Rozdział II

STANDARDY MIĘDZYNARODOWEJ OCHRONY WOLNOŚCI I PRAW JEDNOSTKI

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EFFECTIVENESS OF 'EUROPEAN' FUNDAMENTAL RIGHTS

Introduction

This paper is aimed at outlining the legal effectiveness of fundamental rights[1] found in the legal orders of the European Union and the Rome Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), the principal 'European' systems of protection and cataloguing the most recent developments in the field of fundamental rights. While acknowledging the primary importance of the *acquis* and the ECHR, the author adds that other legal instruments that can be accorded the 'European' moniker do exist – such as the European Social Charter, with its collective complaint procedure. Granted that the paper herein, being one *fructus* of many of a Conference held at 6th of June 2013 in Zieleniec, Poland, is aimed at readers interested in domestic practice, it will contrast the standard of European rights with the national law of the *Rzeczpospolita Polska*, or the Republic of Poland, featuring both the jurisprudence of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and the Polish judiciary, especially the Supreme Court of the Republic of Poland (the *Sąd Najwyższy*, or 'SN').

This paper will approximate the effectiveness (that is, practicability of usage) of European rights by depicting the state of law as it stands at the European level, and then adding a Polish domestic view. To facilitate the latter, reported dicta of Polish courts are used.

It is vital to add that the perspective chosen for the paper herein is the one of an EU citizen (or an EU-seated legal person) whose rights are in need of pursuing. The paper is summarized with an assessment and finished by several conclusions on the matter.

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1 The phrase 'fundamental rights' is used in the text to denote basic rights applicable to everyone, while acknowledging that phrases such as 'human', 'basic' and 'core' rights can be used as well. It is added, however, that a 'fundamental right' seems to be most appropriate one for the paper herein, for it is used by the European courts having jurisdiction on them, and also because the rights in question not necessarily apply to humans, not necessarily are the basic norm found in a legal system and not necessarily either are at a core of of a legal order (where a State does not have a bill of rights), or the phrase may be read to refer to the 'core' (the substance) of a fundamental right, which is not the only part of it. See also Black's Law Dictionary, 2009, 9th ed.

1. Fundamental rights capability – the EU

The European Union, by virtue of a Treaty of Lisbon reform accorded legal personality, and having succeeded the European Community in its rights and obligations, constitutes an international organization comprising 28 Member States, which have conferred some of their powers on it. While noting the magnitude of the understatement and the gross laconicism, it can be said that the EU is active in a vast array of fields, one of which human rights are. The EU action in that field is conducted through the EU's Common Foreign and Security Policy activities, legislation, internal (both intra-EU bodies and, in a limited manner, of Member States) compliance monitoring and the EU Courts' jurisprudence. The law of the Union of which fundamental rights are part, having the quality of supremacy over national legal orders, can be invoked before national courts, where a sufficient link with it exists in a given case. 'Respect for human rights' is a founding value of the EU that is supposed to be upheld and promoted in relations with the wider world. From a constitutional point of view in regard to the principle of conferral, however, the EU, as of the time of writing, does not possess a specific human rights competence to act.

Therefore, secondary legislation of the Union in the field of human rights finds no legal basis other than Article 352 TFEU, on the predecessor of which Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights has been adopted. To add, the EU body created by that act – the EU Agency for Fundamental Rights (FRA) – has been tasked, within the sphere of application of the EU law only, "to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights".

Legal order-wise, EU fundamental rights are situated in two sources of law within the *acquis*, both of which have 'primary' law status.

Firstly, fundamental rights form a part of general principles of law of the European Union, a body of unwritten, judge-made law, where they were enshrined by the (now-) CJEU in a case *Erich Stauder v City of Ulm – Sozialamt*[2], and further expanded in classic cases *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*[3], *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*[4], *Liselotte Hauer v Land Rheinland-Pfalz*[5], *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*[6] and *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*[7]. The body of case-law established that fundamental rights are binding both on the EU

2 Case 29–69, ECR 1969 Page 00419.
3 Case 11–70, ECR 1970 Page 01125.
4 Case 4–73, ECR 1974 Page 00491.
5 Case 44/79, ECR 1979 Page 03727.
6 Case 5/88, ECR 1989 Page 02609.
7 Case C-260/89, ECR 1991 Page I-02925.

and the Member States, while the latter are bound when implementing or derogating from an EU norm. The notion of a 'core' of a right[8] – the substance which must not be infringed – has been adopted as well.

The classic line of case law has been recently expanded, owing to the dynamic character of the Union Court's jurisprudence. It has been held in *Werner Mangold v Rüdiger Helm*[9] and later affirmed in *Seda Kücükdeveci v Swedex GmbH & Co. KG*[10] that general principles – the one of two types of building blocks of fundamental rights in EU law – have the potential to create horizontal direct effect.

The precise question of whether fundamental rights (which are part general principles) do have that horizontal quality as well has not been as of yet straightforwardly answered. However, in a recent case, *Sky* Österreich *GmbH v* Österreichischer *Rundfunk*[11], the Court briefly considered that very question as a part of an application between two TV broadcasters acting in their private capacity, one of which raised a legal challenge against the other on the ground of the right to property and the the freedom to choose with whom to do business, while the defendant relied on a directive (Audiovisual Media Services Directive, 2010/13/EU). The Court of Justice did not find a violation of that rights, but what is interesting is not the outcome, but rather the fact that the Court did *not* dismiss the challenge out of hand and considered it as to the merits. Stating that "since the entry into force of Directive 2007/65, namely on 19 December 2007, European Union law requires the Member States to guarantee the right of broadcasters to make short news reports on events of high interest to the public which are subject to exclusive broadcasting rights, without the holders of such a right being able to demand compensation exceeding the additional costs directly incurred in providing access to the signal".

