in what historical context the countries have joined the Council of Europe and subsequently have ratified the ECHR and its various protocols gives the opportunity to describe the hopes and fears connected with the accession to the Council of Europe and the acceptance of the implementation mechanics of the ECHR. This might explain why a country formulated reservations or interpretative declarations.

ternal organisation of the European Court of Human Rights (the “Court”), see A. Z. Drzemc z e w s k i, The Internal Organisation of the European Court of Human Rights: the Composition of Chambers and the Grand Chamber, in: *European Human Rights Law Review*, 2000, 233 et seq.

For Poland

Before Poland's ratification of the Convention in 1993,² the Constitutional Tribunal took advantage of the fact that Poland had already adhered the International Covenant on Civil and Political Rights (ICCPR),³ which entered into force for Poland in 1977. As several particular human rights in the two treaties are worded in a similar way, the human rights guarantees are to a certain degree equal. Before the new Constitution entered into force, the Constitutional Tribunal (established as early as in 1986⁴) held in a judgment in 1992 that firstly it was competent to examine the question of whether a national law is compatible with international law, based on the rule of law principle, and secondly that the access to an independent and impartial court is part of the rule of law; any restriction would be inconsistent with the international obligation under the ICCPR.⁵ The Supreme Court took the Convention into consideration in dealing with human rights claims even before Poland ratified it.⁶ The Polish courts took advantage of a strong value-oriented tradition in the constitutional theory.

In Poland, before the Convention was ratified, it was obvious that neither criminal law (both substantive and procedural) nor civil procedure law conformed to the human rights standard in Europe. Between 1989 and 1997, Poland made several amendments of the Criminal Code, the Code of Criminal Procedure and the Code of Civil Procedure. These reforms provided for a two-level appeal process in most civil and criminal matters. These amendments were partly made before Poland had ratified the Convention. However, the changes introduced were very much in the spirit of the Convention.⁷

² See *infra* note 9.

³ Międzynarodowy Pakt Praw Obywatelskich i Politycznych, International Covenant on Civil and Political Rights, entered into force 23 March 1976, 999 UNTS 171, entered into force for Poland 18 June 1977, Dz. U. 77.38.167.

⁴ For the historical development of the Constitutional Tribunal, see A. Zoll, Die rechtliche Wirksamkeit der Entscheidungen des polnischen Verfassungsgerichtshofes, in: B.-C. Funk (ed.), *Der Rechtsstaat vor neuen Herausforderungen*, Wien 2002, 856 et seq.

⁵ Trybunał Konstytucyjny, orzeczenie, K 8/91, 1992.01.07, OTK 1992/1/5; similar also Trybunał Konstytucyjny, orzeczenie, 1992.10.20., K 1/92, OTK 1992/2/23. See A. Zoll, Das Rechtsstaatsprinzip in der Rechtsprechung des polnischen Verfassungsgerichtshofes, in: J. A. Frowein/T. Maruhn (eds.), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, Berlin etc. 1998, 65 et seq. Under the new Constitution of 1997, the Constitutional Tribunal has the power to adjudicate the conformity of statute to ratified international agreements whose ratification required prior consent granted by statute, and the conformity of legal provisions issued by central state organs to the Constitution, ratified international agreements and statutes, Article 188 (2) and (3). See also A. Zoll, *Der Einfluss der Rechtsprechung des Verfassungsgerichtshofes auf den politischen Wandel in Polen*, in: *Die Rolle der Verfassungsgerichtsbarkeit in politischen Transformationsprozessen, Gemeinschaftsveranstaltungen der Juristischen Studiengesellschaft und des Bundesverfassungsgerichts anlässlich der fünfzigjährigen Gründungsjubiläen am 22. März 2001, Heidelberg 2002*, 12.

⁶ Sąd Najwyższy, uchwała, 1992.04.10, I PZP 9/92, held that a dismissal because of somebody's political or religious beliefs is an infringement of Articles 9 and 10 ECHR.

⁷ The most significant changes are the introduction of a court control of arrests, transfer of the competence to use temporary arrest to the courts, introduction of more rigorous time limits for tem-

Soon after the collapse of the communist regime in Poland in 1989, the country signed the ECHR and several protocols.⁸ As early as 1991, the Convention and Protocols No. 2, 3, 5 and 8 were signed,⁹ followed in 1992 by the signature of Protocols No. 1 and 4.¹⁰ In 1994 Poland signed Protocol No. 11, which restructured the control machinery.¹¹ Thus far the last step in its ratification history is the accession to Protocol No. 6 regarding the abolition of the death penalty in 1999.¹² However, the very last step for the complete abolition of capital punishment in all circumstances has not yet been taken (March 2005) – Protocol No. 13 has been signed but not ratified.¹³ Protocol No. 12 has neither been signed nor ratified. Pro-

porary arrest, a 5-year moratorium for the execution of capital punishment; for more details, see Z. Hołda, *The Influence of Changed Prison Legislation on Prisoners' Rights and Prison Conditions*, in: L. Leszczyński (ed.), *Protection of Human Rights in Poland and European Communities*, Lublin 1995, 230 et seq.; P. Hofmański, *Menschenrechtsschutz in Polen, neue Dimension nach 1989*, in: P. Brand (ed.), *Démocratie hier, et aujourd'hui*, Białystok 1995, 262; S. Waltoś / A. Wąsek, *Harmonizacja prawa karnego w Europie z polskiej perspektywy*, Palestra 1997, 12 et seq.; see also *infra* note 284.

⁸ For the human rights policy in the communist era, see A. Przyborska-Klimczak, *Poland's Obligations Concerning Human Rights under International Conventions*, in: *East European Human Rights Review* 2 (1996), 96 et seq.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, signed 26 November 1991, ratified 19 January 1993, entered into force for Poland 19 January 1993, Dz. U. 93.61.284; Protocol No. 2, signed 26 November 1991, ratified 19 January 1993, entered into force for Poland 19 January 1993, Dz. U. 95.36.176; Protocol No. 3, signed 26 November 1991, ratified 19 January 1993, entered into force for Poland 19 January 1993, Dz. U. 93.61.284; Protocol No. 5, signed 26 November 1991, ratified 19 January 1993, entered into force for Poland 19 January 1993, Dz. U. 93.61.284; Protocol No. 8, signed 26 November 1991, ratified 19 January 1993, entered into force for Poland 19 January 1993, Dz. U. 95.36.177.

¹⁰ Protocol No. 1, signed 14 September 1992, ratified 10 October 1994, entered into force for Poland 10 October 1994, Dz. U. 95.36.175; Protocol No. 4 signed 14 September 1992, ratified 10 October 1994, entered into force 10 October 1994, Dz. U. 95.36.175; Protocol No. 7, signed 14 September 1992, only ratified 4 December 2002, entered into force for Poland 1 March 2003, Dz. U. 03.42.364; Protocol No. 9, signed 14 September 1992, ratified 10 October 1994, entered into force for Poland 1 February 1995, Dz. U. 95.36.177.

¹¹ Protocol No. 11, signed 11 May 1994, ratified 20 May 1997, entered into force for Poland 1 November 1998, Dz. U. 98.147.962.

¹² Protocol No. 6, signed 18 November 1999, ratified 30 October 2000, entered into force for Poland 1 November 2000, Dz. U. 00.48.549. For a historical appraisal of the death penalty, see J. A. Rybczyńska / J. Szumski, *Death Penalty in Poland. Will Polish Abolitionist Ever Win?*, in: *East European Human Rights Review* 2 (1996), 55 et seq.; A. Zoll, *The New Polish Criminal Law Codification in the Light of the Constitution, Droit polonais contemporain 1998 1–4*, 93 et seq., argues that the combined provisions of Articles 38 and 40 Constitution leave little room for the restoration of the death penalty in Poland.

¹³ In summer 2004 the brutal murder of a young woman gave ample opportunity to discuss the re-introduction of capital punishment in Poland, see J. Kochanowski, *Granica dla najcięższych zbrodni*, Rzeczpospolita, 2004.07.12; PAP, *PiS chce przywrócić karę śmierci*, Rzeczpospolita, 2004.07.12; J. Bielecki / P. Smiłowicz, *Czy możliwe jest przywrócenie kary śmierci na gruncie prawa europejskiego. Unia albo śmierć*, Rzeczpospolita, 2004.07.13; R. Krajewski, *Zbrodniarz o niej nie myśli*, Rzeczpospolita, 2004.07.17; W. Sadurski, *Unia zabrania karać śmiercią. W sprawie kary śmierci nie ma w prawie Unii Europejskiej nawet cienia wątpliwości. Trzeba zdecydować – albo egzekucje, albo Unia*, Gazeta Wyborcza 2004.07.13; T. Dostatni OP, *Za bramy klasztoru. Kara*

TOCOL No. 14 has been signed but not yet ratified. Poland has made no reservations to the Convention or to the Protocols that it has ratified. The right of individual petition and the Court's jurisdiction were recognized from 1 May 1993, four months after ratification of the Convention and two months before publication of the text.¹⁴ The first judgment of the Court dates from December 1997.¹⁵ The accession to the Council of Europe must be understood as a measure to solidify liberal gains and to guard against future rollbacks.

Going back to the early 90s, it was true in the case of Poland (as it was for many other countries from the former Eastern Bloc, which were admitted to the Council of Europe in recent years) that it was not yet complying with the statutory requirements at the time of accession.¹⁶ But Poland's efforts to catch up with the European standards on the statutory level were considerable and effective. In retrospect, the decision to generously open the door for Poland for the ratification of the ECHR was absolutely right.

For Switzerland

Accession and Ratification History

Switzerland became the 18th country to join the ECHR, only ratifying in 1974. Various internal obstacles caused this delay. One hurdle was the concern of maintaining neutrality. Switzerland joined the Council of Europe in 1963, only after it became obvious that it would not become a military or political alliance.¹⁷

The first attempt to join the ECHR in the late 60s failed. The Council of States voted against the proposal of the Federal Council¹⁸ to join the ECHR and its Protocol No. 1 and to make five reservations.¹⁹ In retrospect, one must observe that it

śmierci, *Gazeta Wyborcza* 2004.07.17/18. So far, no concrete steps for the reintroduction of the death penalty have been undertaken.

¹⁴ Dz. U. 93.286.1/277.

¹⁵ *Proszak v. Poland* (appl. no. 25086/94), Judgment, 16 December 1997, Reports 1997-VIII, 2765 et seq.

¹⁶ For the requirements, see A. Drzewski, Monitoring by the Committee of Ministers of the Council of Europe, in: *Baltic Yearbook of International Law* 2 (2002), 85 et seq.

¹⁷ Report by the Federal Council to the Parliament concerning the relationship of Switzerland to the Council of Europe, 26 October 1962, BBl. 1962 II 1085, 1097.

¹⁸ Report by the Federal Council to the Parliament concerning the ECHR, 9 December 1968, BBl. 1968 II 1057.

¹⁹ The reservations concerned (1) the extraordinary religious Articles (Prohibition of Jesuits, Article 51 Constitution then in force, and prohibition to found new cloisters, Article 52 Constitution then in force, abrogated in the popular vote of 20 May 1973. For the wording of the articles, see the message by the Federal Council, 23 December 1971, BBl. 1972 I 105, for the Federal decree, see AS 1973 1455), (2) the lack of female suffrage, (3) some exceptions to the principle of open public hearing and pronouncement of judgments, (4) the factual inequalities for boys and girls in the school system and (5) the laws in different Cantons concerning commitment to an institution (in several Cantons it was possible to deprive someone of his liberty for medical reasons without any judicial control). In addition to these reservations, Switzerland should have formulated an interpretative declaration in respect of Arti-

was a wise decision by the political elite to avoid making these grave reservations to important guarantees of the Convention. By amending the Swiss Constitution before Switzerland joined the ECHR, the Swiss Government prevented a closer look at those reservations. After all, it was arguable whether all those reservations might be compatible with the object and purpose of the Convention.

After this first attempt, the Federal Council almost dramatically changed its policy concerning the ECHR, following the opinion of the Council of States. Thus, the goal of becoming a member of the ECHR was still a priority. Efforts to eliminate obstacles in the national legal order may have been even more intense than they would have been after an immediate ratification. Several amendments were pressed ahead with in the following months. The ECHR not only had its effects in respect of female suffrage and the extraordinary religious Articles, but also on administrative criminal law,²⁰ international judicial assistance, the Federal Statute on narcotics and the Federal Statute on military criminal law.²¹ Some amendments were also affected in various Cantons. Especially affected were the laws concerning commitment to an institution, which clearly were not in conformity with the standards of the ECHR. Various rules in the Cantons' Codes of Criminal Procedure were amended as well. However, most of the incompatibilities could be resolved by an interpretation of the existing rules in the light of the Convention.

After the acceptance of female suffrage in 1971, in a report to the Federal Parliament²² the Federal Council proposed to proceed in several steps. Switzerland would sign the Convention, but not yet Protocols No. 1 and No. 4. The ratification, however, should be carried out only after a positive vote concerning the extraordinary religious Articles. Thus, Switzerland signed the ECHR on 21 December 1972. After the abolishment of the extraordinary religious Articles in 1973, the Federal Council proposed a ratification of the Convention, the formulation of various reservations and the simultaneous acceptance of the right of individual petition and the jurisdiction of the Court.²³ The two chambers of Parliament agreed

cle 6 (3) c and e ECHR, declaring that the costs for legal assistance and interpretation could be imposed on the condemned person. An interpretative declaration shall (only) define the understanding of a guarantee under the ECHR, without constricting it, see Article 53 ECHR; J. A. Frowein/W. Peukert, *Europäische MenschenrechtsKonvention, EMRK-Kommentar*, Kehl/Strassburg/Arlington 1996, Artikel 60.

²⁰ See the message by the Federal Council on a draft Federal Statute on administrative criminal law, 21 March 1971, BBl. 1971 I 993. On page 997 et seq. the Federal Council postulated the abolition of the joint liability in cases of offence in business operations because joint liability was not in conformity with Article 6 (1) ECHR.

²¹ For the effects of the ECHR on Swiss law at that time, see the additional report by the Federal Council to the Parliament concerning the ECHR, 23 March 1972, BBl. 1972 I 989, 997.

²² Additional report by the Federal Council to the Parliament concerning the ECHR, 23 March 1972, BBl. 1972 I 989.

²³ Message by the Federal Council on the ECHR, 4 March 1974, BBl. 1974 I 1035.

in the same year²⁴ and Switzerland ratified the ECHR – already amended by Protocols No. 2, No. 3 and No. 5 – on 28 November 1974.

Protocol No. 1 was signed on 19 May 1976 but has never been ratified. The Federal Council did not submit the Protocol to the Parliament, after the Cantons showed disapproval. One by one, Switzerland signed Protocols No. 6 to 11.²⁵ Protocol No. 12 has neither been signed nor ratified. Protocol No. 13 was signed and ratified on the same day.²⁶ Protocol No. 14 has been signed, but not yet ratified.²⁷ When Switzerland ratified the Convention it also recognized the right of individual petition and the Court's jurisdiction. The former declaration was limited to three years and was always renewed for the same period.

Switzerland made two reservations in respect of (1) the laws in different Cantons concerning commitment to an institution and (2) some exceptions to the principle of open public hearing and pronouncement of judgments and two interpretative declarations stating that (1) accession to a court in the sense of Article 6 (1) ECHR was sufficiently guaranteed when a review by a judicial instance of ultimate resort was possible²⁸ and (2) that the exemption from costs for legal assistance and interpretation (Article 6 (3) c and e ECHR) should not be final. The Swiss Government withdrew the last of these on 23 August 2000.²⁹ Switzerland also formulated two reservations to Protocol No. 7 in respect of its Articles 1 and 5.³⁰ The first judgment of the Court concerning Switzerland dates from December 1979.³¹

The reservations made and the reluctant approach to the ECHR did not indicate a fundamental rejection of the Convention or a deep distrust of the Strasbourg organs, but primarily an understanding that some national rules were not (yet) compliant with the Convention. This attitude seems to be somewhat controversial in view of statements made by those politicians who thought it very unlikely that

²⁴ Federal Decree on the acceptance of the ratification of the ECHR, 3 October 1974, AS 1974 2148, BBl. 1974 I 1068.

²⁵ Protocol No. 6, signed 28 April 1983, ratified 13 October 1987, entered into force for Switzerland 1 November 1987, SR 0.101.06; Protocol No. 7, signed 28 February 1986, ratified 24 February 1988, entered into force for Switzerland 1 November 1988, SR 0.101.07; Protocol No. 8, signed 19 March 1985, ratified 21 May 1987, entered into force for Switzerland 1 January 1990, AS 1989 2371; Protocol No. 9, signed 6 November 1990, ratified 11 April 1995, entered into force for Switzerland 1 August 1995, AS 1985 3950; Protocol No. 10, signed 25 March 1992, ratified 11 April 1995, not yet entered into force; Protocol No. 11, signed 11 May 1994, ratified 13 July 1995, entered into force for Switzerland 1 November 1998, SR 0.101.09.

²⁶ Protocol No. 13, signed 3 May 2002, ratified 3 May 2002, entered into force for Switzerland 1 July 2003, SR 0.101.093.

²⁷ Protocol No. 14, signed 13 May 2004, not yet ratified, not yet entered into force.

²⁸ The wording of the clause did not make clear that a review by the Swiss Federal Supreme Court, not having full cognition, should be possible. This would have made it obvious that this clause was actually a reservation.

²⁹ AS 2002 1143.

³⁰ AS 1988 1596.

³¹ *Schiesser v. Switzerland* (appl. no. 7710/76), Judgment, 4 December 1979, Series A 34.

Switzerland might be condemned.³² Enthusiasm might have been diminished by the myth of alien judges, which already influenced Swiss policy at that time. However, from the very first the reservations were seen as a temporary solution and a mandate to the Swiss legislator to amend the national legal order so that it would be in conformity with the Convention.³³

The accession to the ECHR was not submitted to the popular vote. For the accession to some international treaties Swiss constitutional law provides an optional – and for some far-reaching treaties even a mandatory – referendum.³⁴ At the time the Constitution did not require an optional referendum for treaties that could be denounced.³⁵ After Article 89 (4) of the Constitution had been revised, the Government submitted the accession to Protocols No. 6³⁶ and No. 7³⁷ to the optional referendum. No vote was demanded. Protocols No. 9, No. 10 and No. 11 only affected matters of procedure and therefore did not “entail a multilateral unification of law” in the sense of Article 89 (3) *lit. c* Constitution of 1874.³⁸ An optional referendum was therefore not necessary. Protocol No. 13, concerning the abolition of the death penalty in all circumstances, did not affect the Swiss legal system, because the death penalty was already prohibited by Article 10 (1) Constitution. It was therefore not submitted to the optional referendum.

The fact that the ECHR was not submitted to the vote of the people can be seen as another indicator that the power of the Convention and the Court was underestimated at that time.³⁹ But it should be made clear that this point of view can only be raised in retrospect. The extraordinary development of the Convention and the progressive practice of the Strasbourg Organs could not have been anticipated in the 1970s.

The Fate of the Swiss Reservations

None of the Swiss reservations and interpretative declarations in respect of the ECHR is in force today. However, the Swiss Government did not voluntarily withdraw them all. For the first time ever an international court decided that a res-

³² H. Keller, *Rezeption des Völkerrechts. Eine rechtsvergleichende Studie zur Praxis des U.S. Supreme Court, des Gerichtshofes der Europäischen Gemeinschaften und des schweizerischen Bundesgerichts in ausgewählten Bereichen*, Zürcher Habilitationsschrift, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd. 160, Berlin etc. 2003, 300 and there cited statement of the Federal Council Mr. Graber of 3 October 1972 before the National Council (Amtl. Bull. 1972, NR, 1708).

³³ Statement of the National Council Mr. Tenchio, in: Amtl. Bull. 1969, NR, 333: “Die Vorbehalte sind kein Ruhekitzel, sondern ein Stimulus, ein Ansporn zur Aktion, zur Tat, um Ordnung in unserem Hause zu machen.”

³⁴ Articles 140 and 141 Constitution of 1999.

³⁵ Article 89 (4) Constitution then in force.

³⁶ Parliamentary decision, AS 1987 1806.

³⁷ Parliamentary decision, AS 1988 1598.

³⁸ Article 141 (1) *lit. d* no. 3 Constitution of 1999.

³⁹ See *supra* note 32.

ervation of a state in respect of an international treaty was not valid, with the consequence that the state was fully bound by the treaty. The reservation in respect of Article 5 ECHR, relating to the laws in various Cantons concerning commitment to an institution, was withdrawn by the Swiss Government in 1982,⁴⁰ after the new Articles 397f et seq. on deprivation of personal freedom for medical reasons had been inserted in the Federal Civil Code.⁴¹

The reservation in respect of Article 6 (1) ECHR, concerning some exceptions to the principle of open public hearing and pronouncement of judgments, has been ineffective since the judgment in the case *Weber v. Switzerland*.⁴² The Court decided that the reservation was invalid because it did not contain a brief statement of the law concerned, as prescribed by Article 64 (2) ECHR.

In its judgment in the case *Belilos v. Switzerland*⁴³ two years earlier, the Court had treated the interpretative declaration in respect of Article 6 (1) ECHR in a similar way. The Swiss Federal Supreme Court had dismissed the appeal of Mrs. Belilos based on the interpretative declaration. Mrs. Belilos had been fined by the cantonal police of Vaud and was not entitled to apply to a court with full jurisdiction. The Court stated that the interpretative declaration had the quality of a reservation, because Switzerland meant to exclude certain categories of proceedings from the ambit of Article 6 (1) ECHR. Thus, the Court examined whether the declaration satisfied the requirements of Article 64 ECHR.⁴⁴ The Court decided that the words "ultimate control by the judiciary" could be interpreted in different ways. Therefore the declaration fell "foul of the rule that reservations must not be of a general character" (Article 64 (1) ECHR).⁴⁵ The Court made clear that Article 64 (2) ECHR did not state a purely formal requirement. By not drawing up of a list of the cantonal and federal laws that were not compatible with Article 6 (1) ECHR, Switzerland had disregarded a clear condition, such as the requirement of a brief statement of the law concerned.⁴⁶ Practical difficulties could not justify that. For these reasons the declaration was invalid and thus, Switzerland was bound by the original terms of Article 6 (1) ECHR.⁴⁷

The judgments concerning *Belilos* and *Weber* are of exceptional importance. They stand for the development of the Court's practice that it is competent to investigate reservations and declarations of the Member States to the Convention and to decide on the legal consequences in case of a declaration of nullity of such a reservation (*Kompetenz-Kompetenz*). The first step had been the report by the Euro-

⁴⁰ Federal Decree, 13 June 1978, AS 1982 928.

⁴¹ Swiss Civil Code of 10 December 1907, SR 210; Articles 397f et seq. inserted by Federal Statute, 6 October 1978, in force since 1 January 1981, AS 1980 31.

⁴² *Weber v. Switzerland* (appl. no. 11034/84), Judgment, 22 May 1990, Series A 177.

⁴³ *Belilos v. Switzerland* (appl. no. 10328/83), Judgment, 29 April 1988, Series A 132.

⁴⁴ Today Article 57 ECHR.

⁴⁵ *Belilos v. Switzerland* (note 43), § 55.

⁴⁶ *Belilos v. Switzerland* (note 43), § 56, 59.

⁴⁷ *Belilos v. Switzerland* (note 43), § 60.

pean Commission of Human Rights concerning *Temeltasch*.⁴⁸ The Commission considered the Strasbourg organs to be competent to examine whether reservations of Member States satisfied the requirements of the Convention. The Court took on this argumentation and also decided on the legal consequences of an invalid reservation or declaration. It considered the country to be fully bound by the Convention after its reservation was declared null. That should be the case even if the country had pronounced that its reservation was *conditio sine qua non* for an accession to the ECHR.⁴⁹ It is a tremendous step in legitimacy for an international treaty system that the organs established by the treaty become independent from the parties to such an extent. The system of the ICCPR⁵⁰ did not assign an independent organ with the function of the development of the guarantees of the Covenant. Thus, the Human Rights Committee did not achieve as strong a position as the European Court of Human Rights, although it was declared to have the same competence⁵¹ after the Optional Protocol to the ICCPR⁵² had allowed individuals to petition the Committee directly about alleged violations of the ICCPR by their governments. As a reaction to this Comment by the Human Rights Committee, several states declared that the *Kompetenz-Kompetenz* had not been assigned to the Committee by the Member States.

In Switzerland the *Belilos* judgment had different effects. The Canton of Vaud amended its law, bringing it into conformity with Article 6 (1) ECHR. The new Act instituted an appeal procedure to the Police Court against any decision announced by a municipality. The Federal Parliament heatedly discussed the judgment and its consequences. Even a denunciation of the ECHR and an immediate re-accession was proposed, making a new reservation in respect of Article 6 (1) ECHR.⁵³ The cry for a radical reaction was – and is even more today – politically unlikely to be accepted by a majority.⁵⁴ However, it indicates the enormous effect of the Strasbourg case law in Switzerland and what difficulties the political establishment had in coming to terms with it. The Federal Council decided to accept the part of the judgment concerning criminal law, whereas it assumed the civil and administrative part of the declaration to be unaffected by the judgment. Thus, the

⁴⁸ *Temeltasch v. Switzerland*, Report by the Commission on Human Rights, 5 May 1982, No. 9116/80, DR 31, 120 et seq.; VPB 48 IV 1984, No. 104.

