THE POLISH EXPERIENCES WITH THE MULTI-LEVEL GUARANTEES OF FUNDAMENTAL HUMAN RIGHTS[1]

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I. Introductory remarks

When speaking about the multi-level guarantees of human rights[2] there is no doubt that reference must be made to the European Court of Human Rights (ECHR). In fact, this level is accessible only after two or three judgments of the domestic courts of any State, including Poland, have been passed. So the other levels of guarantees of human rights must be searched in the domestic legal system. In this respect we must distinguish between ordinary courts and the Constitutional Court. It is in this sequence that we are going to discuss them. By doing this we do not want to blame the executive power as such. In fact there is no incentive nor acceptance for the executive acting against human rights. It has simply the greatest opportunity to get involved with human rights and it is the most probable to sacrifice them to something that is usually another value rather then a selfish interest of a given person. Also this kind of presentation is not aimed at diminishing the importance of several organs, among which the

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[2] The feeling of this multiplicity of levels is very strong. The best proof thereof is the debate in EPS (Europejski Przegląd Sądowy; European Judicial Review) the leading Polish journal dealing with the EU law. See: Debate of the EPS – Quis iudicabit? – europejska wspólnota sędziów czy sędziowska wieża Babel [Quis iudicabit? – the European community of judges or a judicial Tower of Babel], EPS 10/2010.

most important is the Polish Ombudsman[3]. Nevertheless it is the judiciary that will be in the center of our interest.

II. The role of the ordinary courts

By ordinary courts we mean all courts other than the Constitutional Court. The notion ordinary courts covers the Supreme Court, the military courts, the administrative courts and last but not least the ordinary courts in the narrow meaning of the term. They are divided into three levels: district courts, regional courts and courts of appeal. They all deal with civil and criminal matters, as well as other categories of cases (labor law, social insurance, commercial law, registers and so on).

From the perspective of the ECHR the role of domestic courts is twofold. Of course, it may happen that the contents of these judgments are contrary to human rights. The actual reason of the lack of conformity in this respect could be judges[4], courts[5] or the entire judicial system of a given state. If not necessarily in the majority of problematic cases, but at least with

[3] For one of the first (and happily enough in English) summaries of the activities of one of the first Polish Ombudspersons, see: T. Zieliński, The International Covenants on Human Rights in the Practice of the Polish Ombudsman, *Polish Yearbook of International Law*, 1995-96, p.7-36. The notion Ombudsperson is the much convenient, as the first and probably the most impressing Polish "Ombudsman" was a woman. On the position of Ombudsman in the Polish legal system, see: B. Nalezi□ski in: P. Sarnecki (ed.), Prawo konstytucyjne RP [The Constitutional Law of Poland], Warsaw 2011, p. 446-458.

[4] In this respect we must refer specially to two reasons of problems. One of them is lack of knowledge or lack of sensitivity. Specially for the old generation the very essence of human rights used to be a relative novelty. The other source of problems is connected with criminal or at least questionable situations including bribery, political or ideological bias of a judge or the influence of local groups of interest. Fortunately enough, the first two are believed to be really rare and the present author has no grounds to put it in doubt. There is a feeling that the last one requires a thorough examination. Very critical comment on the positivism of judges, their tendency to stick to literal interpretation of legal provisions see: E.Łętowska, Czekając na Godota, czyli jak wykonywać wyroki ETPCz (uwagi na tle sprawy Moskal v. Polska) [Waiting for Godot, that is, how to enforce ECHR judgments (remarks against the background of Moskal v. Poland case), EPS 2/2011, p. 4 and 9.

[5] This point is mentioned for logical rather than material reasons. We can imagine that the source of the problem is the very organization of a given court, with one judge having for example 50 pending cases and the other only 5. However bad opinion on the Polish skills of organization may persist, it would be rather impossible for the president of a Polish local court to tolerate such a situation. On the other hand, the main division of labor within the courts – between

respect to the majority of human rights, however, the reason of the lack of conformity is rather the law[6]. So it is the accurate (sometimes too accurate) application of the domestic provisions containing clauses at odds with human rights what creates or perpetuates a breach or breaches of human rights. In such situations, the courts are not the source of the problem, they serve as simple conductors of the will of the legislator or/and the executive.

The second side of the coin cannot however be overlooked. It must be stressed in this respect that the courts are the first barrier allowing for the elimination of breaches of human rights resulting from statutes and regulations. The Polish Constitution adopted in 1997 contains several instruments which are of help in this respect. It will be useful to start our discussion with their presentation.

III. The attitude of the Polish Constitution vis-à-vis human rights

It is generally acknowledged that the present Polish Constitution is quite friendly vis-à-vis international law, and human rights in particular.

Firstly, art. 9 of the Constitution provides that Poland respects the rules of international law binding for it. This is the most general provision in this respect. Its general character is a virtue, but a vice as well. The virtue, as it does not differentiate between different kinds of sources. It refers equally well to treaties, customary law (custom), general principles of law, decisions of international organizations and unilateral acts of states. The only qualifying element refers to the fact of Poland being bound by

departments dealing civil, criminal, labor, social security and other matters – is not dependent on the decision of the head of the court but on external elements, namely the inflow of cases.