The Court also noted that "Article 15(6) of Directive 2010/13 does not affect the core content of the freedom to conduct a business. That provision does not prevent a business activity from being carried out as such by the holder of exclusive broadcasting rights. In addition, it does not prevent the holder of those rights from making use of them by broadcasting the event in question itself for consideration or by granting that right to another broadcaster on a contractual basis for consideration or to any other economic operator", adding that "by establishing requirements relating to the use of extracts from the signal, the European Union legislature has ensured that the extent of the interference with the freedom to conduct a business and the possible economic benefit which broadcasters might draw from making a short news report are confined within precise limits".

Therefore, in that case (decided by the Grand Chamber no less), the Court considered, first, a horizontal situation where a right to property has been employed against a private party (which has escaped the challenge by virtue of a directive),

8 Eg. C-20/00 and C-64/00 Booker Aquaculture Ltd, trading as Marine Harvest McConnell and Hydro Seafood GSP Ltd v The Scottish Ministers, ECR 2003 Page I-07411.

9 Case C-144/04, ECR 2005 Page I-09981.

10 Case C-555/07, ECR 2010 Page I-00365. The Court also affirmed that line in case C-268/09 Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv, ECR 2010 Page I-11869.

11 Case C-283/11, judgment (GC) of 22 January 2013, nyr.

and second, a "positive obligation" situation in regard to the freedom to conduct a business, where a directive applied between private parties allegedly did not satisfy its standards. In neither did the Court refuse to entertain it.

That case featured the other building block of the fundamental rights system in EU law, referencing what the Union has adopted[12]as the Charter of Fundamental Rights of the European Union (CFR), which has been made a primary, autonomous law source to the Treaties[13] – and meant to codify the general principles of EU law (while not derogating them). Since the adoption and coming into force of the Treaty of Lisbon, two sources coexist, with the CJEU alternating between one and the other.

Indeed a new primary law and a "palpable and legible" instrument (as opposed to general principles, whose existence and content might be uncertain sans judicial clarification), the CFR is supposed to make the existing standard more visible. It applies (as do general principles) to natural persons and legal ones where possible[14].

However, the very text of the Charter in its Article 51 limits its application in regard to Member States 'only when they are implementing Union law'. This – textually – is a reiteration of a *Wachauf*-type situation, but the 'only' limiter leaves out the *ERT*-line of case law. The CFR is also being accompanied by a Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom[15], which reads that the rights enshrined in CFR do not 'extend' the EU Court's jurisdiction or 'create' any new rights. However, the actual impact of that protocol is disputed (as the very Charter was meant to codify, not to create rights), all the more as it contains a preamble clause that "[it] is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally [emphasis added]", and the Court seems to think nothing material of it[16].

Additionally, the newest field of application of fundamental rights is the situation where there is a link with EU law that does not amount solely to situation of an implementation or a derogation. The idea of such a link with EU law has been expressly advanced in case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*[17], and the Court has so far identified some situations where such a link does exist – such link can be established, for instance, where

12 Proclaimed as a non-binding document on 7 December 2000 in Nice.

13 Currently, published in OJ no. C 326/391, 2012/C 326/02.

14 Which has been expressly confirmed by the Court in a case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, ECR 2010 Page I-13849. See also supra.

15 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0156:0157:EN:PDF

16 See cases N. S. (C-411/10) v Secretary of State for the Home Department et M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, nyr, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0411:EN:NOT

17 ECR 2008 Page I-07245.

a period for transposition of a directive has expired[18] or where a deprivation of the genuine enjoyment of the rights of a European citizen has taken place[19].

The issue of a link as an anchor that makes the law of the Union applicable (and fundamental rights with it) was bound to come into collision with the aforementioned wording of the CFR in regard to 'implementation' and the conspicuous absence of other fields where EU law has been applied beforehand.

That question was addressed by the Court in case C-617/10 Åklagaren *v Hans* Åkerberg *Fransson*[20], whose importance merits extensive citation.

The Court therein began with stating that "the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

However, the Court continued by asserting, "that article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union. The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations.

In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see inter alia, to this effect, Case C-260/89 ERT [1991] I-2925, paragraph 42; Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 15; Case C-309/96 Annibaldi [2007] ECR I-7493, paragraph 13; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-349/07 Sopropé [2008] ECR I-10369, paragraph 34; Case C-256/11 Dereci and Others [2011] ECR I-0000, paragraph 72; and Case C-27/11 Vinkov [2012] ECR I-0000, paragraph 58).

That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 DEB [2010] ECR I-13849, paragraph 32)[21].

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18 Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg, ECR 2011 Page I-03591.

19 The much-heralded Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm), ECR 2011 I-01177.

20 26 February 2013, nyr. Of note is the fact that the case was decided by a Grand Chamber composed of the President of the Court, Vice-President and three of Presidents of the Chambers. It also included a judge of Polish nationality, prof. M. Safjan. The judgment is available at the Eur-Lex website: http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0617:EN:HTML

21 It is also interesting to note that the case specifically cited in Åklagaren and already mentioned above, C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepub-

According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 Currà and Others [2012] ECR I-0000, paragraph 26).