⁴⁹ *Loizidou v. Turkey*, Judgment (Grand Chamber), 23 March 1995, Series A 310, § 95.

⁵⁰ International Covenant on Civil and Political Rights, entered into force 23 March 1976, 999 UNTS 171, entered into force for Switzerland 18 September 1992, SR 0.103.2.

⁵¹ General Comment No. 24 (52) of 2 November 1994, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, (1994).

⁵² Optional Protocol to the International Covenant on Civil and Political Rights, G.A.res. 2200A (XXI), 21 U.N. Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 UNTS 302, entered into force 23 March 1976, not ratified by Switzerland.

⁵³ Amtl. Bull. 1988, StR, 554.

⁵⁴ In 1988, however, the mentioned postulate was dismissed only by a close vote of 16:15, see Amtl. Bull. 1988, StR, 561.

Federal Council submitted a clarification of the interpretative declaration concerning civil proceedings to the Secretary General of the Council of Europe on 16 May 1988.⁵⁵ Seven months later a list of the federal and cantonal laws concerned was submitted to the Council of Europe.⁵⁶ The belated re-formulation of the interpretative declaration was uniformly qualified as illegitimate by both Swiss and foreign experts.⁵⁷ In 1992 the Federal Supreme Court stated that the judgment of the Court in the *Belilos* case not only affected the part of the Swiss declaration to do with criminal matters, but also showed the invalidity of the civil section for the same reasons.⁵⁸ The additional re-formulation of the declaration in 1988 could not therefore be seen as a specification of an existing reservation but only as an inadmissible belated reservation.

The judgments of the Court concerning *Belilos*⁵⁹ and *Weber*⁶⁰ also led to a constitutional amendment a few years later. The sovereign (i.e. the people and the Cantons) accepted the guarantee of judicial review (*Rechtsweggarantie*)⁶¹ on 12 March 2000. This constitutional right establishes a rule on the national level that is in accordance with Article 6 (1) ECHR.⁶² Its ambit is even broader. It includes not only proceedings concerning civil rights and obligations or criminal charges, but also proceedings based on public law.

The interpretative declaration concerning Article 6 (3) *lit. a* and *e* ECHR was declared valid in the report by the Commission concerning *Temeltasch*,⁶³ even though Switzerland had failed to deliver a brief statement of the law concerned as prescribed by Article 64 (2) ECHR. However, the Swiss Federal Supreme Court doubted the validity of the declaration in view of the judgment in the *Belilos* case.⁶⁴

Finally, the long and cumbersome story of the Swiss reservations came to an end in 2002. The Federal Council withdrew all reservations and interpretative declarations in respect of Article 6 ECHR on 23 August 2002.⁶⁵

⁵⁵ AS 1988 1264.

⁵⁶ AS 1989 276.

⁵⁷ For the references, see L. Wildhaber, *Rund um Belilos. Die schweizerischen Vorbehalte und auslegenden Erklärungen zur Europäischen Menschenrechtskonvention im Verlaufe der Zeit und im Lichte der Rechtsprechung*, in: A. Riklin/L. Wildhaber/H. Wille (eds.), *Kleinstaat und Menschenrechte. Festgabe für Gerard Batliner zum 65. Geburtstag*, Basel 1993, 333 et seq., notes 41 and 42.

⁵⁸ Swiss Federal Supreme Court, Judgment, 1992.12.17, BGE 118 Ia 473.

⁵⁹ *Belilos v. Switzerland* (*supra* note 43).

⁶⁰ *Weber v. Switzerland* (*supra* note 42).

⁶¹ Article 29a Constitution, AS 2002 3148 et seq., adopted in the popular vote of 12 March 2000 by the people and the Cantons, not yet entered into force. For the report by the Federal Council, 20 November 1996, see BBl. 1997 I 1.

⁶² A. Key, *St. Galler Kommentar zu Art. 29a, Rechtsweggarantie (Justizreform)*, in: B. Ehrenzeller/P. Mastronardi/R. J. Schweizer/K. A. Vallender (eds.), *Die Schweizerische Bundesverfassung, Kommentar*, Zürich/Basel/Genf 2002, Rz. 2.

⁶³ *Temeltasch v. Switzerland* (*supra* note 48).

⁶⁴ Swiss Federal Supreme Court, Judgment, 1992.12.17, BGE 118 Ia 473.

⁶⁵ AS 2002 1143, in accordance with the Federal Decree, 8 March 2000, AS 2002 1142.

Comparison and Conclusion

Before ratification could be thought of, it was necessary in both countries to match the national order with fundamental requirements of the Convention. The amendments on the level of constitutional and statutory law were extensive. This goes not without saying.

A comparison of the histories of the Swiss and Polish accession shows a different approach by the two countries. It can hardly be overlooked that the Swiss policy concerning the ECHR was very cautious. The Swiss Government tried to ensure that there would be no inconformity of the national law with the Convention by means of traditional international law, such as reservations and interpretative declarations. The ECHR was seen and treated as an ordinary international treaty. Soon, however, it became obvious that the ECHR was not a treaty like others. It was a “living instrument”,⁶⁶ dynamically developed by the Strasbourg organs. Even when this development had been clearly indicated in the judgment concerning *Belilos*, the Swiss Government did not abandon its policy. Retrospectively, we must admit that there could be no doubt that the Strasbourg organs would not accept the desperate adherence to the policy of reservations. Poland, on the contrary, showed a rather carefree approach, enthusiastically accepting the Convention and its control mechanism. Historic context and certain national attitudes may serve as an explanation of this point. When Switzerland ratified the Convention in 1974 it was not yet established as a “living instrument” or *ordre public* and neither had the question of *Kompetenz-Kompetenz* as yet been brought up. These developments have been broadly accepted since the 1990s.

Poland’s unworried approach to ratification can be explained largely by the historic national will to comply completely and without reservation with European human rights standards. The ratification of the ECHR was a deliberate response to the country’s communist past. In Switzerland no similar expectations existed.

2. Status of the ECHR in National Law

Key Note

The rank of the ECHR in the hierarchy of norms is connected to the everlasting question of monism and dualism. At first glance, this might be of purely academic interest. On closer inspection, the question of rank is important because it gives the judges a wide range of instruments to implement human rights or to ignore them.⁶⁷ In particular, the question whether the ECHR has priority over national

⁶⁶ *Tyrer v. United Kingdom* (appl. no. 5856/72), Judgment, 25 April 1978, Series A 26, § 31.

⁶⁷ For a deeper analysis of this question, see A. Z. Drzemczewski, *European Human Rights Convention in Domestic Law, a Comparative Study*, London, 59 et seq.; Keller (note 32), 6 et seq.; B. Schmid, *Rang und Geltung der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 3. November 1950 in den Vertragsstaaten*, Basel/Frankfurt a.M. 1984, *passim*.

statutes and over the Constitution is of great concern. One must draw a distinction between the status of the Convention and the effect of judgments of the Court in domestic law. Firstly, the question of priority of the ECHR in the national legal order leads inevitably to the question what position and power the highest court has in ensuring human rights in the specific country. Here one has to ask whether the ratification of the ECHR had a general impact on the constitutional design of the judiciary, or in other words, what the ECHR's impact on the national judicial system was. Secondly, attention has to be drawn to the effect of the judgments of the Court in the domestic sphere.

To begin with, in all Member States of the Council of Europe a judgment of the Court is without direct legal effect. Nonetheless, some states allow the applicant to request a reopening of cases, i.e. these states pave the way not only for compensation, but also open the possibility for the correction of a domestic judgment found contrary to the ECHR.⁶⁸

Of general importance is the question whether the Member States took any steps in order to prevent violations of the Convention.⁶⁹ In particular, it is interesting to see to what extent they verify the compatibility of draft laws, existing law and administrative practice with the Convention and to what degree this is institutionalized.

For Poland

Domestic and International Law

The relationship between domestic and international law was not explicitly mentioned in the Polish Constitution of 1952. Although in academic writings the incorporation of international law and its direct applicability was favored, this was not realized in the courts' practice.⁷⁰ Neither did the Constitution of 1992 (the so-called Little Constitution) clarify the relationship of national and international law.⁷¹

Most recently C. Sciotti-Lam, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne*, Publications de l'Institut des droits de l'homme, Bruxelles 2004, *passim*.

⁶⁸ I. Cameron, *The Public Order of Europe, Some Comments on the Domestic Legal Effect of Judgments of the European Court of Human Rights*, Valletta 1999, 43. See *infra* note 248.

⁶⁹ See also Recommendation Rec(2004)5 of the Committee of Ministers on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down by the European Convention on Human Rights, adopted on 12 May 2004.

⁷⁰ A. Z. Drzemczewski/M. A. Nowicki, *The Impact of the ECHR in Poland*, in: *European Human Rights Law Review*, 1996, 265 et seq.; M. Hošková, *Das Völkerrecht als Maßstab verfassungsgerichtlicher Entscheidungen in einigen ost- und mitteleuropäischen Staaten*, in: J. A. Frowein/T. Marauhn (eds.), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa*, Berlin etc. 1998, 444.

⁷¹ For the position and importance of international law in general in Poland before the new Constitution entered into force, see W. Czaplinski, *Einige Anmerkungen zur Bedeutung des Völ-*

In the Polish Constitution of 1997, Article 91 (1) gives the basis for a monistic attitude towards international law, i.e. after promulgation a ratified international treaty constitutes part of the domestic law and is applicable directly, unless its application depends on the enactment of a statute.⁷² Article 91 (2) clearly declares that an international agreement ratified upon prior consent granted by statute will have precedence over statutes if that agreement cannot be reconciled with the provisions of those statutes.⁷³ The Constitution's friendly approach towards international law⁷⁴ is a major challenge for the courts.⁷⁵ Article 89 (1) of the Constitution enumerates the types of international treaties that require prior consent. Among them are agreements that concern freedoms, rights or obligations of citizens. In particular, the pre-emption of the Convention in relation to Polish statutes not reconcilable with the European standards is accepted in the case law of the Supreme Court.⁷⁶

The administration of justice is implemented by the Supreme Court, the common courts, administrative courts and military courts.⁷⁷ Court proceedings have at least two levels.⁷⁸ Common courts are district courts (*Rejonowy*), provincial courts (*Okręgowy*) and the courts of appeal (*Sąd administracyjny*). The Supreme Court exercises supervision over common and military courts regarding judgments.⁷⁹ It is the highest central judicial organ and the highest court of appeal. The High Ad-

kerrechts in der Rechtsprechung der Verfassungsgerichte Mittel- und Osteuropas, in: J. A. Frowein/T. Maruhn (note 70), 495 et seq.; Hofmański (note 7), 265.

⁷² See Zoll (note 12), 89 et seq. For the relationship between national law and international law in general, see W. Czaplinski, International Law and Polish Municipal Law, in: Hague Yearbook of International Law 8 (1995), 37 et seq.; W. Czaplinski, Relationship between International Law and Polish Municipal Law in the Light of the 1997 Constitution and of the Jurisprudence, in: Revue belge de droit international 31 (1998) 1, 259 et seq.; A. Z. Drzemczewski, Relationship between International Law and Polish Municipal Law in the Light of the 1997 Constitution and of the Jurisprudence, in: Revue belge de droit international 31 (1998) 1, 134 et seq.

⁷³ According to Article 241 (1) Constitution, international agreements previously ratified must be considered as agreements ratified with prior consent granted by statute and shall be subject to the provision of Article 91 Constitution, if their connection with the categories of matters mentioned in Article 89 (1) Constitution derives from the terms of an international agreement. This is the case for the Convention.

⁷⁴ See also Article 9 of the Constitution: "The Republic of Poland shall respect international law binding upon it."

⁷⁵ See W. Czaplinski/A. Wyrozumska, Sędzia krajowy wobec prawa międzynarodowego, Warszawa 2001, 103 et seq.

⁷⁶ See *infra* note 85. For case law traditionally friendly towards international law, see E. Skrzydło-Tefelska, Selected Jurisprudence of the Polish Supreme Court and Constitutional Court Involving Questions of Public and Private International Law, in: The Polish Yearbook of International Law 22 (1995/96), 206 et seq. No case of the Constitutional Tribunal has dealt substantially with Article 91 (2) Constitution so far.

⁷⁷ Article 175 (1) Constitution.

⁷⁸ Article 176 (1) Constitution.

⁷⁹ Article 183 (1) Constitution.

ministrative Court and other administrative courts exercise control over the performance of public administration.⁸⁰

Three judiciary organs in Poland are of importance for the reception of the Convention: the Supreme Court (*Sąd Najwyższy*), the High Administrative Court (*Naczelny Sąd Administracyjny*) and the Constitutional Tribunal (*Trybunał Konstytucyjny*).⁸¹

An overview of the case law of the Supreme Court shows that the Convention and its interpretation by the European Court of Human Rights are well known and accepted.⁸² The Supreme Court takes the Strasbourg practice into account on a regular basis in interpreting specific human rights guarantees⁸³ or in sketching the preconditions of the limitation of human rights in general.⁸⁴ The Supreme Court goes so far as to acknowledge the predominance of the Convention over Polish statutes that are contrary to the European standards in criminal proceedings, relying on Article 91 (2).⁸⁵

A look into the practice of the High Administrative Court shows its generally friendly attitude towards the idea of human rights⁸⁶ and towards international law

⁸⁰ Article 184 Constitution.

⁸¹ For the judiciary system in Poland, see Drzemczewski/Nowicki (note 70), 267 et seq. In particular for the function of the constitutional complaint, see *infra* notes 179 et seq.

⁸² For the general importance of the Convention, see *Sąd Najwyższy*, postanowienie, 1995.01.11, III ARN 75/94.

⁸³ *Sąd Najwyższy*, wyrok, 2002.07.12, V CKN 1095/00: interpreting the freedom of press and expression in the light of Article 10 ECHR; *Sąd Najwyższy*, postanowienie, 2003.07.03, II KK 146/03; *Sąd Najwyższy*, postanowienie, 2002.10.15, V KK 140/02; *Sąd Najwyższy* (*Mandugeqi* and *Jinge* case), postanowienie, 1997.07.29, II KKN 313/97: extradition in the light of the *Soering* practice of the Court *Soering v. United Kingdom* (appl. no. 14038/88), Judgment, 7 July 1989, Ser. A vol. 201). See also M. A. Nowicki/I. Rzeplińska, *Ochrona praw cudzoziemców w orzecznictwie organów Europejskiej Konwencji Praw Człowieka*, *Palestra* 42 (1998), 101 et seq.; *Sąd Najwyższy*, wyrok, 2003.04.03, III KKN 143/01: right to an interpreter in criminal proceedings in the light of Article 6 (3) (e) ECHR; *Sąd Najwyższy*, postanowienie, 2003.05.06, III KZ 13/03: right to appeal in the light of Article 13 ECHR; *Sąd Najwyższy*, postanowienie, 2003.05.29, I KZP 15/03: access to court in the light of Article 6 (1) and (3) (c) ECHR concerning in camera decisions without written grounds prepared, because the appeal is manifestly ill-founded; *Sąd Najwyższy*, wyrok, 1999.11.09, II KKN 295/98, limiting the use of anonymous witnesses in the light of Article 6 (1) and Article 6 (3) d ECHR; *Sąd Najwyższy*, wyrok, 1993.07.28, WRN 91/93, interpreting Article 270 § 1 kodeks karny (Criminal Code) in the light of Article 9 ECHR.

⁸⁴ *Sąd Najwyższy*, uchwała, 2003.01.22, I KZP 36/02: interpreting Article 31 (3) of the Constitution in the light of the Article 5 (1) and 8 (2) ECHR and applying the proportionality test.

⁸⁵ *Sąd Najwyższy*, wyrok, 2003.01.08, IV KK 418/02; *Sąd Najwyższy*, wyrok, 2003.01.07, III KK 343/02; *Sąd Najwyższy*, wyrok, 2002.12.18, II KK 298/02; *Sąd Najwyższy*, wyrok, 2002.12.04, III KKN 361/00; *Sąd Najwyższy*, wyrok, 2002.09.03, III KKN 414/99; *Sąd Najwyższy*, wyrok, 2002.05.28, III KK 116/02; *Sąd Najwyższy*, wyrok, 2002.02.11, IV KKN 435/01: concerning Article 451 Kodeks postępowania karnego (Code of Criminal Procedure), Dz. U. 97.89.555, criminal appeal proceedings in absentia in the light of Article 6 (1) and (3) (c) ECHR.

⁸⁶ See *Naczelny Sąd Administracyjny*, wyrok, 1993.11.18, III ARN 49/93, for the general meaning of human rights and their function in the daily life.

in general.⁸⁷ The High Administrative Court has already had some occasions to deal with the Convention.⁸⁸

The Constitutional Tribunal refers to the Convention on a regular basis,⁸⁹ and also quite often to the case law of Strasbourg.⁹⁰ In the cited judgments the Constitutional Tribunal usually based its reasoning on the Polish Constitution rather than on the Convention.⁹¹ This might be a conscious policy favoring the national Constitution in developing the case law and by taking the Convention only as a general source of inspiration. Surprisingly enough, no secondary literature (such as a commentary of the Convention in French or English) has ever been cited in any of the cited cases of the Constitutional Tribunal.

In the literature it was argued very recently that lower courts in Poland do not deal with the Convention at all.⁹² This might be true for the case law of the late 90s.

⁸⁷ Naczelny Sąd Administracyjny, wyrok, 2002.03.27, V SA 221/01; Naczelny Sąd Administracyjny, wyrok, 2001.08.28, V SA 94/01; Naczelny Sąd Administracyjny, wyrok, 2001.08.23, V SA 3198/00; Naczelny Sąd Administracyjny, wyrok, 2001.06.12, V SA 3095/00; Naczelny Sąd Administracyjny, wyrok, 2001.04.11, V SA 3181/00; Naczelny Sąd Administracyjny, wyrok, 2001.04.06, V SA 2830/00; Naczelny Sąd Administracyjny, wyrok, 2001.03.23, V SA 2001/00, all cases deal with the Geneva Convention relating to the status of refugees, 189 UNTS 150, and the Protocol relating to the status of refugees, 606 UNTS 267. Naczelny Sąd Administracyjny, 2001.06.06, V SA 300/01, referring to the case law of the European Court of Justice before Poland was a Member State of the European Union and to Article 23 ICCPR. Naczelny Sąd Administracyjny, wyrok, 2001.09.24, V SA 340/01, referring to the Convention of the Rights of the Child, U.N. Doc. A/44/49 (1989), in interpreting Article 72 Constitution; Naczelny Sąd Administracyjny, wyrok, 2001.02.12, V SA 305/00, the law of the European Union has to be considered when interpreting the Polish law; Naczelny Sąd Administracyjny, wyrok, 2003.03.26, I SA/Łd 1707/02 referring to the Vienna Convention on the Law of Treaties, 1155 UNTS 331.

⁸⁸ Naczelny Sąd Administracyjny, postanowienie, 1994.05.12, III ARN 23/94, dealing with Article 10 ECHR and the corresponding case law; Naczelny Sąd Administracyjny, wyrok, 1994.04.08, III ARN 18/94 applying Article 8 ECHR; Naczelny Sąd Administracyjny, wyrok, 2001.06.11, V SA 3675/00, interpreting Article 18 Constitution in the light of Article 8 ECHR.

⁸⁹ Trybunał Konstytucyjny, wyrok, 2002.07.09, P 4/01, OTK-A 2002/4/52 dealing with Article 6 (1) and 6 (3) d ECHR in the penal and fiscal Code; Trybunał Konstytucyjny, wyrok, 2003.03.05, K 7/01, OTK-A 2003/3/19; Trybunał Konstytucyjny, wyrok, 2001.11.08, P 6/01, OTK 2001/8/248; Trybunał Konstytucyjny, postanowienie, 2000.07.11, K 28/99, OTK 2000/5/150; Trybunał Konstytucyjny, wyrok, 1999.09.14, K 14/98, OTK 1999/6/115; Trybunał Konstytucyjny, wyrok, 1999.06.14, K 11/98, OTK 1999/5/97; Trybunał Konstytucyjny, wyrok, 1998.06.09, K 28/97, OTK/1998/4/50: all cases are dealing with Article 6 (1) ECHR and the requirement of access to a court.

⁹⁰ See e.g. Trybunał Konstytucyjny, orzeczenie, 1997.04.08, K 14/96, OTK 1997/2/16; Trybunał Konstytucyjny, orzeczenie, 1997.04.08, K 14/96, OTK 1997/2/16; Trybunał Konstytucyjny, wyrok, 2000.11.15, P 12/99, OTK 2000/7/260: all cases concern Article 6 (1) ECHR; Trybunał Konstytucyjny, wyrok, 1999.01.27, K 1/98, OTK 1999/1/3 dealing with Article 6 (1) and 8 ECHR.

⁹¹ See for example Trybunał Konstytucyjny, wyrok, 1998.06.09, K 28/97, OTK 1998/4/50. Sometimes one would expect a more detailed reasoning concerning the conformity of Polish law with the Convention, see for example Trybunał Konstytucyjny, wyrok, 2004.02.17, SK 39/02, OTK-A 2004/2/7, dealing with Article 6 (3) c ECHR, denying the right to communicate with his or her advocate out of hearing of a third person as part of the basic requirements of a fair trial, compared with the reasoning in *S. v. Switzerland* (appl. no. 12629/87, 13965/88), judgment, 28 November 1991, Series A 220, in particular §§ 48 et seq., this seems to be odd.

⁹² M.-B. Dembour/M. Krzyżanowska-Mierzevska, Ten Years On: The Popularity of the Convention in Poland, in: *European Human Rights Law Review*, 2004, 402 and 420; M.

However, most recently even the lower courts in Poland show a very receptive attitude towards the Convention.⁹³

Legislation

Generally, the public authorities control the conformity of draft statutes with any obligations under international law. There is no special procedure for reviewing the compatibility of governmental draft legislation with the Convention.⁹⁴ However, every administrative department may indicate the need for adjustment of certain provisions or regulations to the Convention's obligations. This might be changed in the future if the European Union either adopts binding Human Rights Standards with an appropriate system of implementation or ratifies the Convention. If this happens, the Committee of European Integration, which must verify the compatibility of drafted statutes and regulations with the law of the EU, will also have the power to control the compatibility with European Human Rights standards.⁹⁵

In the parliamentary work of the Sejm and the Senate there is no standard procedure to verify whether drafted statutes are compatible with the Convention. However, the Office for Studies and Expertises of the Sejm or the Office for Studies and Analysis of the Chancellery of the Senate may incidentally review a draft statute's consistency with the Convention on the initiative of a member of Parliament or a parliamentary Commission or on its own initiative.⁹⁶ The argument that a draft statute is not in conformity with international human rights standards is a strong one. In recent years, the Polish legislature has not consciously enacted any law not in conformity with the Convention. For historical reasons, such a scenario seems to be impossible.

Krzyżanowska-Mierzevska, *Europejska Konwencja Praw Człowieka: Refleksja nad recepcją Konwencji w Polsce po dziesięciu latach od ratyfikacji*, Biuletyn No. 3 2000, 56 and 61.

⁹³ See Sąd Rejonowy w Stalowej Woli, postanowienie, 2002.12.06, Ko 770/02 dealing with Article 5 (4) ECHR and the case law; Sąd Rejonowy w Stalowej Woli, postanowienie, 2002.02.05, Ko 49/02 and Ko 66/02, dealing with Article 5 (3) ECHR and the case law; Sąd Rejonowy w Stalowej Woli, postanowienie, 2002.01.08, II K 470/01, dealing with Article 10 ECHR and the case law; Sąd Rejonowy w Częstochowie, postanowienie, 2002.05.27, IIIK 75/02, dealing with Article 6 (3) ECHR; Sąd Okręgowy w Elblągu, wyrok, 2003.01.07, IIIKa. 331/02, dealing with Article 10 ECHR and the case law; Sąd Rejonowy w Dąbrowie Tarnowskiej, wyrok, 2002.12.09, II K 379/02, dealing with the requirements of any interference with human rights "in accordance with the law" and the case law; Sąd Okręgowy w Świdnicy, Postanowienie, 2002.11.14, VI Gz 200/02, dealing with Article 6 (1) ECHR; Sąd Apelacyjny w Gdańsku, wyrok, 2002.01.30, II AKa 577/01, dealing with Article 10 ECHR and the case law.

⁹⁴ Drzemczewski/Nowicki (note 70), 276. See also A. Z. Drzemczewski/M. A. Nowicki, Poland, in: R. Blackburn/J. Plakiewicz (eds.), *Fundamental Rights in Europe*, Oxford 2001, 660 et seq.

⁹⁵ See §§ 16 et seq. Ustawa o Komitecie Integracji Europejskiej (statute on the Committee of European Integration), Dz. U. 96.106.494. See also Uchwała, Nr. 139 Rady Ministrów, Monitor Polski 02.30.482.

⁹⁶ Drzemczewski/Nowicki (note 70), 277.