[6] On this topic see: J. Skrzydło, Wykonanie wyroku ETPCz [Execution of Judgments of the European Court of Human Rights], *EPS* 11/2010, p. 4. Of course, it may happen that the reasons are to be found both in the law and in the courts (judges); a good example thereof is an automatic application of so-called provisional arrest in Poland, on this topic see: M. Bernatt, A. Bodnar, Stosowanie tymczasowego aresztowania w Polsce – problem strukturalny – wyrok ETPCz. Z 3.02.2009 r w sprawie Kauczor v. Polsce [The Application of Provisional Arrest in Poland – structural problem – judgment of the ECHR of 3 March 2009 in case Kauczor v. Poland, *EPS* 6/2010, specially at p.48. The authors point at the existence of structural problem in this respect identified by the ECHR.

a given rule. In fact that element would have been applicable even in the lack of an express provision to that end. Article 9 leaves however doubts as regards its self-executing force. W. Czapliński and A. Wyrozumska stress the importance of that provision and see in it an obligation for the parliament but also for judges[7]. It is however doubtful whether the judges will see it that way, especially in light of the presence in the Constitution of express provisions dealing with the effect of treaties in Polish domestic law. They are to be found in art. 91. Its paragraph 1 provides for the direct applicability of ratified international agreements published in the Official Journal. The condition of such application is the self-executing character of a given treaty. In fact that condition has to apply not less to the treaty itself as to any of its provisions.

A few remarks should be made as regards the other two conditions. The first is ratification. In Poland ratification is always an act of the President. It could however be made only at the initiative of the government (the Council of Ministers). Also co-signature of the act of ratification by the Prime-Minister is provided for by the Constitution. So, the ratification requires at least the agreement of three main actors of the executive branch. They are: the President, the Government and the Prime Minister. We may add to this list the minister responsible for a given branch as he or she is the initiator of the governmental procedures. For some matters the executive is however dependent on the parliamentary approval of a given treaty[8]. That approval takes the form of an act of the Parliament (statute). It is of importance for the application in the domestic legal order. If the ratification of a given treaty is made with the parliamentary approval, that treaty has primacy over statutes. The Constitution does not guarantee them primacy over itself, but such a generous solution could have been hardly expected. It would be anything but a standard in a contemporary world. In fact the solution adopted by Poland in 1997 is over the world average.

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7 W. Czapliński, A. Wyrozumska, Sędzia krajowy wobec prawa międzynarodowego [Domestic judge vis-a-vis international law], Warsaw, 2001, p. 105.

8 Those items are listed in art. 89 of the Constitution. They include i.a.: political and military treaties, treaties creating international organizations, treaties resulting in serious expenditure for the Treasury.

Its importance is still the bigger as the treaties on human rights require ratification with the prior parliamentary approval. When adopted in that way they have the above-mentioned primacy over acts of Parliament. What is more, as the majority of human rights treaties were ratified before the entry into force of the Constitution, there is a special provision according to which such treaties should be treated as ratified with a parliamentary approval[9]. This applies especially for the European Convention on Human Rights and the Covenant of Civil and Political Rights. It is because of these provisions that they are given primacy over acts of Parliament (assuming that a given provision is really self-executing).

Secondly, the Constitution itself contains a set of rules on human rights. Chapter II of the Constitution is devoted to the freedoms, rights and duties of men and of citizens[10]. The set of fundamental rights is very similar to the one from the European Convention. In addition, we can find in the Constitution a set of economic and cultural rights as well as political rights of citizens.

Art. 77 (1) of the Constitution gives the right to indemnity in the situation of breach of law by the public organs. Paragraph 2 of art. 77 provides that no act of Parliament can exclude access to the courts in cases in which the rights and freedoms are violated. Art. 79 provides for the so-called constitutional claim. We are going to tell more about it when discussing the powers of the Constitutional Court. What is more, art. 8 (2) of the Constitution provides that the constitutional provisions are to be applied directly unless they themselves provide otherwise. Taken together, the constitutional framework seems to be very friendly not only vis-à-vis human rights but even more precisely towards their direct application by domestic courts, even at the cost of denial of application by them of statutory provisions.

Nevertheless, the actual picture is by no means that optimistic. Let us start with the set of fundamental human rights to be found in the Constitution itself. Let us consider firstly if they could be applied directly.

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9 Art.. 241 (1) of the Constitution.

10 On the set of human rights in the Polish Constitution, see: K. Wojtyczek in: P. Sarnecki (ed.), op.cit., p.89-171.

It is sometimes suggested that the provisions of the Constitution are not directly effective if they refer to acts of Parliament[11]. This is the case of the rules on fundamental freedoms[12]. Accordingly, art. 41 provides for personal freedom. However, it could be limited on the basis of statutes. Art. 57 of the Constitution provides the right to peaceful assembly. But limitations of this right could be introduced by statutes. Art. 58 guarantees the right of association. But it is statutes that are to determine the kinds of associations[13], procedure of their registration and their supervision. The situation of the right to property is somehow better. Art. 64 of the Constitution provides for the possibility of limiting that right by statutes but only to the extent in which the essence of this right is kept. Such references could mean the lack of direct applicability of the constitutional provisions or at least serious doubts in this respect. Although the direct applicability of the Constitution is a new solution and a lot of questions wait for solution, we can hardly imagine an ordinary court questioning an act of Parliament for the lack of conformity with the provisions of the Constitution which refer to statutes. Such a decision (very difficult from the psychological point of view) could probably take place in a case of extreme violation of the very essence of the freedom by the law itself. Fortunately enough, this is not a very probable scenario.

The last element to be mentioned is connected - paradoxically enough - to the Constitutional Court. It is the strongest opponent of such direct application of the constitution by ordinary courts, which would lead to the denial of application of a statute. It became a subject of fierce dispute between the Supreme Court and the Constitutional Court. The first was in favor of ordinary courts declaring statutes inapplicable because of the lack of conformity with the Constitution. The second pointed at the provision according to which judges were subordinate not only to the Constitution but also to statutes[14]. According to the Constitutional Court, such a decision

[11] For the opposite view: see: B. Banaszak, *Outline of Polish Constitutional Law*, Wrocław, 2005, p. 34.