These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see Dereci and Others, paragraph 71)".

As it is apparent from the above judgment, the Court of Justice was prepared to stretch the textual interpretation of the CFR in order to accommodate the standard of protection granted by general principles.

Moreover, the Court suggested that the requirement of a link with EU law[22] is satisfied, where a legislative measure or an executive activity is undertaken by a Member State authority in a field where EU law exists, even if a measure in question is *not* meant to transpose such EU law.

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lik Deutschland, in its paras 29–32, foreshadowed the Åklagaren outcome by dropping the "only" quantifier when addressing article 51(1) CFR and addressing the Explanations to the CFR and the ECHR instead.

22 And, consequently, the 'purely internal situation' scenario in the vein of case 175/78 La Reine v. Vera Ann Saunders (ECR 1979 Page 01129) is avoided.
It seems, however, that the classic requirement of a factor connecting the case to one of the situations envisaged by the Union law is specifically *not* equivalent to the notion of a link with EU law, as in that classic case the Court emphasized that "although the rights conferred upon workers by article 48 may lead the member states to amend their legislation, where necessary, even with respect to their own nationals, this provision does not however aim to restrict the power of the member states to lay down restrictions, within their own territory, on the freedom of movement of all persons subject to their jurisdiction in implementation of domestic criminal law. The provisions of the treaty on freedom of movement for workers cannot therefore be applied to situations which are wholly internal to a member state, in other words, where there is no factor connecting them to any of the situations envisaged by community law".
However, applying EU law (along with fundamental rights) in a situation where there was no factual cross-border element, in the field of criminal law no less, was precisely what the Court did, over 30 years after Saunders, in Åklagaren, where the link with EU law was satisfied by a presence of an EU norm in the field where a measure took place. The decision has already been dubbed 'Mangold 2.0', signifying its importance.
See to that end http://www.verfassungsblog.de/de/eugh-akerberg-fransson-mangold-reloaded/

The Court added, after clarifying the CFR, that (paras 28–29) "the fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union. That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 Melloni [2013] ECR I-0000, paragraph 60)[23].

The Court finished with asserting the national courts' power and obligation to safeguard the CFR in full, by stating that "European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter".

There may be, however, a distinguishable opportunism in the ranks of the Court in regard to interpretation of the CFR, as the Court apparently forgot the Åklagaren and Melloni decisions in a recent case C-87/12, *Kreshnik Ymeraga, Kasim Ymeraga, Afijete Ymeraga-Tafarshiku, Kushtrim Ymeraga, Labinot Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration*, by stating that "as to the fundamental rights mentioned by the referring court, it must be borne in mind that, in accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2) thereof, the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called on to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see Dereci and Others, paragraph 71, and Iida, paragraph 78)".

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23 The decided-on-the-same-day Melloni case, however, dealt with different situation than in Åklagaren v. Fransson, for it involved an EAW. In the cited paragraph 60, the Court therein added that "it is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised". Apparently, constitutional identity notwithstanding, even discriminating on the basis of a 'better' national fundamental rights protection does not escape EU law.

That judgment echoed the limiting streak of the Court in the wake of *Ruiz Zambrano*, namely the *McCarthy-Dereci-Iida-Zakaria*[24] line of case-law, that (almost grudgingly) accepted the notion of EU citizenship becoming relevant and existence of a new branch of EU case-law, but evidently tried to limit the impact of *Ruiz Zambrano*.

Of note is the Court's unwillingness in this branch of case-law to clarify whether fundamental rights can trigger Article 20 TFEU on citizenship, as it sidestepped the express question in *Iida* case – "Can the "unwritten" fundamental rights of the European Union developed in the Court's case-law from Case 29/69 Stauder [1969] ECR 419, paragraph 7, up to, for example, Case C-144/04 Mangold [2005] ECR I-9981, paragraph 75, be applied in full even if the Charter is not applicable in the specific case; in other words, do the fundamental rights which continue to apply as general principles of Union law under Article 6(3) TEU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6(1) TEU?" – mentioning briefly only the CFR in a lot of "summarizing".

As it can be seen from above considerations, the substantive standard of protection, although held in high regard by the CJEU[25], has not been set firmly enough as to its scope – being still limited to situations where EU law does apply, and not fundamental enough to be general. While the field of 'purely domestic situations' has shrunk, the EU still does not cover the entirety of Member State conduct with fundamental rights protection, lacking a general human rights competence.

On the other hand to the substance, there arise questions of enforcement. In this vein, principles of effectiveness of EU law and procedural autonomy of Member States clash.

The Court of Justice has not shied from forcing Member States to acknowledge the need to reopen administrative proceedings in a case of EU law infringement[26] even where national law did not contain a provision for it (as per case C-249/11 *Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti*, nyr), but refrained from intervening where court proceedings in regard to reopening and the principle of *res judicata* were involved (C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH*, ECR 2006 Page I-02585). The Court has also held that EU law neither requires specific remedies for breach of it to be made available nationally to the aggrieved parties (case C-432/05 *Unibet (London) Ltd, Unibet (International) Ltd*

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24 Cases C-434/09 (ECR 2011 I-03375, others nyr), C-256/11, C-40/11 and C23/12. The Court adopted a more Zambrano-friendly approach in joined cases O,S v Maahanmuuttovirasto (C-356/11), and Maahanmuuttovirasto V L (C-357/11), reiterating the "genuine enjoyment" of rights of an EU citizen, which is obviously for the national court to ascertain.