In the Polish constitutional system there is a legislative advisory body (*rada legislacyjna*) whose task is to give opinions about draft statutes to the Government. The opinions are published.⁹⁷ However, as the opinions are often not distributed to members of Parliament or followed by the legislature, the power of this advisory organ is in practice very limited.

The regulation on the censorship of correspondence of a convicted or temporarily arrested person may serve as an example of how the Strasbourg case law triggered a change in national law. Between 2000 and 2004 the Court held in 6 cases that the Code of Execution of Criminal Sentences of 1997 either was not in conformity with Article 8 ECHR or its application constituted a breach of the right of privacy.⁹⁸ This triggered two proposals for an amendment of the law, one by members of Parliament⁹⁹ and one drafted on behalf of the President.¹⁰⁰ The Government argued that the need for changes was apparent in order to clarify the law and to make the national law conform to the Constitution and international obligations.¹⁰¹ However, neither Article 8 ECHR nor the judgments by the Court concerning Poland were mentioned in the Government's reasoning. The references to the requirements under international law are absolutely general and do not allow the exact meaning of the obligation under Article 8 ECHR to be retraced. This is the typical manner in which the administration deals with the Convention. It seems that the Government prefers to refer to the Polish Constitution instead of the Convention, and if the Convention is mentioned, it is only in a general and superficial way.

For Switzerland

Domestic and International Law

The relationship between domestic and international law is not explicitly defined in the Swiss Constitution. Article 191 Constitution of 1999 does not offer a clear answer to questions of priority. However, it is largely undisputed that Switzerland follows a monistic system.¹⁰² Thus, international norms become part of the Swiss legal system. All state organs must respect and apply those norms, as long as

⁹⁷ Przegląd Legislacyjny, <<http://www.prawo.lex.pl/czasopisma/periodyk.xml?position=pl>> (all websites were most recently checked at the beginning of January 2005).

⁹⁸ See the references *infra* in note 298.

⁹⁹ Projekt ustawy o zmianie ustawy – kodeks karny wykonawczy oraz niektórych innych ustaw – projekt poselski (druk 389) (Parliamentary proposal for the amendment of the Code of Execution of Criminal Sentences and other statutes), druk wpłynął 4 marca 2002.

¹⁰⁰ Prezydencki projekt ustawy o zmianie ustawy – kodeks karny wykonawczy oraz niektórych innych ustaw (Presidential proposal for the amendment of the Code of Execution of Criminal Sentences and other statutes) (druk 183), druk wpłynął 20 grudnia 2001.

¹⁰¹ Stanowisko rządu z dnia 25 marca 2002.

¹⁰² See joint comment by the Federal Office of Justice and the Directorate of International Law, 26 April 1989, VPB 53 (1989) No. 54, 403 et seq. with references.

they are formulated clearly and unconditionally enough to have a direct bearing and to be applied in a specific case or to constitute the basis on which a decision can be made.¹⁰³ The direct applicability of the ECHR was surprisingly undisputed in Switzerland. As early as 1977 the Federal Supreme Court stated without further reasoning that in reference to its substantial guarantees the ECHR had become directly applicable by entering into force for Switzerland,¹⁰⁴ with the exception of Article 13.

When the Parliament was drafting the new Constitution in the late 1990s the time was not yet ripe for a clear statement in favor of the international rule of law. Although the subject was debated heatedly, the new Constitution states only that the Federation and the Cantons shall respect international law¹⁰⁵ and that the Federal Supreme Court and the other authorities applying law shall follow both Federal Statutes and international law.¹⁰⁶ Therefore, in the Swiss legal order the hierarchical ranking of international law in general and the ECHR in particular is not fully clarified. In academic writings some authors argue for the rank of a Federal Statute, some for a ranking higher than Federal Statutes, some for a constitutional rank and some for a rank even higher than the Constitution.¹⁰⁷ The predominance of international law over national law was accepted early on as a basic principle.¹⁰⁸ The fact that not only Federal Statutes but also international law is binding for the courts leads to the possibility that a Federal Statute might not be applied, when it is not in conformity with an international obligation.¹⁰⁹ However, this approach has never been fully accepted as a binding rule that would not allow exceptions. The Federal Supreme Court followed a case-by-case strategy when meeting the conflict

¹⁰³ Swiss Federal Supreme Court, Judgment, 1986.09.02, BGE 112 Ib 183, 184; Third report by the Federal Council on Switzerland and the Conventions of the Council of Europe, 22 February 1984, BBl. 1984 I 791.

¹⁰⁴ Swiss Federal Supreme Court, Judgment, 1977.12.19, BGE 103 V 190, 192. Nowadays Article 13 ECHR is also considered directly applicable; see e.g. Swiss Federal Supreme Court, Judgment, 1997.08.20, BGE 123 II 402, E. (Erwägung) 4b/aa. See also Y. Hangartner, *Recht auf Rechtsschutz*, in: *AJP* 11 (2002), 142 with further references; for the question of direct applicability during preparatory discussions of the ECHR, see *Sciotti-Lam* (note 67), 377 et seq. and in respect of Article 13 ECHR, 462.

¹⁰⁵ Article 5 (4) Constitution of 1999.

¹⁰⁶ Article 191 Constitution of 1999.

¹⁰⁷ For the references see J.-F. Aubert, *Bundesstaatsrecht der Schweiz*, Bd. II, Basel 1995, 1113 et seq., Rz. 1777 and M. E. Villiger, *Handbuch der Europäischen Menschenrechtskonvention (EMRK) – unter besonderer Berücksichtigung der schweizerischen Rechtslage*, 2. Aufl. Zürich 1999, 45 et seq., Rz. 59.

¹⁰⁸ Swiss Federal Supreme Court, Judgment, 1881.12.03, BGE 7 774, 783 et seq.; Swiss Federal Supreme Court, Judgment, 1892.06.17, BGE 18 189, 193; Swiss Federal Supreme Court, Judgment, 1893.02.10, BGE 19 134, 137. The last two of these judgments concerned the law of extradition. In this area the Federal Supreme Court constantly emphasized the predominance of international treaties over national law. This fact can be explained with the parallel aims of the national and the international rules at the time as well as with the fact that this practice was approved by all state organs. See Keller (note 32), 649 et seq.

¹⁰⁹ U. Häfelin/W. Haller, *Schweizerisches Bundesstaatsrecht*, 6. Aufl. Zürich 2005, Rz. 1926.

between international rules and Federal Statutes. In a large number of cases the Federal Supreme Court declared the predominance of international law as a basic principle. In other cases, however, the solution was seen in the *lex posterior* rule. In the famous *Schubert* case¹¹⁰ the Federal Supreme Court decided that a Federal Statute could derogate an earlier international treaty (later in time rule, *lex posterior* rule). It followed the clear statement rule, i.e. it held up the opinion that the Court did not have the competence to disregard a Federal Statute when the Parliament had enacted this Statute in full awareness of its incompatibility with an international obligation. Since the *cause célèbre Schubert* difficult cases in which the Federal Supreme Court would have applied this rule have been very rare. Generally, it was only repeated as an *obiter dictum*.¹¹¹ In its more recent case law, however, the Federal Supreme Court seems to stress the predominance of international law even over more recent federal law, particularly when human rights are concerned.¹¹² This interpretation is above all triggered by the Vienna Convention on the Law of Treaties¹¹³ and its Article 26. Unfortunately, not all Chambers of the Federal Supreme Court have adapted this international law-friendly approach.¹¹⁴ The clear statement rule was also quite recently adhered in a decision of the Federal Personnel Appeals Commission. It stated that “*Le législateur a, en pleine connaissance des problèmes [in full awareness of the problems] que la composante ‘prestation’ du salaire soulève sous l’angle de la CEDH, adopté une solution sans voie de recours, si bien que la CRP [Commission fédérale de recours en matière de personnel] n’y déroge pas.*”¹¹⁵

The question of whether a Federal Statute or an older international treaty rule shall prevail does not need to be decided very often. In most of the cases it is pos-

¹¹⁰ Swiss Federal Supreme Court, Judgment, 1973.03.02, BGE 99 Ib 39.

¹¹¹ See e.g. Swiss Federal Supreme Court, Judgment, 1991.06.07, BGE 117 IV 124, 128; Swiss Federal Supreme Court, Judgment, 1990.06.14, BGE 116 V 262, 268; Swiss Federal Supreme Court, Judgment, 1985.10.23, BGE 111 V 201, 203. In the last mentioned judgment the Federal Supreme Court resolved the problem by denying the self-executing character of the international treaty concerned. For one of the rare exceptions, see Swiss Federal Supreme Court, Judgment, 1986.03.09, BGE 112 II 1, 13. The Federal Supreme Court affirmed the *Schubert* rule and stated that it was not necessary to investigate whether an international obligation was violated, since the Swiss legislator had been aware of a possible violation of international law when enacting the Federal Statute.

¹¹² Swiss Federal Supreme Court, Judgment, 1999.07.26, BGE 125 II 417 E.4d.; Swiss Federal Supreme Court, Judgment, 1996.11.01, BGE 122 II 485, E.3a. In Swiss Federal Supreme Court, Judgment, 2003.02.21, BGE 129 II 193, however, this practice seems to be questioned. The Federal Supreme Court did not decide the question of whether its jurisdiction was established by Article 13 ECHR, but rejected the appeal based on considerations on the merits. The Federal Supreme Court stated that it could not diverge from the rule established by a Federal Statute – Article 100 (1) *lit.* b no. 1 and 4 OG – which could not be interpreted in a manner making it compliant with Article 13 ECHR (E.4.2.4). For a review of this judgment, see Y. H a n g a r t n e r, Bemerkungen zu BGE 129 II 193, in: AJP 12 (2003), 1112 et seq.

¹¹³ Vienna Convention on the Law of Treaties of 23 May 1969, entered into force 27 January 1980, for Switzerland 6 June 1990, SR 0.111.

¹¹⁴ K e l l e r (note 32), 615.

¹¹⁵ Decision by the Federal Personnel Appeals Commission (Eidgenössische Personalrekurskommission), 2004.03.24, VPB 68 (2004) No. 91, 1211 et seq.

sible to synchronize the two rules by interpreting the former in the light of the latter, i.e. the Federal Statute has to be interpreted in such a manner that the resulting decision does not infringe upon the ECHR. To prevent decisions that lead to an infringement of the Constitution a Federal Statute can be interpreted in the light of the Constitution, which is of a higher hierarchical ranking because it can be assumed that the legislator did not want to enact an unconstitutional statute.¹¹⁶ Unlike Federal Statutes, international law must not be interpreted in the light of national law by national instances, because its function is to harmonize the law on the international level. Therefore, the only way to synchronize a Federal Statute and an international obligation is by the interpretation of the Statute in the light of the international rule. Of course this instrument can be applied only if the wording of the Federal Statute is open to (such) an interpretation.

The profound importance of the ECHR in the Swiss legal order is also expressed with the extraordinary revision¹¹⁷ that provides for an exceptional remedy in case of a judgment of the Court finding a violation of the Convention or the protocols thereto, and if reparation is only possible by means of a revision.¹¹⁸

The Approach of the Federal Supreme Court

The Federal Supreme Court referred to the ECHR even before it was ratified. In 1971¹¹⁹ it adhered Article 4 (2) ECHR and in a judgment one year later¹²⁰ it stated that even though Switzerland was not bound by the Convention, the principle expressed in Article 6 (3) ECHR corresponded to the national legal order and had to be respected by the administration of justice. In its first judgment concerning the ECHR after its entry into force for Switzerland,¹²¹ the Federal Supreme Court took an important step to facilitate the reception process. At that time the cantonal remedies were not required to be exhausted by the applicant when he lodged a public-law appeal claiming an infringement of an international treaty.¹²² The Federal Supreme Court stated that the applicant could invoke the same rights under the Constitution and the ECHR. Thus, an appeal claiming an infringement of the ECHR should be treated procedurally like a constitutional appeal. The Convention was therefore put on the same level as the Constitution, at least in the procedural context. This had several positive consequences: The importance of the ECHR had been stressed. As it was required that the cantonal remedies be ex-

¹¹⁶ Swiss Federal Supreme Court, Judgment, 1968.11.22, BGE 94 I 669, 678.

¹¹⁷ Article 139a OG (inserted with part I of the Federal Statute of 4 October 1991, in force since 15 February 1992 (AS 1992 288)) and Article 66 (1) *lit.* b VwVG.

¹¹⁸ See *infra* chapter 5.

¹¹⁹ Swiss Federal Supreme Court, Judgment, 1971.02.17, BGE 97 I 45, 51.

¹²⁰ Swiss Federal Supreme Court, Judgment, 1972.02.02, BGE 98 Ia 226, 235.

¹²¹ Swiss Federal Supreme Court, Judgment, 1975.02.12, BGE 101 Ia 67, 69.

¹²² Article 86 OG, then in force, *Bereinigte Sammlung der Bundesgesetze und Verordnungen 1848-1947* (BS) 3 531, 555.

hausted, it was made clear that it was primarily the Cantons' obligation to implement the guarantees of the ECHR. Of course, another reason for this judgment had been the concern about an increase in workload.¹²³ This solution was codified in 1991.¹²⁴

Both the Federal Government and the Federal Supreme Court constantly communicated that the rights guaranteed by the ECHR did not affect the Swiss legal order in a vital manner. Both organs argued that substantially the rights guaranteed by the Convention did not surpass the standard of the (written and non-written) constitutional rights. Thus, there was no need to examine a case also in view of the rights and freedoms guaranteed under the Convention. All the same, the Federal Supreme Court was intellectually geared to the Convention when it had to define the substantial content of the written – and particularly the non-written – constitutional rights and freedoms. This content was therefore constantly enhanced to the level of the ECHR. The latter – after some fifteen years of settlement – was gradually re-formed by the Commission and the Court. This practice of the Federal Supreme Court was partially caused by the fact that before the entry into force of the new Constitution a dual structure of human rights existed in Switzerland: on the one hand the fragmentary catalogue of the Constitution of 1874, on the other the guarantees of the ECHR. The former was supplemented step by step by the case law of the Federal Supreme Court concerning the unwritten fundamental freedoms and the voluminous case law concerning the equal protection clause. In that supplementation process the ECHR undoubtedly was an important source of inspiration. The Federal Supreme Court often¹²⁵ used the same rhetoric, saying that if an applicant simultaneously invoked a constitutional right and a provision of the ECHR for the same complaint, the Federal Supreme Court would initially investigate if the challenged adjudication infringed upon the Constitution. It would, however, take into account the concretization of certain principles of law by the Strasbourg organs.

If a guarantee under both the ECHR and under the national Constitution is allegedly violated, the guarantee offering the more effective protection to the individual must be applied.¹²⁶ The Swiss Federal Supreme Court, however, normally did not further investigate which guarantee gave better protection, but cited the above-mentioned statement without a reasonable explanation.¹²⁷ The fact that the Federal Supreme Court normally did not give any reason for the application of na-

¹²³ Swiss Federal Supreme Court, Judgment, 1975.02.12, BGE 101 Ia 67, 69.

¹²⁴ Federal Statute of 16 December 1943 on the organization of the Federal Administration of Justice, SR 173.110, for the amendments of 4 October 1991, see AS 1992 288.

¹²⁵ See e.g. Swiss Federal Supreme Court, Judgment, 1993.03.03, BGE 119 II 264, 267, E.4; Swiss Federal Supreme Court, Judgment, 1986.02.05, BGE 112 Ia 97, 99. E.3; Swiss Federal Supreme Court, Judgment, 1985.06.19, BGE 111 Ia 81, 82, E.2b.

¹²⁶ Principle of benignity, Article 53 ECHR.

¹²⁷ Nowadays it does investigate the two standards. E.g. Swiss Federal Supreme Court, Judgment, 2003.02.21, BGE 129 II 193, 211 et seq.; Swiss Federal Supreme Court, Judgment, 2002.07.26, BGE 128 I 288, 290 et seq.; Swiss Federal Supreme Court, Judgment, 1999.07.26, BGE 125 II 417, 420 et seq.

tional law makes it difficult to find out what effect this practice really had. However, it seems that the Federal Supreme Court did indeed raise the level of protection by stating to apply Swiss constitutional law, but referring for its interpretation and development to the ECHR and the case law of the Court.¹²⁸ This effect may be exemplified by the judgment *Vest* of the Federal Supreme Court,¹²⁹ which is clearly influenced by the judgment of the Court concerning *Klass*.¹³⁰ This approach is quite widespread in judgments of the Federal Supreme Court concerning the right of personal freedom under the Swiss Constitution.¹³¹

Three points must be emphasized here: Firstly, in general, the Federal Supreme Court promoted the reception of the ECHR in its case law, although without overtly stating it was doing so. The demands of the Convention and the case law of the Court could be adopted spontaneously without provoking any political perplexity or reflection on national sovereignty.¹³² The Swiss Federal Supreme Court achieved an optimal reception result and could avoid an open clash such as is most prominently declared by the German *Bundesverfassungsgericht*.¹³³ However, it also showed a certain lack of frankness and openness towards a new and dynamic legal order. Secondly, the principle of benignity (Article 53 ECHR) does appear to offer an easy-to-handle rule in a conflict case, but only at first sight. It is a tremendous challenge for the courts to determine the ambit of the national and the European guarantees and to decide which of the two provides for a higher level of human rights standards. Thirdly, the Federal Supreme Court seems to have considered the criticism of the apodictic statement that the ECHR does not outreach the guarantees of the Constitution¹³⁴ to be at least not unfounded. Thus, nowadays it is a part of the Federal Supreme Court's routine to check the Convention autonomously and to consider the case law of the Court when a provision of the ECHR is invoked,¹³⁵ making no differentiation whether a judgment of the Court concerns

¹²⁸ D. Thü r e r, Neuere Entwicklungen im Bereich der Europäischen Menschenrechtskonvention, in: Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 1988, 390.

¹²⁹ Swiss Federal Supreme Court, Judgment, 1983.11.09, BGE 109 Ia 273.

¹³⁰ *Klass and others v. Germany* (appl. no. 5029/71), Judgment, 6 September 1978, Series A 28.

¹³¹ Unwritten constitutional right under Article 4 Constitution of 1874, Article 10 Constitution of 1999; see W. H a l l e r, Persönliche Freiheit, in: J.-F. Aubert et al. (eds.), Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874, Basel/Zürich/Bern 1996, Rz. 10 and Swiss Federal Supreme Court, Judgment, 1979.01.31, BGE 105 Ia 26, 29 et seq.

¹³² L. W i l d h a b e r, Les résistances nationales en Suisse – a propos des réserves suisses à l'article 6 de la Convention européenne des droits de l'Homme, in: P. Tavernier (ed.), Quelle Europe pour les droits de l'homme?, Bruxelles 1996, 160.

¹³³ German Bundesverfassungsgericht, Decision, 2004.10.14, 2 BvR 1481/04.

¹³⁴ A u b e r t (note 107), 1115, Rz. 1777^{bis}; M. H o t t e l i e r, La convention européenne des droits de l'homme dans la jurisprudence du tribunal fédéral – contribution à l'étude des droits fondamentaux, Lausanne 1985, 41 et seq.

¹³⁵ E.g. Swiss Federal Supreme Court, Judgment, 2002.11.15, BGE 129 I 113; Swiss Federal Supreme Court, Judgment, 2000.08.25, BGE 126 II 425; Swiss Federal Supreme Court, Judgment, 2000.03.30, BGE 126 I 144; Swiss Federal Supreme Court, Judgment, 1992.07.28, BGE 118 Ib 277.

Switzerland or any other country.¹³⁶ On that score, the Federal Supreme Court plays a leading role in Europe.¹³⁷

By accepting the general predominance of the ECHR over national law, by the equalization of the ECHR with the Constitution, at least on the procedural level, and by taking into account the conventional guarantees for the concretization of constitutional rights, the Federal Supreme Court has very much helped the ECHR to become an essential element of the Swiss legal order. This is particularly noteworthy, as according to the Constitution the Federal Supreme Court's position is rather weak. In return, the ECHR has offered the possibility for the Federal Supreme Court to circumvent Article 191 Constitution.¹³⁸ This fundamental principle says that the courts are bound by both Federal Statutes and the ECHR.¹³⁹

Reception of the ECHR in the Cantons

It is difficult to present an overview of the reception process in the 26 Cantons. Limited space precludes any detailed analyses of the case law on the cantonal level. However, here we give an illustrative overview taking into account three Cantons.¹⁴⁰

¹³⁶ See e.g. Swiss Federal Supreme Court, Judgment, 2004.07.15, BGE 130 II 377; Swiss Federal Supreme Court, Judgment, 2002.11.27, BGE 129 I 139; Swiss Federal Supreme Court, Judgment, 2000.02.14, BGE 126 I 33; Swiss Federal Supreme Court, Judgment, 1996.11.28, BGE 122 I 360. Not only the ECHR and the practice of the Court has been taken into account by the Federal Supreme Court, but also the Resolution (73) 5 of the Committee of Ministers of the European Council concerning the standard minimal rules for the treatment of prisoners. For the Resolution, see <<https://wcm.coe.int/ViewDoc.jsp?id=656187&Lang=en>>, adopted on 19 January 1973; adhered to by the Federal Supreme Court in Swiss Federal Supreme Court, Judgment, 1980.09.30, BGE 106 Ia 277, 281 et seq.; Swiss Federal Supreme Court, Judgment, 1976.06.30, BGE 102 Ia 279, 297 et seq. E.3.

¹³⁷ M.-A. E i s s e n, L'interaction des jurisprudences constitutionnelles nationales et de la jurisprudence de la Cour européenne des Droits de l'homme, in: D. Rousseau/F. Sudre (eds.), Conseil Constitutionnel et Cour européenne des Droits de l'homme. Droits et libertés en Europe, Paris 1990, Annex II, 190 et seq. For the popular method of interpreting the national law in a new way to bring it in conformity with the Convention, see *supra* chapter 2.

¹³⁸ Article 113 (3) and 114^{bis} (3) Constitution of 1874, Article 191 Constitution of 1999.

¹³⁹ This rule is nowadays interpreted as a commandment of application, which gives the Federal Supreme Court the possibility to review the compatibility of a Federal Statute with the ECHR or other international conventions. Thus, although it has to apply the Federal Statute, the Federal Supreme Court can state that the Statute is incompatible with the ECHR and that it is in the legislator's responsibility to bring the Swiss law in conformity with the Convention. In fact, this option has to be considered an obligation, following the obligation of interpreting the Federal Statutes in the light of the ECHR. This development did help the strengthening of fundamental rights *vis-à-vis* to the Federal Parliament; see W. K ä l i n, Verfassungsgerichtsbarkeit, in: D. Thürer/J.-F. Aubert/J. P. Müller (eds.), Verfassungsrecht der Schweiz, Zürich 2001, § 74, Rz. 26 et seq.

¹⁴⁰ For geographic reasons we have chosen the Cantons of Basel City, Thurgau and Neuchâtel. Basel City has been chosen because all the territory is an urban area. Thurgau, on the contrary, can be seen as a typical rural Canton. Neuchâtel shall represent the francophone part of Switzerland.

In the Canton of Basel City¹⁴¹ the first decision in view of the ECHR had already occurred in 1976.¹⁴² By 1984 this judgment had been followed by five decisions concerning Article 6 ECHR¹⁴³ and one concerning Article 9 ECHR.¹⁴⁴ From 1985 to 2000 we can count 20 decisions in which the Convention was adhered. Most of the decisions originate from the years 1991 to 1993. However, the decisions declaring a violation of the Convention originate from the years 1984 to 1991.

The result of this short overview on jurisdiction in the Canton of Basel City is not surprising. It is well known that the procedural guarantees of the Convention are by far the most important rules in Swiss jurisprudence concerning the ECHR. They also triggered the new Code of Criminal Procedure of the Canton of Basel City of 8 January 1997.¹⁴⁵

In the first two decisions in 1977¹⁴⁶ and 1978¹⁴⁷ the courts of the Canton of Thurgau¹⁴⁸ did not find a violation of Article 6 (3) ECHR. However, in quite a striking decision concerning Article 6 (3) *lit. d* ECHR it was declared unnecessary to investigate whether a belated supplementation of files was permitted under the cantonal Code of Procedure because of a violation of the Convention.¹⁴⁹ After a decision in 1983¹⁵⁰ we find no decision until 1992. Six decisions in 1992¹⁵¹ and four

¹⁴¹ For the Canton of Basel City, we can use the reports in BJM, annual edition as an indicator of the reception process. For an overview, see also the general index (Generalregister). Besides, the BJM allows us to notice without further investigation that in the same time period hardly any decisions from the Canton of Basel Country occurred and also that some academic writings were published that investigated the conformity of the Criminal Procedure with the ECHR.

¹⁴² Appellate Court, Judgment, 1976.05.14, BJM 1978, 333. It was stated that the decisions of the European Commission of Human Rights do not quash the decisions of national instances.

¹⁴³ President of the Civil Court, Decision, 1980.01.23, followed by a negative decision/inadmissibility decision of the Appellate Court, BJM 1980, 248; Appellate Court, Judgment, 1981.10.19 (Article 6 (3) *lit. c* ECHR), BJM 1981, 344; Appellate Court, Judgment, 1983.11.18 (Article 6 (3) *lit. e* ECHR), BJM 1984, 287; Remittal Authority (Überweisungsbehörde), Decision, 1984.08.31 (Article 6 (3) *lit. c* ECHR), BJM 1984, 331; Appellate Court, Judgment, 1984.01.25 (Article 6 (3) *lit. d* ECHR), BJM 1984, 285; Criminal Court, Judgment, 1984.09.26 (Article 6 (3) *lit. d* ECHR), BJM 1985, 234.