[12] A. Wyrozumska, Direct Application of the Polish Constitution and International Treaties to Private Conduct, *Polish Yearbook of International Law*, 2001, p. 7.

[13] In a broad meaning of the term, including e.g. parties, companies or associations in a narrow meaning of the term.

[14] Judgments of these courts are presented in: M.Zubik (red.), Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów [The Constitution of the „IIIrd Re-

can be made only on the basis of its judgment. Of course, it would be a complete misunderstanding to see in the Constitutional Court an enemy of human rights. As it will be shown in the next section, its role in this respect is very positive. However, the attitude of the Constitutional Court to the direct applicability of the Constitution is an objective factor. If the above-presented set of constitutional rules important from the perspective of human rights was very promising and optimistic, the very indication that it (or at least an important part of it) cannot work directly, that is without the engagement of the Constitutional Court, is a very bad message.

In fact, the precise scope of the reasoning of the Constitutional Court is difficult to determine. If the judges are subordinate to the statutes they cannot deny their application. Evidently it refers to situations of conflicts with material constitutional provisions, including the constitutional set of human rights. However, what about human rights to be found in ratified treaties published in the Official Journal. Art. 91 of the Constitution is precise enough as regards the application and the primacy of the treaties. The Constitutional Court did not go so far as to deny its legal effect. It does not require clarification that the application of that reasoning would deprive art. 91 (1) and (2) of all practical effect. On the other hand, the impossibility of excluding a situation in which an act of the Parliament would not be applied because of the lack of conformity with the treaty opens the question if the same should not be done with respect to the Constitution itself. All the same, such a climate is everything but encouraging for courageous judgments of ordinary courts.

The lack of direct applicability of a given constitutional provision does not mean of course the lack of any effect. It means however that the denial of application of a statute because of the lack of its conformity with the constitution is dependent on the judgment of the Polish Constitutional Court. The position of the Constitutional Court will be discussed in the second part of the present article. In effect it may be easier for the ordinary and administrative courts to apply international treaties on human rights than the constitution itself.

public" in the jurisprudence of the Constitutional Court and selected courts], Warsaw, 2011, p.61-68. On this dispute see also: A.Wyrozumska, op.cit., p. 9-10.

IV. The practical dimension of the application of international treaties on human rights by ordinary courts

The judgments referring to the European Convention on Human Rights and the Universal Covenant on Civil and Political Rights are numerous. No statistics are conducted on them but it would be rather an astronomical number that is at stake. The first judgments of the Supreme Court and the High Administrative Court (even preceding the present Polish Constitution) were of utmost importance[15], nowadays they are treated as something obvious and requiring no special comment. W. Czapliński and A. Wyrozumska cite in this context two judgments. The first was a ruling on an extradition request made by China with respect to the families Mandugequi and Jinge. The Polish court ruled that their extradition would have been contrary to art. 3 of the European Convention[16]. Another judgment cited by them is a ruling of the Polish Constitutional Court which found an obligation to place the statistical number of illness on health insurance documents to be contrary to several provisions of the Polish Constitution, art. 8 of the European Convention and art. 17 of the Covenant[17].

They are now just examples of a great number of judgments referring to international human rights treaties. As in the same paragraph we cite some judgments referring even to the judgments of the ECHR, there is no sense dwelling on references to the treaties. They go without saying. This does not mean that every person referring to them has the same understanding of them as the Polish courts. So e.g. in one of the cases the accused person referred to art. 6 of the European Convention in order to defend the direct examination of evidence by courts[18]. The Supreme Court could not and

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[15] See: R. Hliwa, L. Wiśniewski, The International Covenants on Human Rights in the Case Law of the Polish Supreme Court, the Constitutional Court and the High Administrative Court, *Polish Yearbook of International Law*, 1995-96, p.27-36. The authors presented judgments of the Supreme Court and High Administrative Court with references to binding force of international human rights instruments, specially the Covenant.

[16] U II KKN 313/97, OSNKW 1997, No 9-10, pos. 85. Cited after: W. Czapliński, A. Wyrozumska, Prawo międzynarodowe publiczne. Zagadnienia systemowe, [Public International Law. Systematic Aspects], Warsaw, 2004, p.545, footnote 1.

[17] U 5/97, OTK 1998, No 4, pos. 46. Cited after: W.Czapliński, A.Wyrozumska, Prawo …, p.546, footnote 1.

[18] Ruling of the Supreme Court of 6 June 2001, II KKN 96/01.

did not try to deny the application of the Convention. It was not convinced by the arguments of the accused on possible exceptions to the rule of direct examination of evidence. In another case one of the banks claimed that its rights resulting from Protocol 1 to the European Convention were breached. The bank had a mortgage on a building belonging to a cooperative. When a flat in this building became a separate property the mortgage was cancelled with respect to that flat. The Supreme Court did not deny the binding force of the Protocol, it simply ruled that the State can regulate the right to property, as it had actually done with respect to mortgages[19].

As judgments referring to international human rights instruments are treated as something obvious, what attracts more attention are more sophisticated questions, e.g. the application of judgments of the ECHR or possibly horizontal effect of the Polish Constitution and international treaties[20]. Let us concentrate on the former. It became the subject of several articles in Polish legal literature[21]. E. Łętowska pointed to the fact that judgments of the ECHR "fell on stony ground"[22]. This is due to the fact that they do not indicate the person or the body responsible for the elimination of breach of human rights. In fact however, this problem could be considered on several levels. One of them concerns the question what should be done with respect to a person who won his/her case in Strasbourg. The other level of discussion deals with what should be done in the field of law or of life, which turned out to be problematic. The third level (somehow interrelated) deals with the influence of a judgment on subsequent cases dealing with identical or similar issues.