25 Recently, the Court (again) emphasized fundamental rights in Kadi IV decision, upholding the Kadi III decision by the GC, annulling EU sanctions adopted to implement UN blacklisting, see cases C584/10 P, C593/10 P and C595/10 P, European Commission and the United Kingdom and (many, many) others v Yassin Abdullah Kadi, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0584:EN:HTML .

26 Interestingly, the Court did not mention that the facts of the case corresponded with Protocol 4 to the ECHR, Article 1 – where imprisonment of people for breach of contract is forbidden, but nonetheless ruled accordingly.

v Justitiekanslern, ECR 2007 Page I-02271), nor does it require the national court in regard to an infringement of EU law to abandon its passive role in adjudication where national law does not oblige it to act ex officio (case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*, ECR 2008 Page I-00411).

EU legal system-wise, even after the Treaty of Lisbon's corrections to the standing capabilities to the unprivileged parties' status before the General Court and/or the Court of Justice, the *Plaumann*[27] standard applies – remaining virtually impossible to challenge legislative regulations and 'true' directives before the GC (the addition of the 'regulatory acts not entailing implementation measures' category, however, made it easier for applicants to challenge[28] non-legislative acts on fundamental rights grounds).

As to the fora available to an unprivileged party – possible litigation can ensue principally before the General Court, with appeals heard by the Court of Justice. It is worth noting that an individual cannot litigate against a Member State before Union Courts – the only possibility of review available is the non-adversarial preliminary ruling procedure requiring prior request from a national court, in which the Court of Justice hears and decides cases.

As of now, it is apparent that the enforcement of the standard of protection of fundamental rights rests on national courts of Member States.

2. Fundamental rights capability – the ECHR

Union law had a blueprint for fundamental rights, namely the Convention for the Protection of Fundamental Rights and Freedoms (the ECHR), opened for signature at 4th November 1950, a written international agreement (hence, a human rights treaty) that operates within the framework of the Council of Europe and constitutes an instrument on the basis of which an international court – the European Court of Human Rights (the ECtHR) decides cases.

The ECHR occupies a place of special significance for EU law, as the latter is 'inspired' by it, although the Convention has not yet been formally incorporated into the law of the Union. The Convention is accompanied by 14 protocols, and two additional are in the process of being ratified by Council of Europe's Member States. The ECtHR hears only "vertical" cases, as the States parties are the primary infringers in regard to the provisions of the ECHR. However, the Convention is incorporated into the States parties' legal systems as a part of national law, possibly allowing the national courts to adjudicate on the basis of it independently, horizontal dimension included.

The ECHR occupies a unique place in the European legal framework as it pro-

27 Case 25/62 Plaumann v Commission, ECR 95, 107.

28 The General Court in case T-18/10 Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union, ECR 2011 Page II-05599, characterized regulatory acts as "covering all acts of general application apart from legislative acts", while "a legislative act may form the subject-matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them". The GC later confirmed that order in a case T-262/10 Microban International Ltd and Microban (Europe) Ltd v European Commission, ECR 2011 Page II-07697, annulling a Commission decision.

vides easy access to the procedure by any aggrieved individual (natural or legal) and specifically includes a legal safeguard of a right to an application for breach of the ECHR.

The ECHR comprises a range of fundamental rights, some of which are absolute and cannot be derogated from or limited (given that fundamental rights are often not absolute and must be viewed through their social function). In that vein, it is notable to possess a Protocol no. 13 prohibiting death penalty in all circumstances, including war and/or armed conflict.

The Court can award pecuniary claims (damages, just satisfaction and costs and expenses) and has recently asserted a power to direct specific tasks to be carried out in order for the State to comply with its ruling, but its judgments are not to be treated as rulings on appeal (the Court itself often states that it is *not* a 'court of fourth instance'), and do not invalidate domestic decisions. However, national law often provides for a reopening of proceedings, should a ECtHR judgment for the applicant be handed down. The Court is assisted by the Committee of Ministers (an inter-governmental organ) that is tasked with enforcement of the Court's jugments; it has been frequently criticized for being unable to do its job efficiently, however.

The ECtHR has adopted a 'pilot judgment' procedure, allowing it to introduce a de facto stare decisis rule, on the basis of which the Court is able to decide a larger number of cases more swiftly, after selecting a model case for a body of applications and then adjusting the pilot judgment accordingly to the facts of each case.

The Court has no power to actually order any direct measures, but it can specify what kind of action should be taken. The ECtHR has adopted this approach in a case[29] no. 32772/02 *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* suggesting a reopening of domestic proceedings, in a case no. 5056/10 *Emre v. Switzerland (no. 2)*, where the appropriate way was to "to annul purely and simply, with immediate effect, the exclusion measure ordered against the applicant (letting him travel to and enter Switzerland)" and in case no. 71503/01 *Assanidze v. Georgia*, where it asked the authorities to release an applicant. Additionally, the Court can order interim measures where required.

To sum up the ECHR it can be said to provide a 'wide' measure in regard to accessibility, but a 'narrow' range of possible effect over a given violation, being dependent on national authorities.

3. European rights in national Polish law

Given the dependence of both the EU law and the ECHR on the national compliance, it is vital to outline the national legal footing on which the European fundamental rights are supposed to be protected and enforced. In this section this paper will examine Polish legal system's handling of European sources.