¹⁴⁴ Criminal Court, Judgment, 1984.06.06, BJM 1986, 98.

¹⁴⁵ Systematische Gesetzessammlung Basel-Stadt, 257.100.

¹⁴⁶ Criminal Court, Judgment, 1977.07.06, Rechenschaftsbericht 1978, No. 31, 90 et seq.

¹⁴⁷ Court of Cassation, Judgment, 1978.01.23, Rechenschaftsbericht 1978, No. 33, 92 et seq.

¹⁴⁸ For the Canton of Thurgau, we can base our observations upon the annual report by the Court of Appeal, the Appeals Commission, the Administrative Court of Insurance, the Criminal Court and the Criminal Chamber (Rechenschaftsbericht des Obergerichts, der Rekurskommission, des Versicherungsgerichts, des Kriminalgerichts und der Kriminalkammer des Kantons Thurgau) until 1989. Since 1990 Rechenschaftsbericht des Obergerichts des Kantons Thurgau an den Grossen Rat, annual edition and overview in additional index (Nachtragsregister) 1968 – 1984, 1985 – 1993 and 1994 – 2002.

¹⁴⁹ Court of Appeal, Judgment, 1982.02.11, Rechenschaftsbericht 1982, No. 27, 73.

¹⁵⁰ Appeals Commission (Rekurskommission), Judgment, 1983.04.11, Rechenschaftsbericht 1983, No. 47, 113 et seq.

¹⁵¹ Criminal Chamber, Judgment, 1992.05.08, Rechenschaftsbericht 1992, No. 12, 84 et seq.; Appeals Commission, Judgment, 1992.12.17, Rechenschaftsbericht 1992, No. 13, 85 et seq.; Criminal Chamber, Judgment, 1992.03.27, Rechenschaftsbericht 1992, No. 14, 89 et seq.; Criminal Chamber,

in 1993¹⁵² are recorded. In 1995 and 1996 four other decisions are reported,¹⁵³ and in 1998 we state one decision.¹⁵⁴ In addition to the annual report, we can also adhere the Administration of Justice in administrative matters in the Canton of Thurgau.¹⁵⁵ Here we find cases concerning Article 5 (4) ECHR and Article 8 ECHR.¹⁵⁶

It is very difficult to provide an explanation for this inconsistent picture. Especially hard to understand is the gap before 1992 and the spate of decisions in 1992 and 1993. One possible explanation is the fact that in 1991 the parliament enacted a new Code of Criminal Procedure.¹⁵⁷ The preparatory work for the new Code certainly led to a deeper understanding of the procedural requirements of the ECHR. However, the ECHR was obviously of only minimal importance until about 1990. From then on, we can observe a very rich practice concerning the procedural guarantees under Article 5 and 6 ECHR, while just a few cases concerned Article 8 ECHR.

The first decision in the Canton of Neuchâtel¹⁵⁸ was pronounced by the Indictments Chamber in 1977.¹⁵⁹ The Chamber referred to the *Minelli* case,¹⁶⁰ stated that Article 5 ECHR was violated, and ordered the immediate termination of an imprisonment. Also in the Canton of Neuchâtel, Articles 5 and 6 of the Convention are the most appealed to.¹⁶¹ Around 1990, however, we note a considerable number

Judgment, 1992.05.07, Rechenschaftsbericht 1992, No. 15, 90 et seq.; Court of Appeal, Judgment, 1992.06.02, Rechenschaftsbericht 1992, No. 16, 92 et seq.; Court of Appeal, Judgment, 1992.10.27, Rechenschaftsbericht 1992, No. 17, 98 et seq.

¹⁵² Court of Appeal, Judgment, 1993.07.15, Rechenschaftsbericht 1993, No. 12, 112 et seq.; Appeals Commission, Judgment, 1993.05.17, Rechenschaftsbericht 1993, No. 27, 134 et seq.; Appeals Commission, Judgment, 1993.11.01, Rechenschaftsbericht 1993, No. 31, 143 et seq.; Court of Appeal, Judgment, 1993.01.07, Rechenschaftsbericht 1993, No. 32, 148 et seq.

¹⁵³ Court of Appeal, Judgment, 1995.09.07, Judgment, Rechenschaftsbericht 1996, No. 27, 162 et seq.; Appeals Commission, Judgment, 1996.08.19, Rechenschaftsbericht 1996, No. 15, 127 et seq.; Appeals Commission, Judgment, 1996.03.04, Rechenschaftsbericht 1996, No. 28, 164 et seq.; Court of Appeal, Judgment, 1996.12.12, Rechenschaftsbericht 1996, No. 43, 207 et seq.

¹⁵⁴ Appeals Commission, Judgment, 1998.11.30, Rechenschaftsbericht 1998, No. 37, 160 et seq.

¹⁵⁵ Thurgauer Verwaltungsrechtspflege, Generalregister 1985 – 1998, 165 et seq.

¹⁵⁶ Two decisions concerning Article 5 (4) ECHR of 1993 and 1994, eight decisions concerning Article 6 (1) ECHR of 1988, 1993 (2), 1994 (3) and 1996 (3), one decision concerning Article 6 (1) *lit. a* ECHR of 1995 and three decisions concerning Article 8 ECHR of 1987 and 1996 (2).

¹⁵⁷ Code of Criminal Procedure (Strafprozessordnung) of 5 November 1991, Systematische Gesetzsammlung Thurgau, 312.1.

¹⁵⁸ As far as the Canton of Neuchâtel is concerned, we adhere the RJN. For an overview, see also the additional index (*répertoire*).

¹⁵⁹ Chambre d'Accusation, Decision, 1977.03.30, RJN, volume 6, II^{me} partie, 267.

¹⁶⁰ Swiss Federal Supreme Court, Judgment, 1976.06.30, BGE 102 Ia 279.

¹⁶¹ Three decisions of 1979 and 1980 concerned Article 5 ECHR and Article 6 (3) ECHR. The Cour de Cassation dealt with the case law of the Federal Supreme Court and the doctrine and twice decided that the actual jurisprudence had to be revised (Cour de Cassation, Judgment, 1979.05.09, RJN, volume 7, II^{me} partie, 154; Cour de Cassation, Judgment, 1979.11.14, RJN, volume 7, II^{me} partie, 197; Cour de Cassation, Judgment, 1980.03.09, RJN, volume 7, II^{me} partie, 249). The Cour de Cassation dealt also with Article 6 (2) ECHR in 1984 (Cour de Cassation, Judgment, 1984.11.21, RJN

of decisions concerning Article 8 ECHR.¹⁶² One decision concerning Article 3 ECHR is reported.¹⁶³ What does stand out is the fact that in the jurisdiction of Neuchâtel – and especially of the Indictments Chamber and the Court of Cassation – the Convention was already of a slightly increased significance before 1980.

Although the collected database is small, roughly speaking this analysis leads to the following assumption: The reception process in the Cantons started around 1980 and was fully effective only by the 90s. Thus, in a Federal State the reception process works with a legal lag of 10 to 20 years. The change might have occurred some years earlier in the francophone part of the country. That would be consistent with the conception of a more cosmopolitan attitude and perhaps also with the fact that there existed no language barrier. It can be generally stated that nowadays, the cantonal courts apply the ECHR without significant trouble. It seems that after a period of keeping their distance, from the beginning of the 1980s the ECHR was adhered more and more often by cantonal courts.¹⁶⁴ The cantonal courts were occupied mainly with Articles 5 and 6 ECHR. These articles affected the cantonal legal order in a direct way. Only around 1990 were substantial guarantees – mostly Article 8 ECHR – invoked more often before cantonal courts.

Legislation

Control of the conformity of draft statutes with the obligations under international law is part of a routine procedure. Every federal draft statute¹⁶⁵ is submitted to those Federal Offices that are interested in and affected by the draft statute be-

1984, 118). Another judgment of the Cantonal Court in 1986 concerned Article 6 (1) ECHR (Cour Cantonal, Judgment, 1986.02.10, RJN 1986, 311 et seq.). In the time period from 1991 to 2000 we count two decisions concerning Article 6 ECHR (Cour de Cassation, Judgment, 1991.10.29, RJN 1991, 83; Cour de Cassation, Judgment, 1993.07.09, RJN 1993, 147), two concerning Article 6 (1) ECHR (Cour de Cassation, Judgment, 1995.05.02, RJN 1995, 102; Chambre d'Accusation, Judgment, 1997.10.08, RJN 1997, 184), one concerning Article 6 (2) ECHR (Cour de Cassation, Judgment, 1997.03.14, RJN 1997, 186), one concerning Article 6 (3) ECHR (Cour de Cassation, Judgment, 1995.05.02, RJN 1995, 102), one concerning Article 6 (3) *lit. a* and *d* ECHR (Chambre d'Accusation, Judgment, 1998.10.05, RJN 1998, 161) and one concerning Article 6 (3) *lit. d* and *e* ECHR (Cour de Cassation, Judgment, 1996.03.15, RJN 1996, 86).

¹⁶² The Cour Administrative examined Article 8 (1) ECHR in view of the residence permit for the husband of a Swiss citizen (Cour Administrative, Judgment, 1989.11.20, RJN 1989, 135). It also adhered Article 8 (1) ECHR in three decisions in 1991 (Cour Administrative, Judgment, 1991.03.14, RJN 1991, 93; Cour Administrative, Judgment, 1991.01.15, RJN 1991, 97; Cour Administrative, Judgment, 1991.11.14, RJN 1991, 97). Two more decisions concerning Article 8 ECHR originate from 1997 and 1998 (Cour Administrative, Judgment, 1997.07.21, RJN 1997, 210; Cour Administrative, Judgment, 1998.03.02, RJN 1998, 180).

¹⁶³ Cour Administrative, Judgment, 1997.02.17, RJN 1997, 228.

¹⁶⁴ A. Haefliger/F. Schürmann, *Die Europäische Menschenrechtskonvention und die Schweiz – die Bedeutung der Konvention für die schweizerische Rechtspraxis*, 2. Aufl. Bern 1999, 440 with examples.

¹⁶⁵ In the Cantons there exist similar systems for the control of draft statutes; see G. Müller, *Elemente einer Rechtssetzungslehre*, Zürich 1999, Rz. 107, 109, 112 and 115 with more references.

fore its discussion in the Federal Parliament. The Offices comment on the draft statute from their points of view. The Federal Office of Justice comments on a draft statute in every case. There is a special Section on Human Rights and the Council of Europe as a part of the International Affairs Division of the Federal Office of Justice, which is charged with examining draft statutes for their compatibility with international instruments for the protection of human rights, such as the ECHR and the ICCPR. In a second step, the revised draft statute is submitted to the Departments, which can comment on the statute as well.¹⁶⁶ The draft is then forwarded for consultation to interested groups outside of the federal administration, such as the Cantons, political parties, NGOs and important private economic bodies. This part of the legislation process can also have its effects on the conformity of the draft statute with international human rights standards.

The Parliament discusses the draft statute on the basis of a message from the Federal Council. As part of the minimal content of this message, a comment on the legal basis of the statute, its effects on human rights, its compliance with law of a higher ranking, and its relationship with European law is prescribed.¹⁶⁷ The comments in the message by the Federal Council on the compatibility of the draft statute with international law are of a high standard.¹⁶⁸ The Federal Council commented on this relationship for six pages in its message on the popular initiative "Equal rights for disabled people" and on the draft Federal Statute on the elimination of disadvantages of disabled persons.¹⁶⁹ It took into account the recommendations and treaties of the UN, the Covenant on the Rights of Children,¹⁷⁰ the covenants and treaties of the International Labor Organization (ILO), the recommendations of the Council of Europe, the ECHR and Additional Protocol No. 12, the European Social Charter and the law of the European Community. The message dealt with Article 8 and 14 ECHR, taking into consideration two judgments of the Court, both of which did not concern Switzerland.¹⁷¹

The ECHR is well known by all bodies engaged in the legislative process, and therefore draft statutes are usually tested several times on their conformity with

¹⁶⁶ Id., Rz. 109 et seq.

¹⁶⁷ Article 141 (2) *lit.* a Bundesgesetz vom 13. Dezember 2002 über die Bundesversammlung (ParlG, SR 171.10).

¹⁶⁸ E.g. message by the Federal Council on the modification of the Civil Code and the withdrawal of the reservation in respect of Article 5 ECHR, 17 August 1977, BBl. 1977 III 1; message by the Federal Council on a Federal Statute on asylum, 31 August 1977, BBl. 1977 III 105; message by the Federal Council on a Federal Statute on the protection of trademarks and declarations of origin, 21 November 1990, BBl. 1991 I 1; message by the Federal Council on the popular initiative "Equal rights for disabled people" and on the draft Federal Statute on the elimination of disadvantages of disabled persons, 11 December 2001, BBl. 2001 1715, 1809 et seq.

¹⁶⁹ Message by the Federal Council on the popular initiative "Equal rights for disabled people" and on the draft Federal Statute on the elimination of disadvantages of disabled persons, 11 December 2001, BBl. 2001 1715.

¹⁷⁰ SR 0.107.

¹⁷¹ *Botta v. Italy* (appl. no. 21439/93), Judgment, 24 February 1998, Reports 1998-I, 412 et seq. and *X. and Y. v. Netherlands* (appl. no. 8978/80), Judgment, 26 March 1985, Series A 91.

the Convention. Generally, the ECHR is seen as a framework binding Switzerland's legislation. It seems, however, a not-impossible scenario that Switzerland could consciously enact law not in conformity with the Convention. In 2004, after the acceptance of the popular initiative on the lifelong internment of untreatable, extremely dangerous sexual offenders and violent criminals,¹⁷² the Federal Council (and Minister of Justice) Mr. Blocher stated that it was possible to envision a scenario of denunciation of and re-accession to the ECHR, making a reservation in order to fulfill the will of the initiators. Such an approach is quite baffling at the beginning of the 21st century. It once more shows the conflict between the rule of law and the democratic principle in Switzerland. Article 139 (3) Constitution allows the Parliament to declare a popular initiative invalid only if it does not respect *ius cogens*, i.e. mandatory rules of international law. However, this term must probably be interpreted in a broader sense, meaning some kind of constitutional core of the international system.¹⁷³ The question of whether the ECHR is a part of the European constitutional core in that sense of an *ordre public* is highly disputed. However, it seems likely that the trend is towards such an interpretation.¹⁷⁴

Comparison and Conclusion

In both countries we find the same systemic starting position: a moderate monistic system provides advantageous conditions for the reception of international rules. However, in these two countries there is no specific statement defining the exact position of the ECHR in the hierarchy of legal norms. As we have seen, the uncertainties are much greater in Switzerland. Two reasons may explain this: First, Article 91 (2) of the Polish Constitution establishes a clear rule to solve a conflict between national statutes and international treaties ratified upon prior consent granted by statute. This rule also favors the ECHR. There is no comparable rule in Swiss law. Second, the strong democratic tradition in Switzerland has proved an obstacle to the unreserved recognition of the primacy of international law.

A comparison of the reception process in Poland and Switzerland suggests the following conclusion: as long as constitutional law fails to resolve the question of the relationship between national law and the Convention, the courts are not in a position to define the hierarchical position of the ECHR in the legal system.

Analysis in Switzerland and in Poland reveals that it is not taken for granted that the ECHR establishes a substantial barrier to constitutional reforms. Thus, the

¹⁷² See Bundesbeschluss über die Volksinitiative "Lebenslange Verwahrung für nicht therapierbare, extrem gefährliche Sexual- und Gewaltstraftäter", 20 June 2003, AS 2004 2341.

¹⁷³ D. Thüerer, Bundesverfassung und Völkerrecht, in: J.-F. Aubert et al. (Anm. 131), Rz. 16.

¹⁷⁴ Y. Hangartner, St. Galler Kommentar zu Art. 191, Massgebendes Recht, in: B. Ehrenzeller/P. Mastrorandi/R. J. Schweizer/K. A. Vallender (eds.), Die Schweizerische Bundesverfassung, Kommentar, Zürich/Basel/Genf 2002, Rz. 28, favors a solution recognizing the ECHR even as a (European) *ius cogens*.

Convention has not yet reached the position of an *ordre public*. The image of a hierarchical system of legal norms would become even more complex in Poland if the European Union ratified the ECHR.

It seems to be a popular method of state organs to deal with the ECHR without comment. Whereas in Poland this can be observed above all in respect of the Government, it has been a tool for the Swiss Federal Supreme Court to deal with the difficult task of harmonizing the constitutional system with the Convention.

It seems that in a country following a monistic system, with a weakly positioned (but sufficiently independent) judiciary, the ECHR can help to strengthen the position of the courts. This may be the result of the central role of judicial proceedings in the conventional system.

The Polish and Swiss courts were already referring to the ECHR before it entered into force for their countries. This unreservedly ECHR-friendly attitude changed when the requirements under the Convention became clearer and had specific impact on national law. The ECHR and its dynamic development by the Court constitute an enormous challenge for the courts. Doing the splits between the dynamic international system and the more inelastic national legal order often extends beyond a simple control of a minimal standard. In Switzerland this is very clearly demonstrated by the case law of the Court and the national courts. This aspect of the reception process will become more and more important in Poland in the coming years. Swiss experience leads to the following assumption: the more differentiated and incisive the case law of the Court, the greater the challenge for the national courts.

The highest courts of both Poland and Switzerland took the Convention into account soon and effectively. The lower courts needed some time for this process. In these courts reception follows with a considerable delay of 10 to 20 years. It is probable that in countries with a weakly developed judiciary, such as Russia, Romania or Turkey, this time lag could be even longer.

A controversial picture arises when we compare the significance of the ECHR in the legislative process of the two countries. In Switzerland the analysis of the ECHR and the control of compliance are clearly more institutionalized, more professional and more sophisticated on the substantial level. In Poland there is a certain backlog on these points.

However, this result contrasts with the fact that it seems more likely that law contradicting the ECHR could be enacted and accepted in Switzerland than in Poland. Must we conclude that in Switzerland the Convention has already lost part of its character as a sacrosanct instrument, which it retains in Poland? Probably this attitude was not as strongly present in Switzerland from the very beginning. The general commitment to the Convention is politically undisputed, and so abstract instruments such as a control mechanism in the legislative process can be introduced quite efficiently. However, on the concrete occasion that a legal question is politically disputed, the ECHR is often reduced to an argument among other arguments. As far as Poland is concerned, *inter alia* the tremendous workload of the

legislator has resulted in the lack of an institutionalized control of draft statutes in respect of their conformity with the Convention.

We have to bear in mind that in the last twenty years the Polish legislator has been confronted with two radical changes. The first change occurred in the 90s with the transition from the communist to the capitalist economic system. The second is related to Poland's accession to the European Union (May 2004), which required an enormous legislative output in order to bring the national law in conformity with the *acquis communautaire*. The whole legislative process suffered from this tremendous workload. In this context, experts refer to an "inflation of law". Examining draft statutes in the context of their conformity with international human rights standards may suffer because of these developments.

3. Domestic Remedies

Key Note

The question of domestic remedies is of interest for two reasons. Firstly, the Court can deal with a matter only after all domestic remedies have been exhausted. Secondly, it has been a constant practice of the Court to investigate the question of exhaustion of domestic remedies, to develop a liberal attitude to this requirement and to formulate the sharing of the burden of proof.

Needless to say, the exhaustion of domestic remedies and the existence of an effective judicial system at the European level – together – are vital for the proper functioning of the European control machinery. It is absolutely necessary that individuals first find judicial protection before the national courts, and that the recourse to the Court remains the exception.¹⁷⁵ This leads to the question of how the national courts deal with the requirements of the domestic remedy rule. Finally, this area is of interest when one asks the question of whether the Court has created a dialogue with the various national constitutional and highest courts and an agreement for cooperation in the protection of human rights.

Whenever the highest national court has jurisdiction in human rights matters, a certain tension arises between the national court and the European Court of Human Rights. We should bear in mind that the Court usually approves or criticizes the domestic authorities in its judgments. Furthermore, the Convention provides no explicit mechanism of co-operation between the national courts and the Strasbourg Court.¹⁷⁶ This makes the relationship between national courts and the Court rather difficult. This is true in particular for the relationship of constitutional

¹⁷⁵ See also Recommendation Rec(2004)6 of the Committee of Ministers on the improvement of domestic remedies, adopted on 12 May 2004.

¹⁷⁶ See, however, the proceedings of preliminary rulings created by Art. 234 of the EC Treaty which are a certain basis of co-operation between the European Court of Justice and the national courts, see A. Stone Sweet/T. L. Brunell, *The European Court, National Judges, and Legal Integration*, in: *European Law Journal* 6 (2000), 117–127.

courts – like the German *Bundesverfassungsgericht* or the Italian *Corte Costituzionale* – and the Court.¹⁷⁷ In the case law concerning Article 35 (1) ECHR the Court (and prior to it the Commission) established the rule that procedures before constitutional courts, to which individuals have direct access under domestic law, constitute a remedy to be exhausted before a complaint is filed with the Court.¹⁷⁸ This makes sense only for countries where individuals have direct access to the constitutional court and the constitutional complaint is an effective remedy.

For Poland

In Poland, the constitutional complaint is limited in two ways.¹⁷⁹ Firstly, it can be lodged only against a statutory provision and not against a judicial or an administrative decision as such.¹⁸⁰ Therefore, a constitutional complaint is only possible in a situation in which the alleged violation of the Convention lies in the statutory provision as such. Furthermore, this statutory provision has to constitute the direct legal basis for the individual decision. Therefore a constitutional complaint is impossible if the provision was merely applied at some stage of the main procedure, to take an interim or an incidental measure.¹⁸¹ Secondly, the limitation of constitutional complaint under Polish law concerns the redress the Constitution provides to the individual. According to Article 190 of the Constitution, the only direct effect of the judgment of the Constitutional Tribunal is the abolition of the statutory provision that has been held unconstitutional. However, the individual decision is not quashed automatically by this decision. Article 190 (4) of the Constitution grants the right to request that the procedure be reopened or otherwise revised in a manner and on the basis of principles specified in provisions applicable to the given proceedings. These two limitations considerably restrain the application of the constitutional complaint as an instrument for the protection of the fundamental freedoms and rights of the individual.¹⁸²

However, the Court has decided that the constitutional complaint is an effective remedy on the condition that the individual decision that allegedly violated the Convention has been adopted in direct application of an unconstitutional provision of national legislation, and that procedural regulations applicable for the revision of such type of individual decisions provide for the reopening of the case or

¹⁷⁷ For the relationship between the German Constitutional Court and the Court, see W. Hoffmann-Riem, Kohärenz der Anwendung europäischer und nationaler Grundrechte, in: EuGRZ 29 (2002), 475 et seq.

¹⁷⁸ *X. v. Germany* (appl. no. 8499/79), Commission's decision of 7 October 1980, 21 DR 176 (1980); *Castells v. Spain* (appl. no. 11798/85), Judgment of 23 April 1992, Series A 236, §§ 24–32.

¹⁷⁹ For more details about the Polish Constitutional Tribunal, see G. Brunner/L. Garlicki, Verfassungsgerichtsbarkeit in Polen. Analysen und Entscheidungssammlung 1986–1997, Baden-Baden 1999.

¹⁸⁰ See Zoll (note 4), 869 et seq.

¹⁸¹ *Brudnicka v. Poland* (appl. no. 54723/00), decision of 16 January 2003 (not reported).

¹⁸² Zoll (note 12), 90.

quashing the final decision upon the judgment of the Constitutional Tribunal in which unconstitutionality has been found.¹⁸³ Therefore on the said conditions it is mandatory to file a constitutional complaint in Poland before going to Strasbourg. It remains to be seen whether the constitutional complaint can be considered an effective remedy for the purpose of Article 35 (1) ECHR in a situation where the alleged violation of the Convention resulted only from the application of a legal provision. Special attention has to be paid to the reaction of the Constitutional Tribunal triggered by this decision of the Court.

The case law under Article 35 (1) of the Convention has changed in recent years, taking into account developments in the legislation and practice of several Contracting States that have incorporated new domestic remedies into their national machinery for human rights protection.¹⁸⁴ The Court has reconsidered its general rule that the exhaustion of domestic remedies must be assessed with reference to the date the application was lodged with the Court. The Court has declared inadmissible a large number of applications against Italy raising similar issues after the “*legge Pinto*” entered into force, even though the applications were lodged before the national law became effective.¹⁸⁵ This approach limiting access to the Court has been followed in several cases.¹⁸⁶ It shows a clear tendency of the Court to place obstructions in the way to Strasbourg.