It is the second of the above-listed levels that was a subject of special interest. In this context such elements are listed as: trainings for judges and prosecutors, translation into Polish of judgments given in cases concerning Poland, transmission of information about judgments to persons personally engaged in cases giving rise to complaints to the ECHR[23]. Of course, one

19 Ruling of the Supreme Court of 28 June 2005**,** I CK 835/04.
20 A. Wyrozumska, op.cit., p.5-26.
21 See: infra.
22 E. Łętowska, op. cit., p. 10.
23 M. Bernatt, A. Bodnar, op.cit., p.52.

cannot forget legislative amendments of provisions giving rise to cases lost by Poland in Strasbourg. As can be seen, those instruments are usually outside the sphere of judicial activity. This is often the case with respect to the first level. But not always. One of the factors stimulating that discussion was a judgment of the Polish Supreme Court of 30 November 2010[24]. The Supreme Court ruled that a judgment of the ECHR which established a breach of human rights was not a ground for reopening of the civil proceedings which had been the object of a final and binding judgment of a domestic court. In fact, the jurisprudence of the Supreme Court is everything but stable in this respect. In 2005 it excluded such an effect of the judgment of the ECHR[25], when in 2007 it accepted such a possibility[26].

M. Ziółkowski argues that there is no general principle according to which such re-opening should always be possible[27]. The main value which would be jeopardized by such an automatic re-opening is the stability of judgments and the interests of the other party to given proceedings. However, M. Ziółkowski expressed the opinion that the denial of re-opening should also not be treated as granted in every possible case. This is especially to be considered in proceedings in which it is the State (or other public body) that is the other party to the proceedings[28]. Also J. Skrzydło presents arguments in favor of such re-opening[29]. They have however rather a character of arguments de lege ferenda – as they point at the necessity of amending the Polish Code of Civil Procedure. The main line of reasoning points to the absurdity of the situation in which a ruling of the Constitutional Court could and the ruling of the ECHR could not be a basis for the reopening of the civil procedure. What deserves special attention with respect to the question of re-opening of proceedings in connection with a judgment of the ECHR is a point of discussion with respect to civil procedure only. Such a possibility is provided for expressly

[24] III CZP 16/10, OSNC 2011/4, pos. 34, cited after M.Ziółkowski, Wyrok ETPCz jako podstawa wznowienia postępowania cywilnego [Influence of the judgments of the European Court of Human Rights on reopening of civil proceedings], EPS 9/2011, p. 4, footnote 1.

[25] V CO 16/05, LEX No 176062, cited after: J. Skrzydło, op.cit., p.11 footnote 79.

[26] I PZ 5/07, OSNP 2008/13-14, pos.196, cited after: J. Skrzydło, op.cit., p.11 footnote 82.

[27] M. Ziółkowski, op.cit., p. 6.

[28] M. Ziółkowski, op.cit., p. 9-10.

[29] J. Skrzydło, op.cit., p.12-13.

in the context of criminal procedure[30] and the procedure of administrative courts[31].

What is more, the Polish courts not only apply the European Convention but also cite judgments of the ECHR. M. Balcerzak and S. Sykuna rightly point out that the attitude to the jurisprudence of the ECHR is a derivative of the attitude to international law in general[32]. In fact those judgments have no formal status of precedents[33]. Nevertheless, a friendly attitude of the Constitution vis-à-vis human rights has a stimulating effect for domestic courts. For example the Supreme Court in the case concerning the extradition to Russia of some Adam M.[34] not only applied art. 3 of the European Convention directly, but also referred to three judgments of the ECHR, including the famous Soering case[35]. The judgment was, however, not a good message for the wanted person, as the Supreme Court cancelled the ruling denying his extradition. The case must be judged once again by a regional court. The reason was of fundamental importance. The Supreme Court was confronted with two opposing and irreconcilable views. One of them was the belief of the prosecutor that Russia is a reliable state respecting human rights to which an extradition can take place. The other one – attributed to some courts – was a permanent lack of confidence in the Russian legal system, with extradition by definition breaching art. 3 of the European Convention. The Supreme Court denied both a priori opinions and demanded precise findings justifying extradition or denial thereof.

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30 Art. 504 § 3 of the Code of Criminal Procedure.

31 Art. 272 § 3 of the Code of Procedure before administrative courts. More on these provisions see: J.Skrzydło, op.cit., p.11.

32 M. Balcerzak. S. Sykuna, Znaczenie i wpływ orzecznictwa Europejskiego Trybunału Praw Człowieka na praktykę polskiego wymiaru sprawiedliwości [Importance and impact of the jurisprudence of the European Court of Human Rights on the practice of the Polish system of justice], in: T.Bąkowski, K.Grajewski, J.Warylewski (eds.), Orzecznictwo w systemie prawa [Jurisprudence in the System of Law], Warsaw, 2008, p.40.

33 M. Balcerzak. S. Sykuna, op.cit., p. 44.

34 IV KK 422/20, ruling of 20 April 2011, available on the website of the Supreme Court, www.sn.pl.

35 Soering v. the United Kingdom, judgment of 7 July 1989, no. 14038/88; the other two were: Bensaid v. the UK, 6 February 2001, no. 44599/98 and Puzan v. Ukraine, 18 February 2010, no. 51243/08.