A recent (2010) Cambridge empirical study by Ciacchi, Comandé and Brügge-

29 All ECtHR cases cited have been reported and made available on the Court's repository of case-law at http://hudoc.echr.coe.int .

meier[30] suggested that legal regard for fundamental rights (especially in horizontal situations) in Poland is tentative, but the overall trend is improving.

Specific Polish legislation meant to provide national remedies for breaches of European fundamental rights is scarce, as claims are left to be examined in existing legal procedures – mainly in a civil litigation.

However, Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania (Dz. U. z dnia 30 grudnia 2010 r.), an act of Parliament implementing some of the EU's anti-discrimination directives (2006/54/EC, 2004/113/EC and 2000/43/EC), can be used by an aggrieved individual where one's fundamental rights were abused discriminatorily. The act is useful for an aggrieved party in easing the onus requirements for the applicant.

That developing state of European fundamental rights protection is however best reflected in Polish courts' case-law, especially in case law of the SN. The attitude of a national judiciary contributes to the effectiveness of fundamental rights. Therefore, several points can be made accordingly in that matter, as the Polish courts have considered both EU law and the ECHR.

As to the former body of law, after almost ten years after accession to the European Union, the Polish courts present differing views on the character, impact and content of EU law.

At the outset, it can be submitted that there are virtually no reported cases featuring unwritten EU law[31].

The common courts and the Supreme Court of Poland (SN) have, however, taken note of the CFR much more extensively than of the unwritten law of the Union. The turn of events is nonetheless not favourable for the effectiveness of EU fundamental rights.

Katowice Appellate Court, in a case no. III AUa 497/12, decided after coming into force of the Treaty of Lisbon, has denied the CFR any binding character (addressing the CFR as "postulatory") and added that it is in any event bound by a national law up to the point of national law in question being derogated by the Constitutional Tribunal. The dicta of the case were as follows: "niezależnie od wskazanych przez apelującego zasad o charakterze postulatywnym, zawartych w Powszechnej Deklaracji Praw Człowieka, Karcie Praw Podstawowych Unii Europejskiej oraz Konstytucji RP zasady realizacji tych postulatów określone zostały w ustawach wewnętrznych państw członkowskich czy sygnatariuszy wskazanych aktów. Dlatego zasto-

30 A. Colombi Ciacchi, G. Bruggemeier, and G. Comande, 'Fundamental Rights And Private Law In The European Union' (2010), Vol. I–II, on Poland.

31 As of the time of writing, common courts reported one case in which claimants have unsuccessfully pursued a claim based on, inter alia, unwritten fundamental rights (before Lublin Appellate Court, case no. III AUa 86/13). The common courts report their cases on the website http://orzeczenia.ms.gov.pl . The Supreme Court has not yet reported any as well: (http://sn.pl/orzecznictwo/SitePages/Baza%20orzecze%C5%84.aspx?Tresc=og%C3%B3lne%20zasady%20prawa%20unii%20europejskiej). The administrative courts have been a bit more inclined to entertain such claims (see http://orzeczenia.nsa.gov.pl/cbo/find?p=1&q=+SZUKANE+[%22og%C3%B3lne+zasady+prawa+unii+europejskiej%22]+ZORZ+[true]), and the Voivode Administrative Court of Warsaw has already allowed a claim based, inter alia, on a general principle (case no. III SA/Wa 1577/07). Administrative courts publish their cases on the website http://orzeczenia.nsa.gov.pl .

sowanie w niniejszej sprawie, w stosunku do obywatela polskiego, mającego stałe miejsce zamieszkania na terytorium RP, znajdują powołane przez Sąd I instancji przepisy ustaw uchwalonych przez Sejm RP. Przepisy te stanowią dla Sądu – jako obowiązujące źródło prawa – podstawę orzekania tak długo, dopóki nie zostaną one zmienione bądź uchylone aktem ustawodawczym względnie orzeczeniem Trybunału Konstytucyjnego".

The Supreme Court at first assessed the CFR during its 'political document' phase in a case no. II KZ 27/2004 (decided 8th of June 2004). The Court denied any weight to the Charter and stated that it cannot bind national courts (ratio decidendi: "Chybione jest powoływanie się w zażaleniu na Kartę Praw Podstawowych Unii Europejskiej i jej art. 8 jako sui generis wzorzec kontrolny w stosunku do przepisów polskiego Kodeksu postępowania karnego oraz wskazywanie na nadrzędność prawa wspólnotowego nad prawem wewnętrznym i „ściśle powiązaną z nią zasadę bezpośredniego skutku tego prawa". Karta Praw Podstawowych Unii Europejskiej stanowi deklarację polityczną i została włączona do projektu Konstytucji dla Europy, który nie został jeszcze przyjęty przez państwa członkowskie Unii")[32].

In another case, no. III PK 83/04, decided on 17th of March 2005, the Court stated that the CFR cannot – as of then – function as an autonomous basis for deciding cases, adding that it does nonetheless have a certain informative character as to the fundamental rights of the Union law (dicta: "Mimo że Karta Praw Podstawowych nie ma charakteru prawnie wiążącego, porównywalnego z pierwotnym prawem wspólnotowym, to zgodnie z opiniami rzeczników generalnych, stanowi istotne źródło informacji o prawach podstawowych gwarantowanych przez wspólnotowy porządek prawny").