For Switzerland

System of Remedies to the Federal Supreme Court

In Swiss public law basically two remedies exist: the public-law appeal (*staatsrechtliche Beschwerde, recours de droit public*)¹⁸⁷ and the administrative-law appeal (*Verwaltungsgerichtsbeschwerde, recours de droit administratif*).¹⁸⁸ The former has its roots in the time of the foundation of the Federal State in 1848. It was an instrument created to control the power of the Cantons. Thus, since 1848 it has been possible to appeal cantonal acts of states to a federal authority because of a violation of constitutional rights. Originally the competent body was mainly the Federal Parliament. In 1874 competence was as a rule assigned to the Federal Supreme

¹⁸³ *Szott-Medynska v. Poland* (appl. no. 47414/99), Decision as to the admissibility (Third Section), 9 October 2003 (not reported). For a critique of this decision, see J. Trzeciński, *Błędna interpretacja polskich przepisów*, Rzeczpospolita, 2004.05.31, and the reply by R. Wieruszewski, *Skarga do Trybunału przed skargą do Strasburga*, Rzeczpospolita, 2004.06.04.

¹⁸⁴ See *infra* the *legge Pinto* and the Polish statute, notes 228 and 229.

¹⁸⁵ *Brusco v. Italy* (appl. no. 69789/01), decision, 6 September 2001, Reports 2001-IX, 405 et seq.; *Giacometti and 5 Others v. Italy* (appl. no. 34939/97), decision, 8 November 2001, Reports 2001-XII, 137 et seq.

¹⁸⁶ *Ngolica v. Croatia* (appl. no. 77784/01), decision, 5 September 2002, Reports 2002-VIII, 337 et seq.; *Andrásik and Others v. Slovakia* (appl. no. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01, 60226/00), decision, 22 October 2002, Reports 2002-IX, 357 et seq.

¹⁸⁷ Article 84 et seq. OG.

¹⁸⁸ Article 97 et seq. OG.

Court, with a large catalogue of exceptions. This catalogue, which established the jurisdiction of political authorities, mainly that of the Federal Council, has step by step been abolished.

The Constitution of 1848 did not provide a control of the federal administration in respect of Federal Statutes. This was not seen as a necessity, as the federal power was originally rather restricted. According to the strong democratic orientation in the second half of the 19th century, the administrative judiciary should be carried out by bodies elected by the people. Thus, after the 1914 creation of a constitutional fundament for an administrative jurisdiction on the federal level by the insertion of Article 114^{bis} Constitution, a broad administrative judicature of the Federal Supreme Court was only established in 1968.

The distinction between a public-law appeal and an administrative-law appeal is increasingly difficult to draw. The interpenetration of national and cantonal competences makes it hard to decide whether a concrete situation is ruled by cantonal or by federal law. Often a question is not answered fully by one of the two bodies of law, but the basic guidelines are ruled on the federal level and the specific realization is part of a cantonal statute. If the decision in question is based on cantonal law, an administrative-law appeal is not possible.¹⁸⁹ Only if we consider the substance of the rules to lie in the federal law is an administrative-law appeal the right remedy.¹⁹⁰

A violation of the Convention can also be claimed with the remedies of civil, criminal, enforcement and social insurance law. However, the public-law appeal because of a violation of constitutional rights is generally reserved.¹⁹¹ Nevertheless, an applicant may have to lodge a civil-law appeal or an appeal in cassation to the Criminal Cassation Division of the Federal Supreme Court because of the commandment of application of Federal Statutes, stated in Article 191 Constitution. If the Federal Supreme Court cannot diverge from a Federal Statute that it has found to be contrary to the ECHR and that has led to a decision violating the ECHR, this remedy is not effective and therefore may not be invoked before going to Strasbourg.¹⁹² The recent developments of the Federal Supreme Court's case law,

¹⁸⁹ Article 97 (1) OG taken together with Article 5 (1) VwVG includes only concrete acts based on federal law.

¹⁹⁰ For more details about the public-law appeal, see W. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde*, 2. Aufl. Bern 1994, *passim*. On the administrative-law appeal, see I. Häner/A. Kölz, *Verwaltungsverfahren und Verwaltungsrechtspflege des Bundes*, 2. Aufl. Zürich 1998, *passim*.

¹⁹¹ See e.g. Article 43 (1) OG (Berufung (civil-law appeal, recours en réforme)), Article 269 (2) Bundesgesetz über die Bundesstrafrechtspflege vom 15. Juni 1934 (BStP, SR 312.0, Nichtigkeitsbeschwerde an den Kassationshof des Bundesgerichts (appeal in cassation, pourvoi en nullité à la Cour de cassation du Tribunal fédéral)).

¹⁹² The Court has considered that in such a case a civil-law appeal or an appeal in cassation can be sufficient in view of the exhaustion of domestic remedies, since it is possible to obtain the annulment of the questioned decision because of a wrongful application of federal law. For the qualification of a civil-law appeal as an effective domestic remedy, see *Burghartz v. Switzerland* (appl. no. 16213/90), Judgment, 22 February 1994, Series A 280-B, § 20. For the qualification of an appeal in cassation as an effective domestic remedy, see *Müller and others v. Switzerland* (appl. no. 10737/84), Judgment, 24 May 1988, Series A 133.

however, show that this practice may no longer be necessary. Due to the statement that a Federal Statute must not be applied when it is contrary to an international rule protecting human rights,¹⁹³ the public-law appeal and the administrative-law appeal regain their quality as effective remedies in the sense of Article 35 (1) ECHR.

However, the complicated system of remedies and the uncertainties concerning the practice of the Federal Supreme Court make it difficult for the Court, and even more so for the applicants, to decide which remedy must be considered effective and has therefore to be exhausted before going to Strasbourg. The Court itself has declared that the rule of exhaustion of domestic remedies referred to in Article 35 (1) ECHR¹⁹⁴ “must be applied with some degree of flexibility and without excessive formalism” and that “it is essential to have regard to the particular circumstances of each individual case”.¹⁹⁵ All the same, it should be possible for a country such as Switzerland to set a clear rule on which remedies are required to be exhausted before going to Strasbourg.¹⁹⁶

Position of the Federal Supreme Court

As the Swiss constitutional system has always been dominated by the democratic principle, the system of constitutional review is marked by a deep distrust towards the judiciary. Therefore, the position of the Federal Supreme Court is by definition rather weak. In particular, the Federal Supreme Court – like any court in Switzerland – is bound by Federal Statutes. Thus, Federal Statutes cannot be subject to a constitutional review.¹⁹⁷ This aspect of the constitutional system of 1874 was maintained on the occasion of the total revision of the Constitution in 1999. The new Constitution was only seen as an update of the already existing written and unwritten rules. There were to be no substantial reformations that might have endangered the whole project.¹⁹⁸ Thus, the constitutional complaint is limited above all by Article 191 Constitution of 1999. Federal Statutes are binding upon the Federal Supreme Court and all instances applying law. The courts therefore

¹⁹³ Swiss Federal Supreme Court, Judgment, 1999.07.26, BGE 125 II 417.

¹⁹⁴ Former Article 26 ECHR.

¹⁹⁵ *Aksoy v. Turkey* (appl. no. 21987/93), Judgment, 18 December 1996, Reports 1996-VI, 2260 et seq., § 53.

¹⁹⁶ The national system of remedies will be modified by the new Federal Statute on the Federal Supreme Court (Bundesgerichtsgesetz). As a part of the reform of justice (Justizreform) the new statute is supposed to contribute to better legal protection and to the efficiency of the Federal Supreme Court. For the first draft of 28 February 2001, see BBl. 2001 V 4480; for the message by the Federal council, see BBl. 2001 V 4202; for a second draft, see the draft statute by the task force Federal Statute on the Federal Supreme Court, report, 16 March 2004, published on <<http://www.ofj.admin.ch/themen/bgg/ber-agvorschlag-d.pdf>>.

¹⁹⁷ Nowadays this limitation is not seen as a prohibition of examination but as a commandment of application, see chapter 2, *supra* note 139.

¹⁹⁸ Kälin (note 139), Rz. 7.

must apply a Federal Statute even if they should find it incompatible with the Constitution.

This constitutional provision would cause no difficulties were it not for the existence of a second – international – legal system. Article 191 Constitution also mentions international law as binding upon the courts in the same manner as Federal Statutes. This inevitably leads to the question of which rule must prevail in cases featuring a conflict between a Federal Statute and international law, such as the ECHR. According to international law it is clear that international obligations must be complied with. As this point of view is not predominant on the national level, the superimposition of the national judicial system by a strongly legitimated international judiciary body constitutes a tremendous challenge for the Federal Supreme Court. The difficulties are caused by the fact that the Court has broader jurisdiction than the Federal Supreme Court. The existence of a judicial instance on the international level to which individuals can apply, leads to the question of whether the restrictions on the national level are still reasonable. In 1996 the Federal Council mentioned that the Swiss legal order had led to the paradoxical situation that the Court had a larger competence to examine a case than the Federal Supreme Court, consequently relegating the latter to a mere instance to walk through (“*simple instance intermédiaire*”).¹⁹⁹ The Federal Supreme Court had to come to terms with these circumstances and define a general strategy to handle them. Of course, in most of the cases it is possible to harmonize the Federal Statute with the ECHR by interpretation. But what if the wording of the Statute does not leave a way open to such a solution?

In its earlier case law the Federal Supreme Court did not dare to tamper with the prohibition of examination under Article 113 (3) Constitution of 1874. It declared that the ECHR had not altered anything in the national assignment of competences and that the Convention did not create any powers (of audit) of the Federal Supreme Court that had not already existed by virtue of the national law.²⁰⁰

In two areas – both politically undisputable and very clear – the Federal Council helped the Federal Supreme Court to overcome the barrier of separation of powers. In an *échange de lettre* motivated by certain judgments of the Court²⁰¹ the Fed-

¹⁹⁹ Message by the Federal Council on a new Federal Constitution, 20 November 1996, BBl. 1997 I 1, 508 et seq./FF 1997 I 1, 516.

²⁰⁰ See e.g. Swiss Federal Supreme Court, Judgment, 1983.06.14, not published, see SJIR 1984, 203 et seq.; Swiss Federal Supreme Court, Judgment, 1984.10.18, not published, see SJIR 1985, 250 et seq.: “[D]e toute façon, selon l’art. 113 al. 3 Cst. [Constitution], le TF [tribunal fédéral] doit appliquer les lois votées par l’Assemblée fédérale et les arrêtés de cette assemblée qui ont une portée générale. Il est ainsi tenu de s’y conformer sans avoir à examiner s’ils dérogent à la constitution. La CEDH n’a rien changé à cet égard. Elle ne modifie en aucune manière la division des compétences, réglée par le droit interne du pays, entre le législateur et le pouvoir judiciaire suprême, ne conférant donc pas au TF des compétences autres que celles qui lui appartiennent en vertu de la constitution et de la loi d’organisation judiciaire. (...) Dès lors, la question de savoir si l’art. 150 CC [Code Civil] est compatible avec la CEDH échappe au contrôle du TF; le recours est partant irrecevable sur ce point.”

²⁰¹ The case of *Lynas v. Switzerland* (appl. no. 7317/75), published in VPB 47 (1983) No. 93, 433 et seq. revealed some faults of the Swiss extradition law in respect of Article 5 (4) ECHR, in spite of the

eral Department of Justice and Police and the Federal Supreme Court agreed on the incompatibility of two statutes with the ECHR in 1976/77 and 1984. Thus, it was decided that the Federal Supreme Court should not apply the rules contrary to the ECHR until the respective legislative amendments entered into force.²⁰²

In its more recent case law the Federal Supreme Court seems to have accepted the necessity of an effective guarantee of the predominance of the ECHR over Federal Statutes. The Federal Supreme Court gave a first hint in that direction in 1991. It stated that the interpretation of national rules in the light of international obligations also affected Article 114^{bis} (3) of the Constitution, then in force,²⁰³ and that it was also part of the responsibility of the courts to ensure the harmonization of national law and international rules. Therefore, the theoretical possibility existed that the Federal Supreme Court would not apply a Federal Statute that was contrary to the ECHR. In the specific case, however, the Federal Supreme Court did not consider it to be necessary, because it was of the opinion that the Federal Statute could be brought into conformity with the ECHR by interpretation.²⁰⁴ A time of change and uncertainty began. The opinion expressed in this judgment was not fully established in later judgments or in academic writings.

Based on the Vienna Convention on the Law of Treaties²⁰⁵ and its fundamental principle of *pacta sunt servanda*, as well as the direct applicability of international law in Switzerland, in 1999 the Federal Supreme Court decided that in cases of conflict, as a matter of principle international law prevailed over national law.²⁰⁶ The effect was that the national rule could not be applied in particular cases. This solution to the conflict became even more intrusive when the protection of human rights was concerned. The Federal Supreme Court did not decide whether in other cases a different solution, in the sense of the *Schubert* rule,²⁰⁷ could be taken into consideration. Also, in 1999 the second civil division of the Federal Supreme Court, which had generally shown a more reserved attitude towards international law in its judgments,²⁰⁸ declared that this could be the approach of the Federal Supreme Court to solve future conflicts.²⁰⁹ It would be very welcome from the point

fact that the Court declared the appeal inadmissible. The second *échange de lettre* was triggered by the Judgments of the Court concerning *Klass v. Germany* (appl. no. 5029/71), 6 September 1978, Series A 28 and *Malone v. United Kingdom* (appl. no. 8691/79), 2 August 1984, Series A 82.

²⁰² O. Jacot-Guillarmod, *Problèmes de législation pénale révélés par la jurisprudence de Strasbourg: perspective de droit suisse et de droit comparé*, in: *Schweizerische Zeitschrift für Strafrecht* 106 (1989), 255 et seq.

²⁰³ Article 191 Constitution of 1999, Article 190 of the Constitution after the entry into force of Article 29a Constitution (AS 2002 3148).

²⁰⁴ Swiss Federal Supreme Court, Judgment (*Erben X*), 1991.11.15, BGE 111 Ib 367, 373.

²⁰⁵ See *supra* note 113.

²⁰⁶ Swiss Federal Supreme Court, Judgment (*PKK*), 1999.07.26, BGE 125 II 417, 425.

²⁰⁷ See *supra* note 110.

²⁰⁸ See e.g. Swiss Federal Supreme Court, Judgment, 1994.11.21, BGE 120 II 384, 387, where the Federal Supreme Court refused to examine some rules of the Civil Code on their compliance with the ECHR.

²⁰⁹ Swiss Federal Supreme Court, Judgment, 1999.03.23, BGE 125 III 209, 218.

of view of legal certainty if all the divisions of the Federal Supreme Court would agree on this approach. All the same, it seems that these questions can only be clarified in the Constitution, or at least in a Federal Statute. By now it has been recognized that the established system of the Convention, with the right of individual petition to an international court, is not an ordinary international treaty and that it has led to an indirect constitutional review. However, the uncertainty and inconsistency are still widespread.²¹⁰

As in every state with a pronounced culture of constitutional review, there exists a certain tension between the highest national judicial body and the Court. In Switzerland this tension is further increased as the superimposition of the national judiciary by the international system directly affects the constitutional position of the Federal Supreme Court. It is practically impossible for the Federal Supreme Court to harmonize the demands of the national and the international legal order, nor has the dilemma of the Federal Supreme Court been resolved by the new Constitution. After the suggestion of the Federal Council to introduce a general constitutional review was dismissed by the Parliament, the legitimacy of the Federal Supreme Court's practice not to apply a Federal Statute contradictory to the ECHR has not been enhanced, to say the least. According to the principle of judicial self-restraint, the Federal Supreme Court does not seem to have the will to introduce a constitutional review through the back door. However, in the field of the ECHR it is almost forced to do so.

Whereas the Convention does not provide for an appeal against a statute as such but only for an examination of an alleged violation of the ECHR in a specific case, Swiss federal law allows an abstract control of cantonal legal norms (*abstrakte Normenkontrolle*) by the Federal Supreme Court.²¹¹ This control mechanism does not exist in respect of federal law. Thus, the Federal Supreme Court usually has to answer the question of whether in a concrete case the application of the law by federal or cantonal authorities has led to a violation of the ECHR. In this procedure, however, a preliminary question can be asked as to whether the applied rules themselves are in conformity with the ECHR (*konkrete/akzessorische Normenkontrolle*). But this examination of a rule and its compliance with the Constitution or the ECHR does not lead to a declaration of nullity of the rule if it is found contrary to the Constitution or the Convention. The Federal Supreme Court can only – and at the most²¹² – refuse the application of the rule in the actual case.

Although the focus naturally lies on the highest national court, it must be stressed that as the ECHR is directly applicable in Switzerland it can be invoked

²¹⁰ See also the above mentioned, very recent decision of the Federal Personnel Appeals Commission, *supra* note 115.

²¹¹ Article 84 (1) OG.

²¹² See Article 191 Constitution of 1999 and the decision of the Federal Supreme Court, *supra* note 206.

before all courts.²¹³ The task to implement the guarantees of the ECHR is therefore not primarily that of the Federal Supreme Court, but of the cantonal judiciary bodies. The Court, however, generally will not further examine whether the cantonal remedies have been exhausted, because this is usually a condition for the Federal Supreme Court to declare an appeal admissible.²¹⁴

Comparison and Conclusion

The comparison of the reception process in Poland and Switzerland clearly points out that the superimposition of the national judicial system fundamentally challenges the national constitutional order. In both countries this process has yet to be systematically analyzed.

The interaction of the national and the international systems raises difficult questions on the constitutional and procedural level: First, which domestic remedies must be exhausted before an applicant can lodge a complaint with the Court? These problems are very clearly shown by the discussion on the Polish constitutional complaint. Second, can the ECHR help a highest national court to gain competences that are not foreseen in the national constitution? If so, which ones? These questions are of great interest to the Swiss Federal Supreme Court.

In Poland a constitutional complaint is possible only against a statutory provision, not against a judicial decision as such. Great dissension exists on the question of under which circumstances a constitutional complaint is an effective remedy for the purpose of Article 35 (1) ECHR. The further development after a disputed judgment of the Court²¹⁵ remains to be seen.

In Switzerland the uncertainty in respect to effective remedies has its roots in the complicated system of remedies to the Federal Supreme Court and the fact that judicial control is still geared to control the power of the Cantons. These difficult questions concerning the point of contact between the national and the international system cannot be resolved solely by the legal practice of the courts, either on the national or the international level. However, a first step could be the institutionalization of a dialogue between the Court and the relevant national instances.

The system of national remedies can have a notable bearing on the reception process. It is hardly a coincidence that Article 5 and 6 ECHR had the greatest effect in Switzerland. This is linked with the fact that up to the present day cantonal statutes have ruled procedural law. Cantonal statutes have always been exposed to a full control in respect of the ECHR. The constitutional system first of all allowed the Federal Supreme Court the control of the Cantons, whereas federal authorities could barely be controlled. This distinction was justifiable at the birth

²¹³ See chapter 2.

²¹⁴ See e.g. Article 48 (1) OG, Article 86 (1) OG, Article 98 *lit. g* OG.

²¹⁵ *Szott-Medynska v. Poland*, *supra* note 183.

of the Federal State in 1848 when the cantonal competences were much less restricted by federal law than they are today. Nowadays, federal law affects the fundamental rights of individuals to at least the same extent.

4. Development of the Jurisdiction of the Court

Key Note

This section addresses the question as to how and why the jurisdiction of the Court concerning Poland and Switzerland increased over the years and which articles were mainly concerned.²¹⁶ As more than 90 % of the applications to the Court are terminated without a ruling on the merits, it is appropriate to exclude this category of cases for statistical purposes.²¹⁷ If the Court held in a judgment that a country has violated more than one guarantee of the Convention, we put every single violation into the statistic. Thus, the sum of judgments is not equivalent to the sum of violations of the different Articles in the Convention.

For Poland

For Poland the data is collected by the Information Office of the Council of Europe.²¹⁸ The number of judgments has increased dramatically over the years, starting with one judgment in 1997 and reaching 43 in 2003. This increase can be traced back to a greater awareness and the immense popularity of the Convention in Poland over the last few years.²¹⁹

Of a total of 180 judgments concerning Poland (until July 2004), 112 cases concern Article 6 (1) ECHR (length of procedure), i.e. 62 % of all cases. 20 cases concern Article 5 (3) ECHR (unlawful detention), 14 cases Article 5 (4) ECHR (review of lawfulness of detention), 11 cases Article 8 ECHR (private and family life), 11 cases Article 5 (1) ECHR (right to liberty and security), 8 cases Article 6 (1) ECHR (impartial and independent court, fair trial), 5 cases Article 13 ECHR (lack of effective remedy), 3 cases Article 6 (3)c ECHR (right to defense), 3 cases Article 10 ECHR (freedom of expression), 3 cases Article 3 ECHR (prohibition of torture or inhuman or degrading treatment), 2 cases Article 11 ECHR (freedom of assembly and association). There are no cases concerning Article 2 ECHR (right to life),

²¹⁶ L. Caflisch, Der Europäische Gerichtshof für Menschenrechte und dessen Überwachungsmechanismen: Vergangenheit, Gegenwart, Zukunft, in: ZSR N.F. 122 (2003) I, 141 et seq.

²¹⁷ However, not every case declared inadmissible by the Court is of no significance to the reception process; see for example the inadmissibility decisions by the court concerning the exhaustion of the domestic remedies *supra* notes 183, 185 and 186.

²¹⁸ For the years 1997–2003, see <www.coe.org.pl/pre_orzecznictwoA.htm> and <www.coe.org-pl/pre_orzecznictwoB.htm>

²¹⁹ For the reason for this popularity, see Dembour/Krzyżanowska-Mierzevska (note 92), 405 et seq.

Article 4 ECHR (prohibition of slavery), Article 9 ECHR (freedom of thought, conscience and religion), Article 12 ECHR (right to marry) and Article 14 ECHR (prohibition of discrimination). 5 cases deal with the Protocols (mostly Article 1 of Protocol No. 1, i.e. right to property).

There has never been a complaint against Poland raising an allegation of very serious violations of human rights, such as torture or the killing of journalists.²²⁰ The overview of the cases indicates a clear predominance of proceedings concerning the procedural rights of Articles 5 and 6 ECHR, whereas the classic human rights like religious freedom or freedom of speech are seldom the basis of an application to the Court. The lack of any proceedings so far involving the question of religious freedom and discrimination is astonishing.²²¹ Human rights experts in Poland explain this by referring to the fact that neither religious freedom nor discrimination is a real issue in Poland at the present time. However, in a country where the Roman Catholic Church is predominant and there is a strong buried xenophobic and anti-Semitic tendency, this result has to be explained also by the lack of legal awareness and culture of taking court action in order to seek assistance in those human rights matters.

The large number of proceedings triggered by lengthy procedure in the domestic system indicates a systematic malfunction of the judiciary on all domestic levels.²²² The general increase of the applicants in Strasbourg is connected to a general mistrust of the Polish judiciary. Proceedings are excessively long and general access to a tribunal or the impartiality and independence of the courts are deficient.²²³ Although the problem is obvious, Poland has not dealt substantially with judicial reform for several years. Lack of resources is the underlying cause of the malfunctioning of the judiciary.

The Court used the instruments adopted by the Committee of Ministers²²⁴ for the first time in a Polish case dealing with property law.²²⁵ On the basis of this

²²⁰ See, however, for single allegations of mistreatment by the Polish police, M. A. Nowicki, Some Remarks on Human Rights Protection in Poland, in: East European Human Rights Review 6 (2000), 92 et seq.

²²¹ See also A. Klich, Human Rights in Poland: The Role of the Constitutional Tribunal and the Commissioner for Citizens' Rights, in: Saint Louis Warsaw Transatlantic Law Journal 1996, 58.

²²² For the poor working conditions of Polish judges in terms of salary, technical and office equipment as well as human resources, see Helsińska Fundacja Praw Człowieka, Ł. Bojarski/J. Swaton, Monitoring warunków pracy sądów rejonowych. Raport z monitoringu (The District Courts' Conditions of Work. Monitoring Report), Warszawa 1998 (available on <www.hfhrpol.waw.pl>); Open Society Institute, Monitoring the EU Accession Process: Judicial Independence, Budapest 2001, 332 et seq.; L. Garlicki/E. Schwiorskott, Justizgrundrechte im polnischen Rechtssystem aus der Sicht des Europäischen Gerichtshofs für Menschenrechte, in: F.-C. Schröder (ed.), Justizreform in Osteuropa, München 2004, 88; Nowicki (note 220), 99.

²²³ For an illustration of these problems, see *Brudnicka v. Poland* (appl. no. 54723/00), Judgment (Third Section), 3 March 2005 (not yet reported) and *Kreuz v. Poland* (appl. no. 28249/95), Judgment (First Section) 19 June 2001, Reports 2001-VI, 127 et seq. See also Ministers' Deputies CM Monitor (99)15 revised 4 February 2000, Compliance with Member States' commitments.

²²⁴ Resolution of the Committee of Ministers on judgments revealing an underlying systemic problem, adopted on 12 May 2004, DH Res. (2004)3.