Another case before the Supreme Court concerned the damages claim of a former prisoner who was kept in an overcrowded room in a prison[36]. He claimed that his state of health deteriorated in connection with his stay in the prison. A district and a regional court denied the claim, arguing that the overcrowding was not an offence of personal rights of a prisoner and there was no proof of causal relationship between his state of health and his stay in the prison. The Supreme Court was of a different opinion. It referred not only to art. 10 of the Universal Covenant and art. 3 of the European Convention but also to several judgments of the ECHR on the treatment of prisoners and miminum spaces for them[37] as well as to the responsibility of a State for prisoners.

In order once again to make this beautiful picture more bitter, let us point at some problems. The condition of the direct application of a treaty is its self-executing character. The latter is not defined by the Constitution but such a strict definition does not seem to be necessary. The clear, unconditional character of a norm and lack of its dependence upon implementing measures seem to be preconditions of such self-executing character. The similarity to the preconditions of direct effect in the EU law are by no means a coincidence. In fact the lack of any of the above-mentioned conditions makes the application of a given norm impossible. The majority of freedoms are based on principles and possible exceptions. It would be difficult to deny them direct application, but the court deciding the case could have serious doubts what should prevail in a given case. Should it be a principle or rather an exception. When confronted with a provision of Polish law which is clear, precise and not evidently contrary to the Constitution or to the very essence of a given right, a court may have a tendency to prefer it to more generally worded international provisions on human rights. Although it would be easy to call it a national bias and to condemn it vividly, the present author would prefer another notion. It would be namely a positivist attitude. It is sometimes a subject of very bitter utterances. In fact however it is a fruit of about 300 years of codification attempts on the European continent.

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[36] V CSK 431/06, ruling of 28 February 2007, available on the website of the Supreme Court, www.sn.pl.

[37] Cases of the ECHR no 8224/78 and 21915/93.

The most impressive picture of the role of judges is attributed to Montesquieu. He desired the judges to be a mouth of laws (statutes). This ideal – fortunately enough – is remote from reality. There are still many elements which show that judicial activism is not always perceived as a virtue. Some commentators would evidently be ready to boast it, many other would rather tend to show that the judicial activism is rather a proof of unhealthy ambitions of a given judge or a special position of one of the parties or possibly of the representative of one of the parties. The very sticking to the very text of a law seems to be – at least in the majority of situations – a guarantee of the right to equality. This makes the courts however not willing to apply a special sensitivity vis-à-vis fundamental human rights. The present author could give an example from his own practice – as a trainee for a judge[38]. During that period he had the opportunity to attend court proceedings. In one of these proceedings a lady demanded a flat from her former employer – a public body. She stayed during the entire period of her employment in a temporary flat as a tenant. It was accessible only for the period of employment. However, she had been promised by her employer a permanent flat several times during the period of her employment. The right to it would not have been dependent of the employment as such. In fact she had not been given any and after the dismissal from the office (connected with the old-age retirement) she was expelled from the temporary flat. The advocate of the lady wanted to persuade the court that the promise of a state body is a source of an obligation in law. That is why he demanded that she should be given a permanent flat from public resources.

The attitude of the court was partly contempt, partly an amusement and partly suspicion that the lawyer wanted to persuade the court to the application of something that was not law in the strict meaning of the term. That attitude seems to be more symptomatic than the judges would themselves be ready to confess. No statistics thereof are made or at least the present author had no access to such statistics. On the other hand the situation of judges does not create perfect conditions for the thorough consideration of cases from the perspective of human rights. The number

[38] It was impossible to establish the number of the case (the only way of identifying cases in the Polish legal system) after more then 10 years. The present author could certify the accuracy of the description by his word of honor.

of cases increased over the time. Especially the courts in Warsaw have problems with closing the cases within a reasonable time. It is itself a source of several breaches of human rights. Actually the length of the court proceedings is the most important problem for Poland from the perspective of human rights, especially if we take the number of complaints to the ECHR as an indicator. It would be a very primitive argument to justify the lack of sensitivity for human rights with the fact that a judge has too many cases waiting for his/her judgment to think of any of them from that perspective as well. In fact the relationship between the two is not that simple but nobody could deny the very existence of that relationship.

As a perfect illustration can serve summary proceedings – in which courts or judges make decisions quickly and the losing party can appeal. In fact the courts act like automats in those cases. If somebody would have made a joke and send them a request with respect to a non-existing person, also that person would be given a nice opportunity to appeal against such a judgment. From a theoretical point of view the court can make such a decision only with respect to small claims[39] or to claims supported by contracts[40]. What is a problem is that the courts do not even care whether the defendant has been asked to pay before the case is taken to the court or if he/she actually lives at the address indicated in the claim. The losing party can certainly appeal. The problem lies with the fact that as regards the second of the above-mentioned procedures such an appeal could be costly. In fact that plaintiff has to pay only a fraction of normal fees (1/4), the remaining ¾ (that is 75 %) is to be paid by the (sometimes really astonished) defendant[41]. Nobody cares whether a plaintiff is a powerful company and a defendant a poor, old lady. Useful as it may be, such a procedure has nothing to do with the careful analysis of cases. The most cruel truth lies in the fact that without such summary proceedings the queues in the courts would be still longer.

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[39] So-called "upominawcze postępowanie". A translation „writ-of-payment procedure on demand" was suggested for it. The present author himself would suggest another translation, namely „monit procedure".

[40] So-called "nakazowe postępowanie". A translation „writ-of-payment procedure" was suggested for it.