In a case no. III KK 243/2006, the Court has given the CFR similar status of an interpretative aid (dicta: "Wspomniane akty prawa międzynarodowego publicznego oraz obu systemów europejskich (Rady Europy i Unii) gwarantują jednak z drugiej strony cześć i godność człowieka. Warto podkreślić, że Karta Praw Podstawowych Unii Europejskiej z ludzkiej godności – którą w art. 1 traktuje jako nienaruszalną, uznając, że powinna być ona szanowana i chroniona – wywodzi w preambule wszelkie inne prawa").

In a case no. II KK 170/2009, the Supreme Court denied any meaning of autonomous CFR litigation (and, quite possibly, any other litigation on the basis of legal principles), stating that only statutes could act as a basis of a legal challenge (dicta: „należy zauważyć, że jest całkowicie nieuzasadnione przywoływanie w treści zarzutów przepisów Konstytucji czy Karty Praw Podstawowych formułujących ogólne zasady, w sytuacji gdy zasady te są chronione materialnymi i procesowymi przepisami aktów prawnych w randze ustawowej, także wskazywanych w nadzwyczajnym środku zaskarżenia wniesionym przez obrońcę skazanego").

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32 However, the Court did not consider the fact that the Charter at that time as well expressed unwritten – but binding – general principles of EU law. On the other hand, the Supreme Administrative Court of Poland – the principal judicial body in the administrative courts' structure – has upheld a claim and set aside a judgment of a lower court in a case where a party has pursued a challenge based on the principle of sound administration and the CFR (case no. OSK 532/2004), even given the fact that the CFR was in itself not binding at that time.

The CFR proper has been addressed in a case no. II CSK 108/10. However, the Court did not find it necessary to afford the Charter almost any attention, even if the cassation appeal featured it extensively.

However, the CFR (along with the ECHR and the ICCPR) featured in the case no. I KZP 12/2012, where the Court – in an uniformizing resolution – stressed its importance in the process of interpreting national law, especially criminal law (dicta: "w KPPUE stwierdzono, że „wszelkie ograniczenia w korzystaniu z praw i wolności uznanych w niniejszej Karcie muszą być przewidziane ustawą i szanować istotę tych praw i wolności. Z zastrzeżeniem zasady proporcjonalności, ograniczenia mogą być wprowadzone wyłącznie wtedy, gdy są konieczne i rzeczywiście odpowiadają celom interesu ogólnego uznawanym przez Unię lub potrzebom ochrony praw i wolności innych osób" (art. 52 ust. 1), „żadne z postanowień niniejszej Karty nie będzie interpretowane jako ograniczające lub naruszające prawa człowieka i podstawowe wolności uznane, we właściwych im obszarach zastosowania, przez prawo Unii i prawo międzynarodowe oraz konwencje międzynarodowe, których Unia lub wszystkie Państwa Członkowskie są stronami, w szczególności przez europejską Konwencję o ochronie praw człowieka i podstawowych wolności oraz przez konstytucje Państw Członkowskich" (art. 53) oraz, że „żadne z postanowień niniejszej Karty nie może być interpretowane jako przyznające prawo do podejmowania jakiejkolwiek działalności lub dokonywania jakiegokolwiek czynu zmierzającego do zniweczenia praw i wolności uznanych w niniejszej Karcie lub ich ograniczenia w większym stopniu, aniżeli jest to przewidziane w niniejszej Karcie" (art. 54))".

For the latter legal source – the ECHR – there are also conflicting authorities whether the Convention, according to the SN and the common courts, does anything more than being an aid to interpretation and allowing for an international complaint procedure and (possibly) a declaration of a violation along with some compensation. In case no. I CSK 175/08 concerning State tortious liability, the Supreme Court decided that Polish courts are not bound in general by the ECtHR's rulings[33] and that a national court entertaining a civil suit is specifically not bound by them in regard to possible damages and/or just satisfaction claims[34] and establishing illegal conduct of the State that would engage liability. Furthermore, in a later case (no. I CSK 577/11) the Court, confirming the decision in I CSK 175/08, did not accept that the ECHR provision and/or an ECtHR ruling can lead to declaring a national law illegal[35].

33 „Sądy polskie nie są w sprawach cywilnych związane orzeczeniami Europejskiego Trybunału Praw Człowieka w Strasburgu, ponieważ jego orzeczenia stwierdzają tylko, czy w przedstawionej mu sprawie doszło do naruszenia Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności" Ratio decidendi reported in Wspólnota 2009/4/30.

34 Dicta therein: „Trybunał bada wyłącznie naruszenie praw człowieka w kontekście przepisów konwencji o ochronie praw człowieka i podstawowych wolności, nie można więc – co do zasady – uznać jego mocy wiążącej dla sądu cywilnego rozstrzygającego o roszczeniu odszkodowawczym".

35 Dicta: „Nie ma normatywnych podstaw do twierdzenia, iż ostateczny wyrok Europejskiego Trybunału Praw Człowieka wydany w sprawie o naruszenie przez Polskę art. 1 protokołu nr 1 do Konwencji (prawo do poszanowania mienia) jest tożsamy ze stwierdzeniem niezgodności aktu normatywnego z Konstytucją, ratyfikowaną umową międzynarodową lub ustawą. W judykaturze Sądu Najwyższego była rozważana problematyka wpływu wyroku Europejskiego Trybunału Praw Człowieka na orzeczenia sądów krajowych (por. wyrok Sądu Najwyższego z dnia 28 listopada 2008 r.,

Conversely, as to the possible reopening procedure, Polish administrative and civil procedural law contain no express provisions allowing for a reopening of proceedings[36]. The Supreme Court has differed on the possibility of reopening *without* an express statutory clause, declaring it impossible (case no. V Co 16/05), then two times possible (case no. I PZ 5/07, case no. V CZ 104/10), then reverting to the original stance (case no. III CZP 16/10). That last time the Court decided with a resolution meant to uniformize the judicial practice, however, thereby making the possibility of reopening rather unlikely.