Resolution the Court is empowered to identify, in judgments that find a violation of the Convention, what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications. The *Broniowski* situation seems to affect nearly 80'000 other people in Poland.²²⁶ The Court stresses that this situation is not only an aggravating factor as regards the state's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention control machinery.²²⁷

Several Member States to the Convention are aware of the problem caused by systemic underlying problems, in particular lengthy procedures in domestic courts and administrations. In Italy the famous "*legge Pinto*" opened the way for lodging a claim before the national courts.²²⁸ Poland has amended the law in a similar way.²²⁹ This new law gives the right to claim that the procedure is too lengthy to any Polish citizen involved in a legal case. The court has to give an opinion within two months and to grant a compensation of up to 10'000 złotys (around 2'500 Euro). Of practical importance is Article 18 of the new Polish statute. It gives every applicant with a case pending before the Court – claiming a breach of Article 6 (1) ECHR because of length of procedure – the right to file a motion at the national level. It is very likely that the result will be that the Court will send these cases back to Poland on the basis of Article 18 because not all domestic remedies have been exhausted.²³⁰

It seems to be a specific feature of the way human rights are dealt with in Europe that lengthy procedure is a systemic problem. However, if the Court has to deal with these cases, the jurisdictional system will be endangered by too large a caseload in Strasbourg.²³¹ The "*legge Pinto*" and the new Polish statute are two ex-

²²⁵ *Broniowski v. Poland* (appl. no. 31443/96), Judgment (Grand Chamber), 22 June 2004, § 190. See also the Judgment by the Constitutional Tribunal, Trybunał Konstytucyjny, orzeczenie, 2002.12.19, K 33/02, OTK-A 202/7/97, for the incompatibility of the proposed statute with the Constitution (protection of property).

²²⁶ *Broniowski v. Poland* (note 225), § 193. Moreover, there are already 167 applications pending before the Court brought by Bug River claimants.

²²⁷ *Broniowski v. Poland* (note 225), § 193.

²²⁸ F. Macchiaroli, *Eccessiva durata dei processi ed equa riparazione tra giurisprudenza di Strasburgo e legge Pinto*, *Giurisprudenza italiana* 153 (2001) 2007–2012; G. Romano/D. A. Parrotta/E. Lizza, *Il diritto ad un giusto processo tra la Corte internazionale e Corti nazionali. L'equa riparazione dopo la legge Pinto*, Milano 2002. Similar proceedings have been introduced apparently in Slovakia and Croatia.

²²⁹ Ustawa z dnia 17 czerwca 2004r o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki (Act on complaints of a violation of a party's right to have a case examined in judicial proceedings without undue delay), signed by the Polish President 2 August 2004, Dz. U. 04.179.1843.

²³⁰ See *supra* notes 185 and 186.

²³¹ For the need of radical reform of the control system to guarantee the long-term effectiveness of the Court so that it can play its pre-eminent role in protecting human rights in Europe, see Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending

amples of a desperate attempt to resolve the systemic malfunction of the judiciary. One has to bear in mind that the “*legge Pinto*” kind of solution constitutes an end-of-the-pipe approach that will only superficially resolve the underlying problems.²³² Countries such as Poland, with an underdeveloped judiciary, will have to invest substantially in human resources, technical facilities and general infrastructure in order to make the third power an effective branch.

It is no coincidence that the Council of Europe has chosen Poland for the realization of a new pilot project. The Council of Europe is sponsoring a lawyer, who is on the spot in Warsaw with the main task of settling disputes between the Polish authorities and citizens in order to avert cases going to Strasbourg. It remains to be seen what effect this will have.

For Switzerland

It took five years for the first cases to be brought up to Strasbourg. In 1979 we count 6 judgments. Over the following years, the number of judgments increased, but not dramatically. If between 1980 and 1984 we state 1.8 judgments on average per year, between 1995 and 1999, the same length of time, we have an average of 5 judgments. This increase in judgments on average per year took place around 1990.

Of a total of 107 judgments concerning Switzerland (until July 2004), 39 cases concern Article 6 (1) ECHR (26 cases fair trial and 13 cases length of procedure), i.e. 36 % of all cases. Eleven cases concern Article 8 ECHR (private and family life), 10 cases Article 10 ECHR (freedom of expression), 9 cases Article 5 (3) ECHR (unlawful detention), 9 cases Article 5 (4) ECHR (review of lawfulness of detention), 6 cases Article 6 (3) ECHR (right to defense), 5 cases Article 5 (1) ECHR (right to liberty and security), 5 cases Article 6 (2) ECHR (*in dubio pro reo*/presumption of innocence), 5 cases Article 13 ECHR (lack of effective remedy), 3 cases Article 14 ECHR (prohibition of discrimination), 2 cases Article 3 ECHR (prohibition of torture or inhuman or degrading treatment), one case Article 5 (2) ECHR (right to information on the reasons of detention), one case Article 12 ECHR (right to marry). There are no cases concerning Article 2 ECHR (right to life), Article 9 ECHR (freedom of thought, conscience and religion) and Article 11 ECHR (freedom of assembly and association). One judgment deals with Article 4 of Protocol No. 7.²³³

the control system of the Convention (CETS No. 194). We have to bear in mind that the Convention was open to no fewer than 800 million people in 2004, see also C a f l i s c h (note 216), 143 et seq.

²³² For proposals to reform the judicial system more radically, see Helsinki Foundation for Human Rights, Polish National Access to Justice Forum, Report on Monitoring of Access to Legal Aid paid for by the State, Warsaw 2002 (available on <www.hfhrpol.waw.pl>).

²³³ All these numbers also include the decisions of the Committee of Ministers. If we exclude these decisions we get the following numbers: Of a total of 75 judgments concerning Switzerland (until July 2004), 24 cases concern Article 6 (1) ECHR (20 cases fair trial and 4 cases length of procedure), i.e. 33 % of all cases. 9 cases concern Article 8 ECHR (private and family life), 9 cases Article 10 ECHR (freedom of expression), 6 cases Article 5 (4) ECHR (unlawful detention), 5 cases Article 5 (3) ECHR

Beside the procedural rights of Articles 5 and 6 ECHR, Article 8 ECHR also stands out in the statistics concerning Switzerland. However, we have to bear in mind that appeals to Article 8 ECHR quite often also occurred in the context of criminal prosecution. A number of cases concerned questions such as the legal bases of telephone tapping by public authorities in the national Codes of Criminal Procedure.²³⁴ Thus, the decisive point in these cases was whether interference by a public authority had been justified in accordance with Article 8 (2) ECHR. Other cases concerned the right to family life, which is often affected in the context of a residence permit, the right to family reunion or the right not to be evicted.²³⁵ The number of judgments concerning Article 10 ECHR is quite astonishing. It appears even more significant when we consider that the first judgment concerning Switzerland in respect of the right to freedom of expression was only pronounced in 1988. This number of cases has its cause in the definition of the ambit of freedom of expression. In Swiss practice the prevailing case law said that an “opinion” could be protected only if it was ideational. The Court, however, declared that the fact that the applicant’s activities were commercial could not deprive him of the protection of Article 10 ECHR.²³⁶ Advertising is also included within the scope of the guarantees under Article 10 ECHR.²³⁷

If we take a look at the proportion of judgments declaring a violation to judgments in which the Court has found no violation of the Convention, the cases of Article 6 (1) ECHR become less important,²³⁸ whereas those concerning Articles 8 ECHR²³⁹ and 5 (4) ECHR²⁴⁰ predominate.²⁴¹ Because of the small number of judgments in relation to the length of time, it is difficult to make a further analysis of the statistics. The differences between the various Articles may be of a nearly ac-

(review of lawfulness of detention), 5 cases Article 6 (3) ECHR (right to defense), 5 cases Article 13 ECHR (lack of effective remedy), 4 cases Article 6 (2) ECHR (*in dubio pro reo*/presumption of innocence), 3 cases Article 14 ECHR (prohibition of discrimination), 2 cases Article 5 (1) ECHR (right to liberty and security), one case Article 5 (2) ECHR (right to information of the reasons for detention), one case Article 12 ECHR (right to marry) and one case Article 4 of Protocol No. 7.

²³⁴ *Kopp v. Switzerland* (appl. no. 23224/94), Judgment, 25 March 1998, Reports 1998-II, 524 et seq. (violation of Article 8 ECHR); *Lüdi v. Switzerland* (appl. no. 12433/86), Judgment, 15 June 1992, Series A 238 (no violation of Article 8 ECHR).

²³⁵ *Boultif v. Switzerland* (appl. no. 54273/00), Judgment (Second Section), 2 August 2001, Final 02/11/2001, Reports 2001-IX, 119 et seq.

²³⁶ *Autronic AG v. Switzerland* (appl. no. 12726/87), Judgment, 22 May 1990, Series A 178.

²³⁷ *Casado Coca v. Spain* (appl. no. 15450/89), Judgment, 22 February 1994, Series A 285-A. This judgment also shows how the ambit of freedom of expression was developed by the case law of the Court, see § 35.

²³⁸ 18 declarations of violation and 21 declarations of no violation of the ECHR.

²³⁹ 8 declarations of violation and 3 declarations of no violation of the ECHR.

²⁴⁰ 6 declarations of violation and 3 declarations of no violation of the ECHR. However, two declarations of no violation of the ECHR originate from 1979.

²⁴¹ If we exclude the decisions of the Committee of Ministers: Article 6 (1) ECHR: 12 declarations of violation and 12 declarations of no violation of the ECHR; Article 8 ECHR: 7 declarations of violation and 2 declarations of no violation of the ECHR; Article 5 (4) ECHR: 5 declarations of violation and 1 declaration of no violation of the ECHR.

cidental nature. However, the statistical data for Switzerland clearly disprove a frequently made assumption: the higher the human rights standards on the national level, the smaller the number of cases going to Strasbourg. The case law for Switzerland shows that even after a consolidation of the ECHR on the national level, the number of cases going to Strasbourg increased over the years.

Comparison and Conclusion

The number of applications in Strasbourg has increased in respect of both Poland and Switzerland from the time of their accession to the ECHR. However, the dimension of the increase is by far smaller in Switzerland. We are not aware of any very serious violations of the Convention in either country. Unlike Poland,²⁴² Switzerland apparently does not face any problems that might be the source of an underlying systemic problem in the sense of the Resolution of the Committee of Ministers.²⁴³

A cursory examination of the reception process could lead to the following assumption: First, the less developed the standard of human rights in a Member State, the more applications in respect of this country can be expected in Strasbourg. Second, the guarantees invoked before the Court offer an exact description of the human rights situation in the different countries. Third, progress in human rights standards is automatically followed by a decrease in the number of applications in Strasbourg. The analysis of the reception process in Poland and in Switzerland, however, contradicts these assumptions. The applications lodged with the Court allow only a partial revelation of the human rights situation in a certain country: Firstly, only a limited number of the violations of the ECHR are brought up before national courts. An even smaller number of cases are finally examined by the Court. Secondly, the range of claimed violations is considerably affected by non-legal reasons, such as the sociopolitical sensibility, the national culture of judicial dispute settlement, the position and public image of the judiciary, the degree of professionalism in respect of the filing of applications, etc. A highly developed national system of remedies generally has a positive effect on the conformity with the ECHR. However, it also simplifies the way for the applicant to take a further step to Strasbourg,²⁴⁴ which is a factor that leads to an increase of applications to the Court. Thirdly, the Court is not an appellate instance. Thus, a system of jurisdiction on the European level can only be successful when an effective national mechanism of legal protection exists.

²⁴² *Broniowski v. Poland*, *supra* note 225.

²⁴³ See *supra* note 224.

²⁴⁴ Villiger (note 107), Rz. 29, also mentioning the political sense of fighting for one's rights and the attitude of lawyers towards the appeal to the Court as reasons for the quite high number of Swiss applications in Strasbourg.

These conclusions also are of importance for the discussion concerning the reform of the Court's structures and procedures in the context of Protocol No. 14.²⁴⁵ In the long run, the problem of the huge workload of the Court can hardly be solved by adjusting the conventional mechanisms in respect of admissibility. It must be in the interest of all Member States to ensure the existence or development of efficient mechanisms of legal protection in the individual countries.

5. Effect and Publication of the Judgments on the National Level

Key Note

The judgments of the Court are declaratory in nature, i.e. the judgment itself cannot quash a national verdict or annul a national legislative act. However, certain countries provide for an exceptional remedy in order to appeal the judgment of last instance if the Court holds there is a violation of the Convention.²⁴⁶ Reopening the procedure at the national level does not mean that the national judgment is automatically annulled, but it gives the applicant the right to reopen the proceedings. These remedies provide in a certain sense for an "indirect effect" of the Convention in the national legal order. Finally, the question of whether the Convention has achieved a quasi-constitutional character by these means is of interest.

Of interest is also the question of whether the judgments from Strasbourg concerning a specific country are made available in the national language, on a government website or in separate print media (public and private, summarized or full text). The spreading of case law plays an important role for the reception process.²⁴⁷ This is also true for the mass media. Only in a society in which people know their rights is the way to the courts open.

Generally, the Court stresses that it judges only individual cases, but not the law in general. Furthermore, it can be difficult to determine from a judgment of the Court whether it is the national law that is at fault with the Convention or simply its application. Sometimes the Court makes it difficult to draw any concrete conclusions. This is true for the administrative bodies, the courts and the legislator of the concerned country, and also for other countries. Comparative analysis is required to investigate whether there should be more concrete requirements on how the judgments should be worded and whether the introduction of an instrument like an authorized general comment would be helpful for judgments of general and outstanding significance.

²⁴⁵ For the chances of the Protocol No. 14, see H. Keller/M. Bertschli, Erfolgspotenzial des 14. Zusatzprotokolls zur Europäischen Menschenrechtskonvention, in: EuGRZ 32 (2005), forthcoming.

²⁴⁶ See *infra* note 248 for Poland and note 258 for Switzerland.

²⁴⁷ See also the Recommendation Rec(2003)13 of the Committee of Ministers on the publication and dissemination in the Member States of the text of the European Convention on Human Rights and of the case law of the European Court of Human Rights

For Poland

In Poland it is possible to reopen a criminal procedure after an applicant has been given a positive judgment in Strasbourg on the merits.²⁴⁸

A selection of judgments by the Court are translated into Polish and published regularly by the Information Office of the Council of Europe,²⁴⁹ and they are made available on the internet.²⁵⁰ The translated judgments are free on the internet, but the printed versions must be purchased. This means that the systematic distribution of the judgments must be funded, otherwise it fails for financial reasons.

As many courts in Poland have little or no access to the internet or have inadequate computer facilities,²⁵¹ and as many judges (in particular of the older generation) are not familiar with computer and internet technologies and in addition have a language barrier, it is of practical importance that the hard copies of the translated judgments are sent addressed to a certain judge directly on his or her desk (to district courts, appellate bodies and the highest courts).

In Poland the daily newspaper "*Rzeczpospolita*" publishes articles on a regular basis about the European human rights system in general²⁵² and about specific cases concerning Poland.²⁵³ The articles include summaries of judgments and commentaries by members of the governments or by academics.²⁵⁴ The highest attention was paid to cases with important economic implications for the country; "*Rzeczpospolita*" published 15 articles on the *Broniowski* case alone,²⁵⁵ and often points to the high compensation the Court has awarded.²⁵⁶ A recent case dealing

²⁴⁸ Kodeks postępowania karnego, z dnia 6 czerwca 1997 roku, Dz. U. 97.89.55, Article 540 § 3: "Postępowanie wznawia się na korzyść oskarżonego, gdy potrzeba taka wynika z rozstrzygnięcia organu międzynarodowego działającego na mocy umowy międzynarodowej ratyfikowanej przez Rzeczpospolitą Polską." (The proceedings shall be re-opened for the benefit of the accused, when such a need results from a decision of an international authority acting under the provisions of an international agreement which has been ratified by the Republic of Poland.)

²⁴⁹ See Biuro Informacji Rady Europy, Biuletyn, Wybór Orzecznictwa Europejskiego Trybunału Praw Człowieka w sprawach polskich.

²⁵⁰ <www.coe.org.pl>. A selection of translated cases is also available on the website of the Justice Department, <www.ms.gov.pl/re/re_wyroki.shtml>.

²⁵¹ Helsińska Fundacja Praw Człowieka, *Bojarski/Swaton* (note 222), no. 3: 60 % of judges of the first instance have no access to computers, and 38 % share a PC with over a dozen or even several dozen others. As few as 2 % of judges have a computer to themselves.

²⁵² See e.g. M. A. Nowicki, *Polacy w Strasburgu*, *Rzeczpospolita*, 1996.11.26; M. Kozłowski, *Pierwsza sprawa przeciwko Polsce*, *Rzeczpospolita*, 1997.08.25; W. Gontarski, *Kosztowna niewiedza*, *Rzeczpospolita*, 2003.07.09.

²⁵³ See e.g. K. Chrupkova, *Wyrok korzystny dla polskiego obywatela*, *Rzeczpospolita*, 1998.03.26; M. A. Nowicki, *Winna przewlekłość*, *Rzeczpospolita*, 1998.10.31; P. Nowotniak, *Sąd sędzi 18 lat, rząd zapłaci 50 tysięcy*, *Rzeczpospolita*, 2001.07.18; R. Kowalska, *Pięć razy do psychiatry*, *Rzeczpospolita*, 2003.12.05.

²⁵⁴ See also *Drzemczewski/Nowicki* (note 70), 281.

²⁵⁵ *Rzeczpospolita*, 2004.07.02, 2004.06.29, 2004.06.25, 2004.06.24, 2004.06.23, 2004.06.22 (two articles), 2004.06.21, 2004.06.02, 2003.09.15, 2003.06.17, 2002.12.21, 2002.12.17, 2002.10.23.

²⁵⁶ See e.g. R. Kowalska/E. Południk, *Wysokie odszkodowanie za naruszenie prawa własności*. Europejski Trybunał Praw Człowieka w Strasburgu przyznał wczoraj Ryszardowi

with the severe scheme of rent control also got special media attention even before the Court made its judgment.²⁵⁷

For Switzerland

An exceptional remedy for a case that an applicant has brought successfully in Strasbourg is provided for all proceedings. The review of a judgment of the Federal Supreme Court is admissible when a judgment of the Court has found that there has been a violation of the Convention or the protocols thereto, and if reparation can only be awarded by a rehearing proceeding.²⁵⁸ The rule looks easy to apply, but only at first glance. It is clear that a successful appeal in Strasbourg is not automatically followed by a review: the applicant must demand it. He must lodge the application with the Federal Supreme Court within 90 days of the delivery of the decision of the Court by the Federal Office of Justice.²⁵⁹ Less clear is the relationship to Article 41 ECHR²⁶⁰ and to Article 191 Constitution. This last problem was the subject of a judgment of the Federal Supreme Court in 1998.²⁶¹ It declared that a judgment of the Court referred only to a specific national judgment. However, if this judgment has been predetermined by a certain statute, the national courts must refrain from applying this statute in order to fulfill the obligations of Articles 50 and 53 ECHR.²⁶² This should be the case even if the Court did not explicitly comment on the Federal Statute in question.²⁶³ The Federal Supreme Court stated that Article 139a OG was *lex specialis* in respect of a Federal Statute that had been held contrary to the Convention.²⁶⁴ This reasoning may not be very convinc-

Zwierzyńskiemu 120 tys. euro odszkodowania od Polski za naruszenie przez władze publiczne jego prawa własności, Rzeczpospolita, 2002.07.03. M. Łuczka, Dwie sprawy, dwie przegrane Polski. Polska przegrała wczoraj w Strasburgu dwie sprawy ze swoimi obywatelami. Będzie to nas kosztowało 38 tys. zł, Rzeczpospolita, 2000.04.05; P. Nowotniak, Polska zapłaci 20 tysięcy złotych ..., Rzeczpospolita, 2000.10.27; G. Zynam, Polska zapłaci 20 tysięcy złotych, Rzeczpospolita, 2000.12.22.

²⁵⁷ *Hutten-Czapsak v. Poland* (appl. no. 350147/97), Judgment (Fourth Section), 22 February 2005 (not yet reported); see R. Krupa-Dąbrowska, Kamienicznicy czekają na wyrok, Rzeczpospolita, 2004.06.26. In view of the growing number of similar applications against Poland, the case has been considered the “pilot case” for the purpose of establishing whether the impugned system of rent control is compatible with the requirements of Article 1 of Protocol No. 1.

²⁵⁸ Article 139a OG. Corresponding rules exist in Article 66 (1) *lit. b* VwVG, Article 229 (4) and 278^{bis} BStP and Article 200 Bundesgesetz über den Militärstrafprozess vom 23. März 1979 (MStP).

²⁵⁹ Article 141 (1) *lit. c* OG.

²⁶⁰ “... [Q]ue réparation ne peut être obtenue que par la voie de la révision”, see Article 139a (1) OG. For an illustration, see Swiss Federal Supreme Court, Judgment, 1994.03.24, BGE 120 V 150, E.2d.

²⁶¹ Swiss Federal Supreme Court, Judgment, 1998.08.24, BGE 124 II 480.

²⁶² Today, Articles 41 and 46 ECHR.

²⁶³ Swiss Federal Supreme Court, Judgment, 1998.08.24, BGE 124 II 480, 486.

²⁶⁴ *Id.*, 480, 487.

ing,²⁶⁵ but it leads to a logical result that once more allows courts to handle the problems caused by Article 191 Constitution in an efficient way. Thus, Article 139a OG is another important gate of entry for the implementation of European human rights standards in the Swiss national legal order.

The solution chosen by the Federal Supreme Court again leads inevitably to the paradoxical situation which the Federal Council had already complained of in 1996 as it proposed an upgrading of the system of constitutional review.²⁶⁶ Why should the Federal Supreme Court be bound by different rules in an ordinary proceeding or a reopened proceeding after the Court has found a violation of the ECHR, although it must answer the same questions?

The Court, too, has declared that the Member States are obliged to refrain from applying a rule that it has declared contrary to the Convention, and to amend the rule as soon as possible.²⁶⁷ It is important for the national courts, however, that the Court makes clear as a matter of routine whether a national rule itself or only the concrete application has led to a violation. Only in very rare occasions does the Court give as clear a statement as in its judgment concerning *Marckx v. Belgium*.²⁶⁸

The provision of the possibility to return the matter directly to a court of lower instance²⁶⁹ has proved confusing rather than useful. Thus, it is not envisaged that this rule be repeated in the new Federal Statute on the Federal Supreme Court.²⁷⁰

Most of the judgments of the Court concerning Switzerland are published in VPB,²⁷¹ which is edited by the Federal Chancellery. Only those judgments that do not end a proceeding in Strasbourg or that are clearly of no interest do not come up in VPB. The judgments are not translated into German and Italian. However, at least the head notes of all judgments are available in French, German and Italian. The information is delivered by the International Affairs Division of the Federal Office of Justice, which represents Switzerland before the Court.

²⁶⁵ M. P. W y s s, EMRK-Verletzung und bundesrechtliche Revision nach Art. 139a OG – Leitlinien für Umsetzung und Vollzug von Urteilen der Strassburger Organe durch die Schweiz anhand der neuesten bundesgerichtlichen Judikatur, in: *Recht* 17 (1999) 3, 96, note 30.

²⁶⁶ Message by the Federal Council on a new Federal Constitution, *supra* note 199. See also M. B o r g h i, Switzerland, in: R. Blackburn/J. Polakiewicz (note 94), 877 et seq.

²⁶⁷ *Vermeire v. Belgium* (appl. no. 12849/87), Judgment, 29 November 1991, Series A 214-C. For further analysis of the effects of judgments of the Court beyond the present case, see A. K l e y, Das Verfahren vor dem Europäischen Gerichtshof für Menschenrechte und die Tragweite seiner Urteile, in: *AJP* 6 (1997), 1005 et seq.

²⁶⁸ *Marckx v. Belgium* (appl. no. 6833/74), Judgment, 13 June 1979, Series A 31, § 58, “Admittedly, it is inevitable that the Court’s decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions and not from individual measures of implementation, but the decision cannot of itself annul or repeal these provisions: the Court’s judgment is essentially declaratory and leaves to the State the choice of the means to be utilized in its domestic legal system for performance of its obligation under Article 53 (art. 53).”

²⁶⁹ Article 139a (2) and (3) OG.

²⁷⁰ See Article 108 of the draft by the Federal Council of 28 February 2001, BBl. 2001 V 4480.

²⁷¹ *Verwaltungspraxis der Bundesbehörden*. Very much information is available also on the website of VPB, <<http://www.vpb.admin.ch>>.

As it is a division of the Federal Department of Justice and Police that represents Switzerland before the Court, the distance to the national organs responsible for the implementation of European human rights standards is not as great as when the representing function is assigned to the Federal Department of Foreign Affairs. Judgments and decisions of the Court are always transmitted to the federal instances that have been involved in the national proceedings and to the Canton concerned. If a judgment is significant to more than the specific case all the Cantons are informed by the Federal Department of Justice and Police. The International Affairs Division also informs the potentially concerned federal and cantonal instances of cases before the Court concerning other countries that could be of significance for Switzerland.

Further useful information is available on <<http://www.humanrights.ch>> with another link to a valuable index of judgments of the Court translated into German on <<http://www.egmr.org>>. The most important German-language forum is the EuGRZ.²⁷² In its 30 years of existence it has published more than 200 Strasbourg judgments in German. A highly valuable overview on judgments of the Court is edited regularly in AJP in German.²⁷³

Since in Switzerland access to the Internet naturally belongs to every office, availability of the judgments of the Court is not a problem. As both French and English are also very common in the German- and Italian-speaking part of the country, there exists little or no language barrier.