[41] See: art. 19 (2) and (4) of the Act on court costs in civil cases, Dz. U. No 90, pos. 594.

To complete the picture one should add that the body of law itself is bigger and bigger and more complicated. In 1991 the number of the Official Journals[42] was 125, the number of items[43] published in them was 561 and the number of their pages 1.824. In 2001 those numbers were respectively 157; 1.866 and 13.132. In 2011 there were 299 Official Journals, 1.778 items (that is even smaller then 10 years ago) but the number of pages reached the astronomic figure of 17.484. It means – that the length of the Official Journals per year is almost 10 times bigger as 20 years ago. Those numbers do not necessarily mean that the burden of judges increased in a direct proportion, but nobody could dream about the lack of any influence of those numbers on judges. It would be also difficult to present the Polish legal system as a stable one. A lot of energy is necessary in order to trace successive amendments. Suffice to state that e.g. the Law on personal income tax was amended 14 times in 2011. Perhaps it is an extreme example but amendments are a rule, not an exception. That is why the special role in the fight for human rights is reserved for the Constitutional Court.

V. The Constitutional Court and the human rights

The position of the Constitutional Court among the organs responsible for the protection of human rights in Poland is of special importance. Firstly, it has at its disposal a set of instruments which make it possible for it to have a decisive voice in the question of conformity of Polish laws (other than the Constitution itself) with human rights. By the latter we mean both the human rights enshrined in the Constitution and in the human rights treaties. The Court does not have the possibility of eliminating the cases of improper application of provisions which are themselves not contrary to human rights provisions. However, the control of the Court is no longer a purely abstract one. This is due to the institution of the constitutional claim. In this respect one can see a very interesting interplay between the Polish Constitutional Court and the ECHR. Some interesting judgments deserve special attention and will be discussed below. Let us start with the

[42] In Polish „Dziennik Ustaw". A normative act cannot bind unless it is published in it.
[43] That is acts – such as statutes, regulations and so on.

presentation of the abovementioned powers of the Constitutional Court important from the perspective of the protection of human rights.

V.1. The Polish constitutional provisions on the position of the Constitutional Court

The first of the provisions interesting from our perspective concerns the power of the President to delay the signature of a new act of the Parliament and to ask the Constitutional Court about the conformity of that statute with the Constitution. This provision is regulated in art. 122 (3) of the Constitution. The lack of conformity with the treaties (including the ones on human rights) may not be the subject of such a referral, but the rights as enshrined directly in the Constitution itself can be the subject of such an examination. This makes it possible for the Constitutional Court to eliminate possible breaches of human rights before they take the shape of a statute.

The other powers of the Constitutional Court can be divided into three groups. These are: (1) The power to rule on the constitutionality[44] and legality[45] of normative acts; (2) the power to answer questions of domestic courts on the constitutionality and legality of normative acts, and (3) the so-called constitutional claim. The first two categories of judgments can refer not only to the conformity with the Constitution but also with ratified international agreements, including the ones on human rights.

The first category of judgments can be given at the request of one of 17 categories of subjects. They include the President, the Prime Minister, the Ombudsman, the Chairpersons of both Houses of the Parliament, churches, trade unions, the President of the Supreme Court. The control is made in an abstract way. The second category of judgments can be given only at the request of another court. A precondition thereof is the fact that a judgment is necessary for the court referring a question to decide a case

[44] That is conformity with the Constitution.

[45] Here understood as conformity with ratified treaties, the EU law and acts of Parliament. They serve as a standard. Such an examination is possible only with respect to acts of inferior character to the standard with which it is compared. That is why the Constitution provides for quite a precise hierarchy of normative acts.

pending before it. The third procedure interesting from our perspective is the constitutional complaint. It is mentioned in art. 79 of the Constitution. The essence of the constitutional claim lies in the fact that a person can bring his/her case to the Constitutional Court when he or she believes that his/her constitutional rights and freedoms have been breached on the basis of a normative act (act of Parliament, regulation and so on). What is examined by the Constitutional Court is not the application of the act of the law (decision, judgment) but the normative act lying at its basis.

Art. 79 refers to an act of Parliament which is to regulate the procedure of the constitutional complaint. It is in the Act on the Constitutional Court[46] where we can find many important rules governing this legal instrument. The most important rules are the requirement of the exhaustion of legal remedies and the term – 3 months since the handling to the claimant of a definite ruling[47]. As opposed to the previous two procedures, this procedure is open to everybody. The limitation lies in the fact that the complaint can only concern the conformity with the Constitution, it cannot refer to the conformity with statutes or treaties. Nevertheless, it could refer to almost all rights and freedoms regulated in the Constitution. There are only two express exceptions concerning the right to seek asylum and the right to protection of refugees.

These three procedures create a considerable field of influence for the Constitutional Court with respect to human rights. That is why it is really important to distinguish the Polish Constitutional Court as a separate actor in this field. This last conclusion is all the more accurate if we take into consideration the interplay between this court and the ECHR.

VI. The interplay between the Polish Constitutional Court and the ECHR

We have just mentioned the influence of the ECHR on domestic courts. We must however also notice situations in which it is the ECHR that can refer

[46] Dz. U. Nr 102, poz. 643 with subsequent amendments.
[47] For both see: Art. 46 of the Act on the Constitutional Court.

to domestic judgments. It is worth to cite in this context two judgments – in Hutten Czapska case and in the Urban case.