On the other hand, there are authorities that allow for horizontal application of the ECHR, as the Supreme Court has held in a case no. I CK 834/2004. Therein, the Court has stressed the fact that the Convention remains a part of national Polish law as an international agreement – with the addendum that, in the event of a conflict of law, it prevails over national statutes (an act of Parliament or *ustawa*). The dicta were as follows: "Zarzuty kasacji dotyczące naruszenia art. 1 Protokołu nr 1 do Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności zmierzają do wykazania, że ostateczny kształt jaki nadał prawodawca po nowelizacji art. 44 ustawy o spółdzielniach mieszkaniowych nie mieści się w standardach umów międzynarodowych wiążących Polskę. Powoływany Protokół do Konwencji stanowi źródło powszechnie obowiązującego prawa (art. 87 ust. 1 w zw. z art. 241 ust. 1 i 89 ust. 1 pkt 2 Konstytucji). Bezpośrednie stosowanie umowy ratyfikowanej, ogłoszonej w Dzienniku Ustaw i zawierającej postanowienia samowykonalne stwarza możliwość powoływania się na jej postanowienia przed sądem polskim, zwłaszcza gdy – jak dowodzi kasacja – gwarantowane przez umowę prawa są dalej idące aniżeli uprawnienia wynikające z prawa krajowego"[37].

V CSK 271/08 OSNC-ZD 2009/3/78, uchwałę 7 sędziów Sądu Najwyższego z dnia 30 listopada 2010 r., III CZP 16/10, OSNC 2011/4/38). Nie ma uzasadnionych podstaw do przypisywania wyrokom Europejskiego Trybunału Praw Człowieka znaczenia orzeczeń prejudycjalnych w rozumieniu art. 417 1 par. 1 k.c. Ostateczny wyrok Europejskiego Trybunału Praw Człowieka wydany w sprawie ze skargi indywidualnej przeciwko Rzeczpospolitej Polskiej (art. 34 E.K.P.Cz.) stwierdzający naruszenie przez Polskę art. 1 protokołu 1 do konwencji (prawo do poszanowania mienia) w związku z utrzymywaniem przez polskiego ustawodawcę szeregu regulacji prawnych, które ograniczały prawo własności właścicieli nieruchomości, w tym uniemożliwiały swobodne ustalenie poziomu czynszów, nie jest tożsamy ze stwierdzeniem niezgodności aktu normatywnego z Konstytucją, ratyfikowaną umową międzynarodową lub ustawą w rozumieniu art. 417(1) par. 1 k.c". For a detailed analysis, see K. Wójtowicz, *Glosa do wyroku Sądu Najwyższego z dnia 14 czerwca 2012 r.* (sygn. akt I CSK 577/11), Zeszyty Naukowe Sądownictwa Administracyjnego (1/2013), p.173.

36 Criminal procedure, tax administrative procedure and administrative court procedure do contain them, however (article 540§3, articles 240§1 pts 9 and (specifically for CJEU) 11 and article 272§3 of the relevant legislation).

37 Dicta continued: „Artykuł 1 Protokołu nr 1 do wskazanej Konwencji stanowi, że każda osoba fizyczna i prawna ma prawo do poszanowania swego mienia. Nikt nie może być pozbawiony swojej własności, chyba że w interesie publicznym i na warunkach przewidzianych przez ustawę oraz zgodnie z podstawowymi zasadami prawa międzynarodowego. Powyższe postanowienia nie będą jednak w żaden sposób naruszać prawa państwa do wydawania takich ustaw, jakie uzna za konieczne dla uregulowania sposobu korzystania z własności zgodnie z interesem powszechnym lub w celu zapewnienia uiszczania podatków bądź innych należności lub kar pieniężnych. W skład mienia chronionego przez powołany artykuł 1 wchodzą zarówno nieruchomości, jak i rzeczy ruchome a także – jak trafnie wskazuje kasacja – ograniczone prawa rzeczowe. Pozbawienie zatem osoby fizycznej lub prawnej ograniczonego prawa rzeczowego możliwe jest tylko z przyczyn wskazanych

Moreover, there are authorities that confirm the ECHR's binding character, such as case no. V CSK 271/08[38].

However, the Constitutional Tribunal (*Trybunał Konstytucyjny*), a judicial body tasked with interpreting constitutional provisions and deciding constitutional complaints, has excluded European rights from the scope of the constitutional complaint in Polish law[39].

It can also be duly noted that the doctrines of constitutional identity and "Honeywell-style" ultra vires lock (originating from the German Bundesverfassungsgericht's case-law) have made its way into the Tribunal's jurisprudence (cases no. K 32/09 and SK 45/09, reviewing the Treaty of Lisbon and Regulation no. 44/2001/EC).