Judgments of the Court are not hot topics in the Swiss media. While the general public knows that there is a judicial instance in Strasbourg, it is not often aware of its judgments. However, Swiss cases are generally briefly reported in daily newspapers.²⁷⁴ Important judgments concerning other countries do also come up in the media.²⁷⁵ The ECHR holds further interest in Switzerland as an argument for the compatibility or non-compatibility of new national statutes.²⁷⁶

²⁷² EuGRZ, Kehl am Rhein, since 1974, edited twice a month.

²⁷³ F. Schürmann, Chronik der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, in AJP since 1993 (see e.g. AJP 5 (1996), 500–511, AJP 6 (1997), 308–311, AJP 9 (2000), 895–909, AJP 12 (2003), 1488–1510).

²⁷⁴ See e.g. Judgment of the Court *Nideröst-Huber v. Switzerland*, NZZ of 19 February 1997; Judgment of the Court *Kopp v. Switzerland*, NZZ of 26 March 1998; Judgment of the Court *Athanasoglou u.a. v. Switzerland*, NZZ of 7 April 2000; Judgment of the Court *Ziegler v. Switzerland*, NZZ of 23 October 2002.

²⁷⁵ See e.g. Judgment of the Court *Pretty v. United Kingdom*, NZZ of 30 April 2002, Judgment of the Court *Dogan and others v. Turkey*, NZZ of 1 July 2004, Judgment of the Court *Von Hannover v. Germany*, NZZ of 2 September 2004.

²⁷⁶ See e.g. the articles in NZZ of 11 February 2004, 9 February 2004, 30 January 2004, 22 May 2003 on the popular initiative on the lifelong internment of not treatable, extremely dangerous sexual offenders and violent criminals (*supra* note 172).

Comparison and Conclusion

Whereas Polish law only allows the reopening of criminal proceedings,²⁷⁷ in Switzerland an exceptional remedy exists for any proceeding.²⁷⁸ The existence of such an exceptional remedy on the national level in order to appeal the judgment of last instance if the Court holds there is a violation of the ECHR does not automatically qualify the character of the Convention as quasi-constitutional. To make such a qualification it is necessary to include the hierarchic position of the ECHR and the practice of the national courts concerning cases of conflicting rules.²⁷⁹ However, the establishment of an exceptional remedy can be an instrument to harmonize the national legal order and the ECHR by means of procedural law.

The publication of the judgments of the Court and their dispersal and translation are, without doubt, of great importance for the reception process. However, the financial resources must be handled carefully. The almost never-ending translation of judgments concerning length of procedure in Poland serves as an example. The translation of these judgments limits the ability to deal with important judgments concerning other countries. It would be a more rational and responsible approach to select the most relevant leading cases on the European level for translation into the various national languages.

The situation in Poland demonstrates that the reception of the ECHR in a country depends not only on the constitutional system and the attitude of the political establishment and the national courts towards the Convention. Factors such as technical equipment and exchange of information are vital as well.

6. The Court's Case Law in Substance

Key Note

Besides the theoretical underpinnings and the procedural questions, the judgments by the Court are at the center of the analysis of this research project. It is obvious that the cases in which the Court found a violation of the Convention are the most spectacular and of central importance. However, it is worth looking at the important cases in which the country did not violate the Convention²⁸⁰ and it is indispensable to look at the decisions of the Court concerning admissibility and in particular the exhaustion of the national remedies.²⁸¹

²⁷⁷ *Supra* note 248.

²⁷⁸ *Supra* note 258.

²⁷⁹ See chapter 2.

²⁸⁰ An illustrative example for Poland is *Gorzelik v. Poland* (appl. no. 44158/98), Judgment (Grand Chamber), 17 February 2004, which deals with the minority in Silesia.

²⁸¹ See *supra* note 183.

The case law must also be seen as a starting point for constitutional and legal changes. It is vital to the reception process that a country draws the necessary conclusions from an unpleasant judgment in amending law and practice.

For Poland

From 1944 to 1989 in Poland the State was owned by those in power. The Communists were anything but servants of the citizens. Therefore, in the communist era in Poland the police played a regime-oriented, repressive role. The police use of force was not embedded in a normative system of institutional checks and balances. Conceptions of the rule of law and human rights had limited impact, if any at all. The unjustified use of physical force was part of the daily police routine. Moreover, the absence of any system of independent democratic accountability of the police led to a systemic violation of human rights. Following the fall of the communist regimes, Poland went through a process of reorientation concerning the role of the police. On the one hand, both outside and within the police there has been a growing awareness that it is vital for a democratic society that the police act in accordance with human rights standards. On the other hand, the police were (and still are) faced with massive crime problems.²⁸² Soon after the ratification of the Convention in 1997, Polish national law provided the changes necessary for reform. The result of these changes is that there are no current indications of systemic police torture or inhuman treatment.²⁸³ Against the historical background, this result is striking.

Before 1997 Polish criminal proceedings were clearly not in conformity with the European requirements of Articles 5 and 6 (and partially Article 8) ECHR.²⁸⁴ At

²⁸² N. Uildriks, *Dealing with Complaints Against the Police in Romania, Bulgaria and Poland*, in: *Netherlands Quarterly of Human Rights* 10 (2001), 272 et seq.

²⁸³ *Id.*, 288. The only case in which the Court held a violation of Article 3 was *Iwańczuk v. Poland* (appl. no. 25196/94), Judgment (Fourth Section), 15 November 2001, Final 15/02/2002 (not reported).

²⁸⁴ See *Garlicki/Schwierskott* (note 222), 95 et seq.; J. Szumski, *Pre-trial Detention and Human Rights in Poland*, in: L. Leszczyński (ed.), *Protection of Human Rights in Poland and European Communities*, Lublin 1995, 216 et seq.; see also *supra* note 7. For the inconsistency of the *Kodeks postępowania karnego* of 1969/1973 (Code of Criminal Procedure) and the *Kodeks karny wykonawczy* of 1969/1998 (the Code of Execution of Criminal Sentences) with Article 5 (1), 5 (3), 5 (4) and 8 ECHR, see *Wesołowski v. Poland* (appl. no. 29687/96), Judgment (Second Section), 22 June 2004, Final 22/09/2004 (not reported); *M.B. v. Poland* (appl. no. 34091/96), Judgment (Fourth Section), 27 April 2004, Final 27/07/2004 (not reported); *D.P. v. Poland* (appl. no. 34221/96), Judgment (Fourth Section), 20 January 2004, Final 20/04/2004 (not reported); *G.K. v. Poland* (appl. no. 38816/97), Judgment (Fourth Section), 20 January 2004, Final 20/04/2004 (not reported); *Matwiejczuk v. Poland* (appl. no. 37641/97), Judgment (Fourth Section), 2 December 2003 (not reported), Final 02/03/2004; *Goral v. Poland* (appl. no. 38654/97), Judgment (Third Section), 30 October 2003, Final 30/01/2004 (not reported); *Klamecki v. Poland* (appl. no. 31583/96), Judgment (First Section), 3 April 2003 (not reported); *Salapa v. Poland* (appl. no. 35489/97), Judgment (Third Section), 19 December 2002, Final 19/03/2003 (not reported); *Nowicka v. Poland* (appl. no. 30218/96), Judgment (Second Section), 3 December 2002, Final 03/03/2003 (not reported); *Dacewicz v. Poland* (appl. no. 34611/97), Judgment (Fourth Section), 2 July 2002, Final 02/10/2002 (not reported); *Migon v. Poland* (appl. no. 24244/94), Judgment (Fourth Section), 25 June 2002, Final 25/09/2002 (not reported); *Olstowski v. Poland* (appl.

the time, the public prosecutor was an organ vested with the power to use pre-trial detention in preliminary proceedings. Therefore the public prosecutor was not an officer authorized by law to exercise judicial power in the sense of Article 5 (3) ECHR. Although the law has been changed, there are still some sensitive areas, for example the detention of foreigners at the airport if their deportation is not possible and Article 5 (1) ECHR,²⁸⁵ or the detention of alcoholics in sobering-up centers.²⁸⁶

Out of the 14 cases concerning Article 5 (4) ECHR, one is particularly worth mentioning, because it has a connection to the vast majority of cases dealing with length of procedure. The proceedings by which the lawfulness of the applicant's detention in a psychiatric hospital was to be examined and which only took place one year and eight months after the request had been submitted have been considered as a breach of Article 5 (4) ECHR.²⁸⁷

Most of the cases in which Poland has been convicted of a violation of the Convention concern Article 6 (1) ECHR. The largest number deals with the length of procedure.²⁸⁸ The allegation of lengthy procedure is common in criminal²⁸⁹, civil²⁹⁰ and administrative proceedings²⁹¹. Other aspects of Article 6 (1) ECHR, such as sufficient access to a court hampered by excessively high court fees,²⁹² or access to an impartial tribunal²⁹³ have been sporadically alleged by applications in Stras-

no. 34052/96), Judgment (Fourth Section), 15 November 2001, Final 15/02/2002 (not reported); *Ilowiecki v. Poland* (appl. no. 27504/95), Judgment, 4 October 2001, Final 04/01/2002 (not reported); *Kreps v. Poland* (appl. no. 34097/96), Judgment, 26 July 2001, Final 26/10/2001 (not reported); *Szeloch v. Poland* (appl. no. 33079/96), Judgment (Fourth Section), 22 February 2001, Final 22/05/2001 (not reported); *Kawka v. Poland* (appl. no. 25874/94), Judgment (First Section), 9 January 2001, Final 27/09/2002 (not reported); *Jabłoński v. Poland* (appl. no. 33492/96), Judgment (Fourth Section), 21 December 2000 (not reported); *Trzaska v. Poland* (appl. no. 25792/94), Judgment (First Section), 11 July 2000 (not reported); *Niedbata v. Poland* (appl. no. 27915/95), Judgment (First Section), 4 July 2000 (not reported); *Baranowski v. Poland* (appl. no. 28358/95), Judgment (First Section), 28 March 2000, Reports 2000-III, 241 et seq.; *Musiak v. Poland* (appl. no. 24557/94), Judgment (Grand Chamber), 25 March 1999, Reports 1999-II, 155 et seq. See also *supra* notes 99 et seq.

²⁸⁵ See for an illustration *Shamsa v. Poland* (appl. no. 45355/99, 45357/99), Judgment (Third Section), 27 November 2003, Final 27/02/2004 (not reported).

²⁸⁶ See *Litwa v. Poland* (appl. no. 26629/95), Judgment (Second Section), 4 April 2000, Reports 2000-III, 289 et seq.

²⁸⁷ *Musiak v. Poland* (appl. no. 24557/94), Judgment (Grand Chamber), 25 March 1999, Reports 1999-II, 155 et seq.

²⁸⁸ For the statistical data, see *supra* note 218.

²⁸⁹ For an illustration, see *Wróbel v. Poland* (appl. no. 46002/99), Judgment (Fourth Section), 20 July 2004, Final 15/12/2004 (not reported).

²⁹⁰ For an illustration, see *Kranz v. Poland* (appl. no. 6214/02), Judgment (Fourth Section), 17 February 2004, Final 17/05/2004 (not reported).

²⁹¹ For an illustration see *Zwierzyński v. Poland* (appl. no. 34049/96), Judgment (First Section), 19 June 2001, Reports 2001-VI, 203 et seq.

²⁹² *Kreuz v. Poland* (appl. no. 28249/95), Judgment (First Section), 19 June 2001, Reports 2001-VI, 127 et seq.

²⁹³ *Werner v. Poland* (appl. no. 26760/95), Judgment (Fourth Section), 15 November 2001, (not reported).

bourg. One has to observe that the vast majority of cases – in which the Court held a violation of Article 6 (1) ECHR because of excessively long procedure – is in practice the most fundamental problem of the reception process in Poland.

Sporadic cases deal with Article 6 (3) c ECHR, the requirement of a fair trial²⁹⁴ and sufficient means to pay for legal assistance.²⁹⁵ The cases do not indicate a systematic problem of Polish law in this respect, but are rather illustrations of badly applied national law in practice.

Most of the cases in which the Court held a violation of Article 8 ECHR²⁹⁶ concern the censorship of the correspondence of detainees, which was allowed without limitations in the Code of Execution of Criminal Sentences of 1969.²⁹⁷ The law was amended in 1997. However, on several occasions the Court still found a breach of Article 8 ECHR.²⁹⁸

Poland was twice convicted because of an infringement of Article 10 ECHR. In the first case the Court held that the Press Law in force at the material time was not sufficiently precise in specifying the conditions under which a press register could be refused.²⁹⁹ In the second case the Court held that an 8 months prison sentence for insulting a judge was unnecessarily sever.³⁰⁰

²⁹⁴ *Belziuk v. Poland* (appl. no. 23103/93), Judgment, 25 March 1998, Reports 1998-II, 558 et seq.

²⁹⁵ *Berliński v. Poland* (appl. no. 27715/95, 30209/96), Judgment (Fourth Section), 20 June 2002, Final 20/09/2002 (not reported); *R.D. v. Poland* (appl. no. 29692/96, 34612/97), Judgment, Fourth Section, 18 December 2001, Final 18/03/2002 (not reported).

²⁹⁶ For the two exceptions, see *Worwa v. Poland* (appl. no. 26624/95), Judgment (Third Section), 27 November 2003, Final 14/06/2004, Reports 2003-XI (not yet printed); *Płoski v. Poland* (appl. no. 26761/95), Judgment (Fourth Section), 12 November 2002, Final 12/02/2003 (not reported).

²⁹⁷ *G.K. v. Poland* (appl. no. 38816/97), Judgment (Fourth Section), 20 January 2004, Final 20/04/2004 (not reported); *Matwiejczuk v. Poland* (appl. no. 37641/97), Judgment (Fourth Section), 2 December 2003, Final 02/03/2004 (not reported); *Goral v. Poland* (appl. no. 38654/97), Judgment (Third Section), 30 October 2003, Final 30/01/2004 (not reported); *Klamecki v. Poland* (appl. no. 31583/96), Judgment (First Section), 3 April 2003 (not reported); *Salapa v. Poland* (appl. no. 35489/97), Judgment (Third Section), 19 December 2002, Final 19/03/2003 (not reported); *Nowicka v. Poland* (appl. no. 30218/96), Judgment (Second Section), 3 December 2002, Final 03/03/2003 (not reported); *Radaj v. Poland* (appl. no. 29537/95, 35453/97), Judgment (First Section), 28 November 2002, Final 28/02/2003 (not reported); *Niedbata v. Poland* (appl. no. 27915/95), Judgment (First Section), 4 July 2000 (not reported).

²⁹⁸ See *G.K. v. Poland* (appl. no. 38816/97), Judgment (Fourth Section), 20 January 2004, Final 20/04/2004 (not reported); *Salapa v. Poland* (appl. no. 35489/97), Judgment (Third Section), 19 December 2002, Final 19/03/2003 (not reported); *Mianowski v. Poland* (appl. no. 42083/98), Judgment (Fourth Section), 16 December 2003, Final 16/03/2004 (not reported); *Matwiejczuk v. Poland* (appl. no. 37641/97), Judgment (Fourth Section), 2 December 2003, Final 02/03/2004 (not reported); *Klamecki v. Poland* (appl. no. 31583/96), Judgment (First Section), 3 April 2003 (not reported); *Niedbata v. Poland* (appl. no. 27915/95), Judgment (First Section), 4 July 2000 (not reported). See also *supra* notes 99 et seq.

²⁹⁹ *Gawęda v. Poland* (appl. no. 26229/95), Judgment (Former First Section), 14 March 2002, Reports 2002-II, 105 et seq.

³⁰⁰ *Skalka v. Poland* (appl. no. 43425/98), Judgment (Third Section), 27 May 2003, Final 27/08/2003 (not reported). For a similar case in which the Court held by twelve votes to five that there was no breach of Article 10 ECHR, see *Janowski v. Poland* (appl. no. 25716/94), Judgment (Grand Chamber), 21 January 1999, Reports 1999-I, 187 et seq.

All cases in which the Court held a violation of Article 13 ECHR have a connection with the judgments in which the proceedings were deemed lengthy.³⁰¹ A Polish case³⁰² triggered a change in the Court's case law concerning the relationship between Article 6 (1) ECHR and Article 13 ECHR proceedings. Whereas under the old practice the Court did not deal separately with the matter of an effective remedy in cases of a breach of Article 6 (1) ECHR, the growing frequency of these procedures led the Court to rethink its practice. The Court held that if Article 13 ECHR was to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by Article 6 (1) ECHR, individuals would be systematically forced to refer complaints to the Court in Strasbourg. However, these complaints should first be addressed within the national legal system.³⁰³ In 2001 the Constitutional Tribunal held that it was possible to lodge a civil action against the State Treasury under Article 417 of the Civil Code.³⁰⁴ However, so far the Court did not accept this remedy as an effective one as the Polish Government failed to substantiate its contention.³⁰⁵

Given the large number of cases concerning the length of procedure, it is worth coming back to this problem once again. The length of procedure can be traced to different root causes. Firstly, many civil servants do not feel any need to speed up their work or simply to interact pleasantly with a citizen, given their bad working conditions or are simply practicing a (post-)communist working mentality.³⁰⁶ Secondly, the accession to the Convention implied that many proceedings, which formerly were purely administrative, had to be changed to judicial proceedings. The courts got the power in those areas and the burden of new proceedings, but received no additional infrastructure or human resources. This development can be illustrated by one case that made its way to Strasbourg.³⁰⁷ In 1991 the Polish legislator enacted a politically and historically important statute on the annulment of

³⁰¹ *Listawska v. Poland* (appl. no. 37761/97), Judgment (Fourth Section), 13 July 2004, Final 15/12/2004 (not reported); *Lobarzewski v. Poland* (appl. no. 77757/01), Judgment (Fourth Section), 25 November 2003, Final 25/02/2004 (not reported); *Cegielski v. Poland* (appl. no. 71893/01), Judgment (Fourth Section), 21 October 2003, Final 21/01/2004 (not reported); *D.M. v. Poland* (appl. no. 13557/02), Judgment (Fourth Section), 14 October 2003, Final 14/01/2004 (not reported); *Kudła v. Poland* (appl. no. 30210/96), Judgment (Grand Chamber), 26 October 2000, Reports 2000-XI, 197 et seq.

³⁰² *Kudła v. Poland* (appl. no. 30210/96), Judgment (Grand Chamber), 26 October 2000, Reports 2000-XI, 197 et seq.

³⁰³ *Kudła v. Poland* (*supra* note 302), § 155.

³⁰⁴ Trybunał Konstytucyjny, wyrok, 4 December 2001, SK 18/00, OTK 2001/8/256.

³⁰⁵ *Listawska v. Poland* (appl. no. 37761/97), Judgment (Fourth Section), 13 July 2004, Final 15/12/2004, § 51 (not reported); *Lobarzewski v. Poland* (appl. no. 77757/01), Judgment (Fourth Section), 25 November 2003, Final 25/02/2004, § 50 (not reported); *Cegielski v. Poland* (appl. no. 71893/01), Judgment (Fourth Section), 21 October 2003, Final 21/01/2004, § 42 (not reported); *D.M. v. Poland* (appl. no. 13557/02), Judgment (Fourth Section), 14 October 2003, Final 14/01/2004, § 49 (not reported). See also Krzyżanowska-Mierzevska (note 92), 45 et seq.

³⁰⁶ See also Dembour/Krzyżanowska-Mierzevska (note 92); Klich (note 221), 59; Krzyżanowska-Mierzevska (note 92), 42 and 48 et seq.

³⁰⁷ *Kurzac v. Poland* (appl. no. 31382/96), Judgment (Fourth Section), 22 February 2001, Final 22/05/2001, Reports 2000-VI, 489 et seq.

convictions where persons had been persecuted for their activities aimed at achieving independence for Poland.³⁰⁸ This was the instrument addressing the most flagrant wrongs done by the communist regimes (by a later amendment to the law those of the Stalinist era were included). Originally, the ordinary criminal courts had the competence to deal with those proceedings, but because of an amendment to the law only the Warsaw Regional Court was competent between 1993 and April 1995. The effect was that shortly afterwards thousands of cases were pending in the Criminal Division of the Warsaw Regional Court. This created inevitable organizational problems and lengthy proceedings for which Poland was convicted in the aforementioned judgment. This development seems characteristic for the situation in Poland: a deserving project of legislation, but a poorly managed implementation.

The overview of the case law concerning Poland shows some characteristic features. Firstly, there is no sign of the very serious human rights violations that appear so spectacularly in other countries such as Russia, Belarus, Ukraine or Turkey. Secondly, there is no indication that some areas in the written law are in vital contrast to the Convention's requirements. Thirdly, however, the case law indicates that human rights standards are rather a problem on a day-to-day basis. This is because in certain administrative areas a (post-)communist mentality prevails in the work place and the context and substance of human rights is not yet fully present in the daily life of many civil servants.³⁰⁹ This gives rise to mistrust of the Polish judiciary and administration and explains why many Poles place their hope to Strasbourg.

For Switzerland

As in Strasbourg, the main body of the complaints before the Federal Supreme Court concerns Articles 5 and 6 ECHR. The majority of applicants claim deficiencies of organization and procedure.³¹⁰ While the reformations of national statutes triggered by the ECHR or Strasbourg case law were of some significance, they did not lead to a fundamental, much less a revolutionary change in the Swiss legal order as a consequence.³¹¹ The procedural guarantees of Article 5 and 6 ECHR are very much influenced by the Anglo-Saxon system of procedure. Thus, the judge and judicial control of exertion of power play an important role. It is therefore not surprising that the interpretation of "other officer authorized by law to exercise

³⁰⁸ Ustawa o uznaniu za nieważne orzeczeń wydanych wobec osób represjonowanych za działalność na rzecz niepodległego bytu Państwa Polskiego, 23 February 1991, Dz. U. 91.34.149.

³⁰⁹ For other reasons hampering the access to justice in Poland, see E. Łętowska, *Der Zugang zum Recht*, in: C. D. Classen/H. Heiss/A. Suproń-Heidel, *Polens Rechtsstaat am Vorabend des EU-Beitritts*, Tübingen 2004, 107 et seq.

³¹⁰ Haefliger/Schürmann (note 164), 438.

³¹¹ *Id.*, 447.

judicial power³¹² has led to various discussions and amendments in the cantonal Codes of Criminal Procedure.³¹³ Above all, the concept of equality of arms concretizes the fair trial in the sense of Article 6 ECHR. However, it is not easy to convert this principle into the Continental system of criminal procedural law.³¹⁴

Soon after the entry into force of the ECHR for Switzerland, a decision of the Commission³¹⁵ triggered an amendment of the Federal Statute on military criminal procedure,³¹⁶ as there had been no judicial instance that decided on a close arrest (*scharfer Arrest*) in the military disciplinary procedure. Quite a few judgments of the Strasbourg organs concerned detention on remand and triggered various amendments in cantonal Codes of Criminal Procedure.³¹⁷

Central to the Court and national instances was the requirement of a judicial control of detention (*habeas corpus*, Article 5 (4) ECHR). First of all, federal criminal procedure had to be reformed,³¹⁸ because it had been in the Federal Prosecutor's competence to decide on the maintenance of the detention on remand. An important judgment was *Sanchez-Reisse v. Switzerland*,³¹⁹ which was followed by various amendments of cantonal law.³²⁰ The right to judicial control of detention was also inserted into the new Constitution of 1999.³²¹

The judgment by the Court in the case of *Minelli*,³²² who had been committed to pay two-thirds of the court costs despite the termination of the criminal prosecution, triggered a change of practice concerning the imposition of court costs. The

³¹² Article 5 (3) ECHR.

³¹³ See S. Trechsel, *Der Einfluss der Europäischen Menschenrechtskonvention auf das Strafrecht und Strafverfahrensrecht der Schweiz*, in: *Zeitschrift für die gesamte Strafrechtswissenschaft* 100 (1988) 3, 686 et seq. with examples.

³¹⁴ *Id.*, 694 et seq.; see also R. Levi, *Zum Einfluss der EMRK auf das kantonale Prozessrecht, Erwartungen und Ergebnisse*, in: *Schweizerische Zeitschrift für Strafrecht* 106 (1989), 228 et seq.

³¹⁵ *Eggs v. Switzerland*, decision, Commission, 4 March 1978, DR 15, 35; *Eggs v. Switzerland*, resolution, Committee of Ministers, 19 October 1979, EuGRZ 7 (1980), 274, the Committee did not follow the decision of the Commission because the Federal Statute had been amended in the meantime; *Santschi v. Switzerland*, decision, Commission, 13 October 1981, DR 31, 5.

³¹⁶ MStP, *supra* note 258, entered into force 1 January 1980, AS 1979 1037, 1058.

³¹⁷ *Huber v. Switzerland* (appl. no. 12794/87), Judgment, 23 October 1990, series A 188. For the practice of the Federal Supreme Court after this judgment of the Court, see Swiss Federal Supreme Court, Judgment, 1991.09.10, BGE 117 Ia 199, 201; Swiss Federal Supreme Court, Judgment, 1992.01.24, BGE 118 Ia, 95, 97. For an extreme example, where a duration of 4 years was found to be legal, see *W. v. Switzerland* (appl. no. 14379/88), Judgment, 26 January 1993, Series A 254-A.