VI.1. The Hutten-Czapska Case[48] - facts

The case of Ms. Hutten-Czapska was connected with the Polish regulations dealing with the protection of tenants. The entire system originated in the communist period, not covered as such by the jurisdiction of the ECHR with respect to Poland. Suffice it to say at this point that the system was based on public (that is governmental) administration of flats and houses, even if they constituted private property. In fact, the owners (even if not expropriated) did not have any influence on the choice of a tenant and the level of the rent. The decisions in this respect were made by local authorities[49]. That system was adopted by a decree of 1946 and modified by a statute of 1974.

It was just the situation of Ms. Hutten-Czapska. During the second world war the house of her parents in Gdynia was used by the German army, then in 1945 by the Soviet army. After that period the Polish communist authorities started to give access to the house (or rather to a few flats into which it was divided) to some people (connected with the regime), the owners having no access to the house or to the management thereof. In 1991 Ms. Hutten-Czapska took over the management of the house[50]. She did not have any chance to take over any part of the house for herself, because of the Polish rules on the protection of tenants. Those rules were changed in 1994. All the same, the regime of the previously established relationships was kept in force for the next 10 years[51]. According to that temporary regime, the level of rent for such flats was determined by the public authorities. The landlord had almost no possibility of getting back the possession of the flats, the exception being connected with devastation and so on. The level of rent was not sufficient to cover the costs for keeping the building in a proper state.

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48 Hutten-Czapska v. Poland, no 35014/97, judgment of 22 February, 2005.

49 See, Hutten-Czapska case, par. 71 and 72.

50 See, Hutten-Czapska case, par. 37.

51 That is to 31 December, 2004. See art. 56 of the 1994 Act; see also: Hutten-Czapska case, par. 81.

VI.2. The ruling of the Polish Constitutional Court

Before the case Hutten-Czapska was decided by the ECHR, the Polish Constitutional Court gave a few rulings on the Polish law concerning the protection of tenants. As they were the point of reference for the ECHR, they deserve our attention. The first judgment was given on 12 January, 2000[52]. The ruling of the Constitutional Court was given in response to a question sent by the Supreme Court. The Constitutional Court declared art. 56 of the 1994 Act to be contrary to the Constitution. As art. 56 established the temporary system, it was just the assessment of it that was at stake. It was held to be contrary to the right to property[53], the principle of the rule of law and social justice[54] and the constitutional principle of proportionality[55]. What deserves our special attention was that as regards the right to property also art. 1 of Protocol 1 to the European Convention was invoked. The main object of interest was the level of rent for private houses and flats covered by the state-regulated system. What deserves our attention is the fact that the rules in question related to around 100 000 landlords and 600.000 – 900.000 tenants.

The Constitutional Court analyzed the situation of the landlords of such flats and houses. Although it did not amount to expropriation, in fact the rules made the right to property a fiction, the landlord having no influence on the person of the tenant or the level of the rent. On the other hand, the landlords were subject to far-reaching obligations as regards the preservation of buildings. Tax law did not take into consideration the peculiar situation of landlords, treating them as normal economic actors. The Constitutional Court conceded that the situation of many tenants requires protection, including the regulation of the levels of rent. The division of the burdens was a problem – in fact the private persons (landlords) were obliged to take on themselves the cost of the social policy of the State. Some tenants were relatively well-situated persons. On the other hand, no measures were taken by the State to make good to the landlords the actual losses resulting from the inadequate level of the rent. That is why the breach of

[52] Hutten-Czapska case, par. 84-86.
[53] Art. 64 § 3 of the Constitution.
[54] Art. 2 of the Constitution.
[55] Art. 31 § 3 of the Constitution.

the above-mentioned provisions of the Constitution and Protocol 1 was established. The second judgment in this field was given on 10 October, 2000[56]. It stated that the imposition of several duties on landlords despite the insufficient amount of rents was contrary to the Constitution.

As a result of those two judgments a new statute on the protection of the rights of tenants was adopted in 2001. It also provided for strict rules on increasing the levels of rent. The allowed increases were dependent on the actual level of the rent as compared to the value of a flat. With respect to very low rents[57] it was possible to increase them even by 50%, but for higher ones[58] – by only 15%. The ceiling of 3% of the reconstruction value of a building was established for a rent per year. It could have meant the freezing of the level of a rent applied before the entry into force of the statute. The termination of the relationship of tenure was very difficult – either dependent on the provision of a replacement flat or on a 3-year (sic!) term! Although the provisions on the duties of landlords with respect to their property were omitted in the statute itself, they were to be found in other provisions of law[59].
The Polish Ombudsman brought an action for annulment of the statute to the Polish Constitutional Court. He claimed that the statute even worsened the situation of landlords, instead of improving it. The Constitutional Court gave its judgment on 2 October, 2002[60]. It referred widely to its previous ruling. The main point of criticism was the fact that the method used did not eliminate the gap between the allowable level of rent and the cost of preserving the state of the buildings concerned. The level of 3% was presented as hardly possible to achieve. The Constitutional Court pointed to the fact that the increase of the regulated rent was much bigger than the ones allowed by the new statute. The Constitutional Court suggested two possible solutions – either to allow for a big increase at the beginning and regulate strictly subsequent increases or to avoid a very big increase but to allow for relatively big increases in subsequent periods. The statute allowed for relatively small increases from a very low level of rent. On

[56] Hutten-Czapska case, par. 87.
[57] That is the rent which yearly did not exceed 1% of the reconstruction value of the flat.
[58] That is the rent which yearly exceeded 2% of the reconstruction value of the flat.
[59] Hutten-Czapska case, par. 89-99.
[60] Hutten-Czapska case, par. 100.

the other hand the Constitutional Court did not question the level of 3% as an important instrument of the protection of tenants. That part of the judgment was confirmed on 12 May, 2004 when the Court gave a ruling on a constitutional claim of a private person[61]. It is important to recall that the 3% level was an element of the temporary provisions – to expire on 31 December, 2004.