Assessment and conclusions

True to the spirit of the mentioned Cambridge report, current state of Polish law in regard to European fundamental rights is in development. However, developments that are being reported are worrisome – the Polish judiciary seems to treat the unwritten EU fundamental rights, the CFR and the ECHR as an interpretative aid at best, denying them practical usage as an autonomous basis for litigation or a reason for reopening of proceedings. The Polish courts, in particular the Supreme Court of

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w art. 1 Protokołu nr 1. Z przepisu tego wynika, że dopuszczalne jest pozbawienie własności ze względu na użyteczność publiczną, z zachowaniem warunków przewidzianych przez prawo i wynikających z zasad ogólnych prawa międzynarodowego oraz prawo regulacji korzystania z mienia zgodnie z interesem ogólnym lub w celu zapewnienia uiszczania podatków, bądź innych należności albo grzywien. W dotychczasowym stanie rzeczy (art. 316 par. 1 w zw. z art. 13 par. 2 kpc) nie istnieją podstawy do przyjęcia istnienia przesłanek zezwalających na tego typu ingerencję i brak zabezpieczenia interesów wierzycieli hipotecznych oraz ochrony praw nabytych, zwłaszcza, że ostrze tej ingerencji skierowane jest tylko przeciwko niektórym z wierzycieli. Godzi zatem zarówno w zasadę równości i sprawiedliwości społecznej różnicowanie podmiotów charakteryzujących się wspólną cechą istotną. W orzecznictwie Europejskiego Trybunału Praw Człowieka (w sprawie Bronkowski przeciwko Polsce) na podstawie art. 1 konstruowane są pozytywne obowiązki państwa w zakresie działalności ustawodawczej, mającej na celu ochronę własności ze wskazaniem, że powinna być zachowana równowaga między konkurencyjnymi interesami jednostki i wspólnoty jako całości". Its sister case (no. I CK 835/2004) was decided in the very same way.

38 Dicta: „Postanowienia Konwencji mogą zatem stanowić nie tylko wskazówkę interpretacyjną przy wykładni przepisów prawa wewnętrznego, ale i bezpośrednią podstawę rozstrzygnięć organów krajowych, jeżeli pozwala na to ich charakter. Konwencja o ochronie praw człowieka ma przy tym pierwszeństwo przed ustawą, jeżeli ustawy tej nie da się pogodzić z Konwencją (art. 91 ust. 2 Konstytucji). Europejski Trybunał Praw Człowieka, utworzony w celu zapewnienia przestrzegania zobowiązań wynikających z Konwencji, rozpoznaje skargi międzypaństwowe oraz indywidualne składane przez osoby, organizacje pozarządowe lub grupy jednostek pokrzywdzone naruszeniem wolności lub praw wynikających z Konwencji i jej protokołów (art. 19, art. 32 ust. 1, art. 33 i art. 34 Konwencji). Początkowo uznanie jurysdykcji Trybunału stanowiło wyraz dobrej woli umawiających się państw, obecnie ma natomiast charakter obligatoryjny".
However, some ordinary courts do not share that view as well – Katowice Appellate Court decided in a case no. II AKa 6/11 that "Ani Konwencja, ani też kolejne protokoły dodatkowe, w których z czasem uzupełniono katalog podstawowych praw zawarty w pierwotnym tekście Konwencji, nie zawiera jednakże stanowczych wskazań bądź zakazów, które powinny zostać w całości implementowane do systemu prawa krajowego i stąd też nie sposób zarzucić sądowi, iż obraził zawarte tam przepisy w rozumieniu art. 438 pkt 1 kpk".

39 Case no. Ts 281/10.

the Republic of Poland, have also repeatedly stressed that they are not bound by CJEU or ECtHR decisions. There exist authorities to the contrary, but they appear to be in minority.

On the European level, EU courts pursue strong substantive standards for protection. Conversely, the ECtHR asserts its accessibility and moves to expand its mandate to include directing the States to implement its rulings in a certain way. However, purely internal situations, conferral, access problems and limited standing on one hand, and dependence on the Committee of Ministers with a lack of an express legal basis in the ECHR on the other impede these.

Given the above considerations, several conclusions can be presented:

- A strong substantive commitment on the European level is largely dependent on the national authorities' – especially the judiciary's – willingness to cooperate,
- Polish case-law remains in development, but the trend has taken a turn for worse in regard to the effectiveness of European fundamental rights,
- Further study – in particular a continuous gathering of empirical data – must continue to ascertain the direction in which Polish and European law expands.

This paper argues that, in order to induce a more European-engaged element, the idea of an 'European' chapter of the Polish Constitution should not be abandoned, and contributions in that field should not be neglected[40]. In addition, a measure akin to what is article 1143 of the Polish Code of Civil Procedure could be introduced into relevant procedures, to enable the courts to receive aid of an expert witness in interpreting European law. Such measure would have to be utilized solely in order to enhance the swiftness of proceedings, be confined to a given case and would have to not encroach upon the exclusive jurisdiction of the Court of Justice to give preliminary judgments. However, the closing remark is that as of now, effectiveness of European fundamental rights remains limited.

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40 To that end see draft proposals produced by the team of leading experts (prof. J. Barcz, prof. J. Ciemniewski, prof. W. Czapliński, prof. M. Kruk-Jarosz, dr E. Popławska, prof. P. Tuleja, prof. K. Wojtyczek, prof. K. Wójtowicz (Chair) and prof. A. Wyrozumska, with dr P. Radziewicz as secretary). The draft is available at the Polish Sejm's website: http://orka.sejm.gov.pl/WydBAS.nsf/0/2AF963C8F804D14FC12578DC0032D985/$file/Zmiany%20w%20Konstytucji.pdf