³¹⁸ Article 52 (2) BStP, amended by annex (2), Bundesgesetz vom 22. März 1974 über das Verwaltungsstrafrecht (VStrR, SR 313.0), AS 1974 1857, entered into force 1 January 1975.

³¹⁹ *Sanchez-Reisse v. Switzerland* (appl. no. 9862/82), Judgment, 21 October 1986, Series A 107.

³²⁰ See e.g. Swiss Federal Supreme Court, Judgment, 1989.01.18, BGE 115 Ia 56, 60 et seq.; Swiss Federal Supreme Court, Judgment, 1989.03.22, BGE 115 Ia 293, 299 et seq.; Swiss Federal Supreme Court, Judgment, 1990.03.14, BGE 116 Ia 60, 63 et seq.; Swiss Federal Supreme Court, Judgment, 1995.03.28, BGE 121 II 53, 54 et seq.

³²¹ Article 31 (IV) Constitution of 1999. For the most recent practice, see Swiss Federal Supreme Court, Judgment, 2000.02.29, BGE 126 I 172.

³²² *Minelli v. Switzerland* (appl. no. 8660/79), Judgment, 25 March 1983, Series A 62.

Swiss Federal Supreme Court adapted the judgment of the Court and concretized the guarantees under Article 6 (2) ECHR.³²³

In *Lüdi v. Switzerland*³²⁴ the Court gave an important judgment concerning the right of an accused to examine or have examined witnesses on his behalf as expressed in Article 6 (3) ECHR. The Court stated that an anonymous witness on whom the judge bases his decision as a matter of principal must be treated in the same manner as an ordinary witness. The Federal Supreme Court approved this rule in later judgments.³²⁵ Switzerland has very recently enacted a new Federal Statute on undercover inquiry that shall satisfy the requirements established by the Court, such as the legal basis for undercover inquiries and the protection of the rights of the defense.³²⁶

The Strasbourg practice may have had its greatest effect on criminal procedure in the Cantons through two judgments concerning Belgium, *De Cubber*³²⁷ and *Piersack*³²⁸. Following these judgments the Federal Supreme Court decided in 1986 that the union of the examining magistrate and the subject judge (*Sachrichter*) into one person was not compatible with Article 6 (1) ECHR.³²⁹

The autonomous interpretation of the term “determination of [...] civil rights and obligations” and “criminal charge” by the Court had various effects on the Swiss legal order. The Court also increasingly qualified matters of public law – according to national criteria – such as questions of expropriation as “civil rights and obligations”. This development had a considerable effect on the cantonal and federal procedure of expropriation. Only after the Federal Supreme Court declared invalid the renewed interpretative declaration in respect of Article 6 (1) ECHR in 1992³³⁰ was access to a court with full jurisdiction as granted by Article 6 (1) ECHR fully accepted in Switzerland.

The legal protection demanded by the Strasbourg practice in matters of land use planning made some additional amendments necessary in Switzerland. Land use plans (*Nutzungspläne*) that can cause a material or formal expropriation fall under

³²³ Swiss Federal Supreme Court, Judgment, 1983.09.21, BGE 109 Ia 160, 163 et seq.; Swiss Federal Supreme Court, Judgment, 1988.06.29, BGE 114 Ia 299, 302; Swiss Federal Supreme Court, Judgment, 1990.06.27, BGE 116 Ia 162, 165 et seq.

³²⁴ *Lüdi v. Switzerland* (appl. no. 12433/86), Judgment, 15 June 1992, Series A 238.

³²⁵ Swiss Federal Supreme Court, Judgment, 1992.08.14, BGE 118 Ia 457; Swiss Federal Supreme Court, Judgment, 1998.12.02, BGE 125 I 127.

³²⁶ Bundesgesetz vom 20. Juni 2003 über die verdeckte Ermittlung (BVE, SR 312.8), entered into force 1 January 2005. For the message by the Federal Council, 1 Juli 1998, see BBl. 1998 IV 4241, referring to the *Lüdi* judgment (note 324) on page 4249, the requirements for the protection of the rights of the defense on page 4300 and for the legal basis on page 4303.

³²⁷ *De Cubber v. Belgium* (appl. no. 9186/80), Judgment, 26 October 1984, Series A 86.

³²⁸ *Piersack v. Belgium* (appl. no. 8692/79), Judgment, 1 October 1982, Series A 53.

³²⁹ Swiss Federal Supreme Court, Judgment, 1986.06.04, BGE 112 Ia 290; Swiss Federal Supreme Court, Judgment, 1986.06.04, not published, see EuGRZ 13 (1986), 670.

³³⁰ Swiss Federal Supreme Court, Judgment, 1992.12.17, BGE 118 Ia 473, 480 et seq. For the precedent confusion related to the *Belilos* judgment, see *supra* note 53.

the guarantee of Article 6 (1) ECHR.³³¹ The subsumption of such cases under the term “civil rights and obligations” was difficult, because such decisions were often in the competence of political bodies, sometimes even of an assembly at the municipal level. The judiciary was not seen as competent to give judgment on such decisions.

Swiss criminal tax law was another sector that was highly influenced by Article 6 ECHR and the case law of the Strasbourg organs with regard to the term “criminal charge”. The Federal Supreme Court only clearly stated that proceedings of criminal tax law fell under Article 6 ECHR in 1993.³³² As a consequence of this practice the prohibition of self-incrimination in the proceedings of tax evasion followed.³³³

The Strasbourg organs examined the conditions of detentions on several occasions. However, in most of the decisions they found no violation of Article 3 ECHR. The cases concerned arrest by the police, detention on remand and the enforcement of sentences. The Commission declared a violation of Article 3 ECHR in the case of *Hurtado v. Switzerland*. The applicant had suffered a broken rib on the occasion of his arrest, but was not visited by a doctor until eight days after the injury occurred.³³⁴

In 1982 the Commission had to decide on a very serious case.³³⁵ Two suspected terrorists were held in detention on remand under a very strict regime. They were isolated from other detainees and were video-supervised around the clock. By a close vote of 8:5 the Commission decided that the level of cruelty necessary to declare a violation of Article 3 ECHR had not been reached. It seemed that the carefully formulated judgment of the Federal Supreme Court could have turned the balance. It stated that even under the given circumstances the measures just missed exceeding the allowed limit.³³⁶ The Commission examined additional Swiss applications, but did not find a violation of Article 3 ECHR.³³⁷

³³¹ Swiss Federal Supreme Court, Judgment, 1994.03.24, BGE 120 Ia 19.

³³² Swiss Federal Supreme Court, Judgment, 1993.10.11, BGE 119 Ib 311, 314 et seq. with indications to the older, inconsistent case law of the Federal Supreme Court and the decision of the Commission in the case of *Sydow v. Sweden* (appl. no. 11464/85), decision, Commission, 12 May 1987, DR 53, 85.

³³³ *J.B. v. Switzerland*, (appl. no. 31827/96), Judgment (Second Section), 3 May 2001, Reports 2001-III, 435 et seq.

³³⁴ *Hurtado v. Switzerland* (appl. no. 17549/90), Report by the Commission, 8 July 1993, see VPB 1994, no. 86 B. It did not come to a judgment of the Court since a friendly settlement could be obtained; see VPB 1994, no. 86 A.

³³⁵ *Kröcher and Möller v. Switzerland* (appl. no. 8463/78), decision, Commission, 16 December 1982, DR 26, 24.

³³⁶ Swiss Federal Supreme Court, Judgment, 1978.06.07, not published; see Villiger (note 107), Rz. 283 et seq.

³³⁷ See *Bonzi v. Switzerland* (appl. no. 7854/77), decision, Commission, 12 July 1968, DR 12, 185; *X. v. Switzerland* (appl. no. 7754/77), decision, Commission, 9 May 1977, DR 11, 216; *J.-A. v. Switzerland* (appl. no. 19959/92), decision, Commission, 23 May 1996, VPB 1996, no. 98; *G. K. v. Switzerland* (appl. no. 21084/92), decision, Commission, 5 April 1995, VPB 1995, no. 115.

Another guaranty very frequently invoked is Article 8 ECHR. The main areas of conflict lie above all in alien law, but also in the protection of free communication. Although the Convention does not recognize a right to asylum, the protection of family life under Article 8 ECHR can be violated by an extradition, eviction or denial of family reunion. In 1981 the Federal Supreme Court developed an important and highly disputed practice (*Reneja-Praxis*) based on Article 8 ECHR.³³⁸ The Federal Supreme Court declared that foreigners could deduce a right to residence from the right to respect for private and family life if the consideration of interests under Article 8 (2) ECHR showed a predominance of the private interests of the applicant *vis-à-vis* to the public interest. Thus, the Federal Supreme Court declared admissible an administrative-law appeal in spite of the rule that this remedy was not available in an immigration-control case if it concerned the issue or refusal of permits to which federal legislation conferred no entitlement.³³⁹ Several applications have been lodged with the Court, but the large margin of appreciation, the generally attentive reception of the Strasbourg case law and the well balanced consideration of values by the Federal Supreme Court led to quite a small number of judgments of the Court finding a violation of the Convention. However, in 2001 the Court found a violation of Article 8 ECHR, stating that the national courts had laid too much weight on the grave crime that the applicant had committed.³⁴⁰

The case law concerning Article 8 ECHR is illustrative of the Federal Supreme Court's strategy of a silent reception of the European standards. Although the Federal Supreme Court constantly declared that the protection of free communication under Article 8 ECHR did not grant more than Article 16 (4) Constitution of 1874, it seems quite obvious that its case law is very much influenced by the judgment of the Court concerning *Klass*.³⁴¹ Various cases before the Court concerned telephone tapping by public authorities. As such surveillance constitutes a grave interference with the right to respect for private life the Court requires high standards for its legal base. Thus, the Court found a violation of Article 8 ECHR in

³³⁸ Swiss Federal Supreme Court, Judgment, 1983.12.09, BGE 109 Ib 183 (*Reneja-Dittli I*) and Swiss Federal Supreme Court, Judgment, 1984.09.07, BGE 110 Ib 201 (*Reneja-Dittli II*). The Federal Supreme Court referred to a decision of the Commission concerning *X, Y and Z v. United Kingdom*, 6 July 1982, EuGRZ 10 (1983), 423 no. 54. In later judgments the Federal Supreme Court rendered more precisely this practice and confined its application. The question of whether the practice was compliant with the Convention was rather disputed after the judgment of the Court concerning *Gül v. Switzerland* (appl. no. 23218/94), Judgment, 19 February 1996, Reports 1996-I, 159 et seq.

³³⁹ See Article 100 *lit. b* no. 3 OG and Article 4 Bundesgesetz vom 26. März 1931 über Aufenthalt und Niederlassung der Ausländer (ANAG, SR 142.20).

³⁴⁰ *Boultif v. Switzerland* (appl. no. 54273/00), Judgment (Second Section), 2 August 2001, Final 02/11/2001, Reports 2001-IX, 119 et seq.

³⁴¹ *Klass and others v. Germany* (appl. no. 5029/71), Judgment, 6 September 1978, Series A 28.

two cases because of an insufficient legal base in Swiss law.³⁴² Switzerland enacted a Federal Statute that has solved these insufficiencies.³⁴³

The free communication of a detainee with his lawyer has also caused quite a broad discussion in Switzerland. Two Swiss cases concerned the non-forwarding of letters from or to a detainee by the prosecutor's office.³⁴⁴ As in both cases the Court declared a breach of the Convention because the measure was not proportional, there was no need to alter national rules that were principally compatible with Article 8 ECHR.

The Court's case law concerning Article 10 ECHR treats above all the proportionality of graveness and purpose of interference. As the freedom of expression is a base for the exercise of all fundamental rights under Article 10 (2) ECHR there is little scope for restrictions on debate on questions of public interest.³⁴⁵ According to the Court, there is only a narrow margin of appreciation afforded to the national organs. Above all, the judgments concerning *VgT (Verein gegen Tierfabriken)*, *Hertel* and *Autronic AG* are worth mentioning. In *VGT v. Switzerland*³⁴⁶ the Court followed an earlier judgment³⁴⁷ declaring that advertising falls under the protection of Article 10 ECHR. The judgment concerning *Hertel*³⁴⁸ revealed some difficult questions concerning the relationship of the protection of competition and the protection of freedom of expression³⁴⁹. In *Autronic AG v. Switzerland*³⁵⁰ the Court made clear that not only ideational "opinions" fell under

³⁴² *Kopp v. Switzerland* (23224/94), Judgment, 25 March 1998, Reports 1998-II, 524 et seq.; *Amann v. Switzerland* (appl. no. 27798/95), Judgment (Grand Chamber), 16 February 2000, Reports 2000-II, 245 et seq.

³⁴³ Bundesgesetz vom 6. Oktober 2000 betreffend die Überwachung des Post- und Fernmeldeverkehrs (BÜPF, SR 780.1), entered into force 1 January 2002. For the report by the Federal Council, 1998.07.01, see BBl. 1998 IV, 4241, referring to the *Kopp* judgment (note 342) on page 4266 and to the judgments of the Court concerning *Klass* (note 341) and *Malone (Malone v. United Kingdom)* (appl. no. 8691/79), Judgment, 2 August 1984, Series A 82.) and their reception in Swiss Federal Supreme Court, Judgment, 1983.11.09, BGE 109 Ib 273, on page 4273.

³⁴⁴ *Schönenberger and Durmaz v. Switzerland* (appl. no. 11368/85), Judgment, 20 June 1988, Series A 137; *Stürm v. Switzerland* (appl. no. 22682/93), report by the Commission, head notes published in VPB 1998, no. 117.

³⁴⁵ See *Scharsach and News Verlagsgesellschaft v. Austria* (appl. no. 39394/98), Judgment, 13 November 2003, Final 13/02/2004 (not yet reported), § 45.

³⁴⁶ *VGT (Verein gegen Tierfabriken) v. Switzerland* (appl. no. 24699/94), Judgment (Second Section), 28 June 2001, Final 28/09/2001, Reports 2001-VI, 243 et seq.

³⁴⁷ *Casado Coca v. Spain* (appl. no. 15450/89), Judgment, 22 February 1994, Series A 285.

³⁴⁸ *Hertel v. Switzerland* (appl. no. 25181/94), Judgment, 25 August 1998, Reports 1998-VI, 2298 et seq.

³⁴⁹ For an overview on the various comments in academic writings concerning the *Hertel* judgment, see A. Furrer/P. Krummenacher, Grundrechtskonflikte im UWG? Was lernen wir aus der Rechtsprechung Hertel?, in: *Recht* 22 (2004) 5, 173 et seq.

³⁵⁰ *Autronic AG v. Switzerland* (note 236).

the protection of Article 10 ECHR. The judgment, declaring a breach of the right to receive information, also triggered an amendment of the national law.³⁵¹

Another development in national law was caused by the famous judgment of the Court concerning *Goodwin v. United Kingdom*.³⁵² The Court affirmed the protection of journalistic sources. This judgment triggered the introduction of the protection of journalistic sources as a principle in the Swiss Criminal Code³⁵³ and the Constitution of 1999³⁵⁴.

One of the rare judgments of the Court concerning Switzerland in respect of the right to marry under Article 12 ECHR is well worth mentioning. The case of *F. v. Switzerland*³⁵⁵ is a leading example of the conflict between a Federal Statute and the Convention. Article 113 (3) Constitution of 1874 did not allow the national courts to diverge from a Federal Statute that was not compliant with the ECHR.³⁵⁶ It was therefore not always possible for the courts to solve the conflict in accordance with international law. At the time³⁵⁷ Swiss law provided the possibility for the courts to fix a period of not less than one and not more than two years during which the party at fault should not be entitled to remarry. Where a divorce was granted on the ground of adultery, this period could be extended to three years. The Federal Supreme Court had declared the question whether a rule of the Civil Code was compliant with the Convention to lie outside its jurisdiction because of the commandment of application of Federal Statutes stated in Article 113 (3) Constitution of 1874. Not being bound by any national restriction, the Court found a violation of Article 12 ECHR. It held that this measure affected the very essence of the right to marry and was disproportionate to the aim pursued. As a reaction to this judgment the Federal Department of Justice and Police called on the cantonal courts and the Federal Supreme Court to no longer apply the blamed rule of federal law.³⁵⁸

As the procedural guarantees of Article 5 and 6 ECHR provide for a better protection than Article 13 ECHR, the latter usually cannot be invoked in addition to

³⁵¹ Bundesgesetz vom 21. Juni 1991 über Radio und Fernsehen (RTVG, SR 784.40), entered into force 1 April 1992. Article 52 states that “chacun est libre de recevoir tout programme suisse ou étranger qui s’adresse au public en général”.

³⁵² *Goodwin v. United Kingdom* (appl. no. 17488/90), Judgment, 27 March 1996, Reports 1996-II, 438 et seq.

³⁵³ Article 27^{bis} (1) Schweizerisches Strafgesetzbuch vom 21. Dezember 1937 (StGB, SR 311), inserted by Federal Statute of 10 October 1997, entered into force 1 April 1998, AS 1998 852, 856. For the message by the Federal Council, 17 June 1996, see BBl. 1996 IV 525, referring to the *Goodwin* judgment on page 572.

³⁵⁴ Article 17 (3) Constitution of 1999.

³⁵⁵ *F. v. Switzerland* (appl. no. 11329/85), Judgment, 18 December 1987, Series A 128.

³⁵⁶ Commandment of application, see chapter 2, *supra* note 139.

³⁵⁷ Article 150 Schweizerisches Zivilgesetzbuch von 1907 (ZGB, SR 210). The Article remained formally in force until the new law on divorce entered into force on 1 January 2000, see AS 1999 1118, 1144. For the message by the Federal Council, 15 November 1995, see BBl. 1996 I 1, referring to the judgment of the Court concerning *F. v. Switzerland* on page 12 and 67.

³⁵⁸ See VPB 1989, no. 64 B.

Article 5 or 6 ECHR. The Court has established the rule that Article 13 ECHR can be appealed to separately only in respect of the length of procedure.³⁵⁹

There has only been one important judgment of the Court concerning Switzerland in respect of the right to an effective remedy. However, the judgment of *Camenzind v. Switzerland*³⁶⁰ reveals a weak point in the Swiss order of remedies *vis-à-vis* Article 13 ECHR. The requirement of a present interest in invoking the protection of the courts³⁶¹ can deprive an applicant of an effective national remedy. In the actual case the applicant was no longer affected by the measure of a search of residential premises. Thus, the national courts stated that he was not entitled to lodge an appeal against the search.

A conflict between the national legal order and the Convention can also arise because of Article 191 Constitution of 1999. An applicant can be deprived of an effective remedy when the courts do not examine a Federal Statute on its conformity with the ECHR.

Comparison and Conclusion

A comparison of the case law concerning Poland and Switzerland reveals similarities and differences: in both legal systems there are no systematic very serious violations to be noted. Also very similar is the fact that procedural guarantees are by far the most important rules in the case law concerning both countries. A difference between the two countries is the variety of violations of the ECHR, which is broader in the case of Switzerland. This slightly surprising fact can probably be explained by the longer period of time that Switzerland has been a Member State of the Convention. With regard to some guarantees it seems to be only a matter of time before the first Polish application is brought up in Strasbourg. As Poland will be an attractive country of immigration for Russians, Byelorussians, Ukrainians, etc. since it has become a member of the European Union, Article 8 ECHR in the context of family reunion could in particular become much more important.

The Court's case law has to be regarded in the context of the historical and sociopolitical context in the specific country. In Poland human rights matters have been affected above all by the post-communist environment. The relationship between those in power and the general public could not be turned over completely from one day to the next.

The case law concerning Switzerland does not reveal any particular factor that would have affected the human rights situation to a similar extent. In Switzerland the accession to the ECHR was not an answer to a certain historic or political

³⁵⁹ *Kudła v. Poland* (appl. no. 30210/96), Judgment, 26 October 2000, Reports 2000-XI, 197 et seq.

³⁶⁰ *Camenzind v. Switzerland* (appl. no. 21353/93), Judgment, 16 December 1997, Reports 1997-VIII, 2880 et seq.

³⁶¹ For the requirement of a present interest for the public-law appeal, see Häfelin/Haller (note 109), Rz. 2016.

situation. The step was rather one of European integration in a large sense and pressure in respect of the external image of the country. Switzerland was also bound to its long human rights tradition. An absence from the Convention would have caused confusion both in Switzerland and abroad.

Conventional standards are very well integrated into the Swiss legal order. The judgments of the Court finding a violation of the Convention almost always consider the cause of the breach to lie in the lack of proportionality of a measure. There is hardly any interference by Swiss authorities without a national legal base. Thus, national law is generally well prepared for the protection of fundamental rights in all aspects. The same is essentially true for Poland, as it probably will be for all countries with an existing constitutional structure basically in accordance with the rule of law.

7. Promoting the Knowledge of the Practice Concerning the ECHR

Key Note

The anchoring of the conventional system and obligations in everyday professional life is decisive for the reception process. Thus, the question of whether there exists, on private or public initiative, an opportunity for lawyers (in particular judges) to gain continued education is important.³⁶² Connected to this is the question what role the ECHR plays in the curricula of the law faculties and in the political science departments of the national universities.

For Poland

In Poland, three main institutions take care of the continued education of students, lawyers (barristers) and judges: the universities, the Information Office of the Council of Europe in Warsaw and the Helsinki Foundation (one of the most active NGOs).

A look at websites of Polish universities indicates that there are no mandatory and specified courses in international or European human rights standards.³⁶³ However, the Court's case law might be a subject in international law, general constitutional law or in criminal proceedings law courses.

³⁶² See also Recommendation Rec(2004)4 of the Committee of Ministers to Member States on the European Convention on Human Rights in university education and professional training, adopted on 12 May 2004.

³⁶³ See e.g. Uniwersytet Warszawski: <www.uw.edu.pl>; Uniwersytet im. A. Mickiewicza w Poznaniu: <www.amu.edu.pl>.

For Switzerland

The universities are the primary guarantee of continued education in the matter of reception. Also worth mentioning is the Summer University on Human Rights, which is located in Geneva. Additionally, international training programs are offered by non-governmental organizations, such as the International Training Centre on Human Rights and Peace Teaching and the International Service for Human Rights, both located in Geneva.

The ECHR is the subject of both special and basic courses at universities in Switzerland. Every law student is confronted with the Convention in basic courses, such as constitutional law and criminal procedure. In special courses, such as seminars and additional courses, interested students have the opportunity to specialize in the ECHR to a certain extent.

Comparison and Conclusion

The possibilities to enjoy education in the field of European human rights law are much broader in Switzerland than in Poland. The pressure to look into the subject during university studies, as well as later on during the practical occupation as a lawyer, is much higher in Switzerland.

The ECHR is one of the essential instruments a lawyer in Switzerland has to work with, just like national law. In Poland this deep anchoring of the Convention in a lawyer's daily life is not yet as far advanced. It is obvious that a high degree of cognition is very important for the reception process. Additionally, it would be shortsighted to think that judges play the only important role in that field. After all, it is the lawyers' task to invoke a guarantee of the ECHR and it is also the lawyer who is in direct contact with the public looking for its rights.

C. Final Remarks

An important finding of this analysis is that the reception of the ECHR depends on a large variety of factors. The history, the constitutional system, the political tradition and the human rights awareness of a specific country are decisive for the understanding of the reception process. Other factors such as the availability of technical equipment, media attention for human rights problems and an efficient exchange of information have a great effect as well.

Looking back to the detailed analysis of the Polish and the Swiss reception process the comparison reveals a series of astonishing similarities: On an ideological level, in both countries the Convention enjoys a tremendous esteem. For both countries it is an absolute "must" to be a Member State of the Convention, and their efforts to meet the European standards were considerable. Probably, it is true for both countries that there is no other international treaty with a similar effect. On the theoretical level, both countries have developed functional solutions to in-

tegrate the ECHR without resolving all constitutional problems in detail. The Convention has not yet the status of an *ordre public*, but constitutes a silent parallel human rights constitutional order. The Swiss and the Polish constitution can no longer offer a self-contained human rights protection scheme. This development has its effects with regard to the material content of the human rights guarantees, which is undisputed and well analyzed in both the Polish and Swiss literature. However, the impact of the ECHR as a parallel constitutional order on the procedural level is still largely neglected. The superimposition of the national judicial system by the Court challenges or even undermines the constitutional judiciary order. This complex of problems is manifested in questions such as the exhaustion of national remedies, the mandatory character of the judgments of the Court for the national courts or the minimal standard defined by the Convention. These largely unresolved problems have created a rather difficult relationship between the highest national courts and the Court, a problem that must be tackled in the future.

As regards the better implementation of the human rights guarantees, the comparison of the two countries shows that the reception of the ECHR could be considerably improved in Poland by measures taken on the purely practical level: better education of judges, better integration of the Convention in the university curricula, more functional infrastructure for the judiciary and administration, easier access for all interested persons to leading judgments of the Court translated in Polish – to mention only a few. It goes without saying that these measures are cost intensive.

This pilot project was limited to the reception of the ECHR in Poland and Switzerland. Needless to say, these results are transferable to other countries only to a very limited extent. The reception process has other features in dualistic countries such as Great Britain or Italy and struggles with other practical hurdles in Russia or Turkey. Here much future research has to be done in order to get the necessary data for an improvement in the reception process in Europe.

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