VI.3. The ECHR and the rulings of the Constitutional Court

Ms. Hutten-Czapska brought her case to the ECHR in 1994, just after the ratification by Poland of Protocol Nr 1[62]. The decision on admissibility was made in 2003, the hearing held in 2004 and the ruling given in 2005. The Court established a violation of article 1 of protocol No. 1 with respect to Ms. Hutten-Czapska and a systemic problem connected with adverse functioning of Polish legislation in imposing on landlords restrictions without providing for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance.

In the judgment we can find several references to the rulings of the Polish Constitutional Court. In fact, Ms. Hutten-Czapska requested quite a specific way of application thereof. She pointed to the fact that several provisions of the Polish legal acts were annulled by the Polish Constitutional Court. That is why she suggested that the ECHR should declare that the Polish authorities acted in her case without the requisite legal bases[63]. The legality was the first element of a three-fold test that the ECHR declared to apply, the other two being the legitimate aim and the balance between the general interest and the personal right. The ECHR did not go so far, stating that the test of legality was fulfilled when the authorities had followed the provisions binding at a material time.

The ECHR referred to the judgments of the Constitutional Court when analyzing the other two tests. The first of them related to the legitimate

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61 Hutten-Czapska case, par. 109-110.

62 11 years necessary for the judgment is a very nice illustration of the practical side of the right to a smooth and fair trial. In fact the claim was brought to the then European Commission of Human Rights and there was a change of the chamber hearing the case.

63 Hutten-Czapska case, par. 152.

aim of the provisions in question. The ECHR agreed with the Polish government and the Polish Constitutional Court that the provisions in question were motivated by the inadequate number and high prices of flats. The social character of the provisions was beyond any doubt. What remained to be decided was whether the Polish authorities respected the balance between the general interest of the society and the private right of the claimant. As one can have no doubt, it was this test which could not be passed by the provisions in question. It was also in this field that references to the judgment of the Polish Constitutional Court were numerous despite the efforts of the Polish government.

The task of the latter was especially difficult. In order to defend the case and not to criticize the Constitutional Court the Government tried to persuade the ECHR that the judgment of the former was made with respect to a general category – of all persons covered by the law. The situation of an individual claimant could be different. The governmental agent pointed to the fact that the claimant had not proven that the rent received by her had been not sufficient for covering the costs of the house. What was emphasized also was the fact that the regulations were of temporary character and that they did not deprive the right to property of its essence.
None of those arguments was successful. The ECHR underlined that the Constitutional Court disposed of a practical knowledge of the provisions in question. It was on the part of the government to prove that the situation of the claimant was different. That is why the ECHR agreed with the Constitutional Court as regards the deprivation of the essence of the right to property. It was due not to the very regulation of the level of rents or even to the mandatory character of the relationship between the landlord and the tenant. It was rather the impossibility of covering the costs of the functioning of buildings covered by this system.

The Hutten-Czapska case was not the only and not even the first one in which we can find references of the ECHR to the Polish Constitutional Court. That list is quite long and comprises cases as Broniowski[64],

[64] Broniowski v. Poland, no. 31443/96. This extremely important case concerned the claims of people who repatriated to Poland form the former eastern Polish territories ceded to the USSR.

Wegera[65] and Orchowski[66]. It would not make sense to discuss all these cases. The exception will be made with respect to one judgment, namely in the Urban case.

VI.4. The Urban Case[67]

The Urban case related to the Polish provisions on judicial officers called assessors. The office of an assessor was usually the one directly preceding the nomination for a judge. Assessors had to fulfill almost all qualities as regular judges (Polish nationality, law studies, accomplished practical training), in fact the very fact of having been an assessor was a pre-condition for nomination as a judge. Assessors were nominated by the Minister of Justice. He/she could also dismiss assessors. The condition for such a dismissal was the consent of a board of judges of a given regional court. The Minister of Justice, with the consent of that college, could authorize assessors to hold the functions of judges for a determined period not exceeding 4 years[68]. In fact a large proportion of cases in Polish courts was decided by assessors.

It was an assessor who decided the cases of Mr. Henryk Urban and Mr. Ryszard Urban. They were accused of misdemeanors consisting of denial of disclosing their identity to police officers and one of them also with the use of offensive language. They were sentenced to a fine of 100 PLN. In fact, one of the accused had demanded the withdrawal of an assessor who subsequently decided the case, but not because of her being just an assessor but because he claimed that she was biased against him. Such a demand was made with respect to all the judges and all assessors of the court competent in the case. The claim that the judgment was given by an assessor (that is not an independent judge) was made only at the time of appeal. The appellants could and did refer to the recent judgment of the Polish Constitutional Court.

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65 Wegera v. Poland, no 141/07. This case concerned the rights of prisoners to visits.

66 Orchowski v. Poland, no 17885/04. This case concerned the overcrowding of detention facilities.

67 Henryk Urban and Ryszard Urban v. Poland, nr 23614/08, judgment of 30 November 2010.

68 Art. 134-136 of the Act of 2001 on the system of ordinary judiciary, described in Urban case, par. 17.

VI.5. The judgment of the Constitutional Court

On 24 October 2007 the Constitutional Court gave a ruling on the basis of two constitutional claims concerning the judicial powers being exercised by assessors. The Court ruled that the provision to this effect was contrary to art. 45 (1) of the Polish Constitution. The reason was the fact that assessors did not enjoy the necessary guarantees of independence from the executive. The Constitutional Court underlined that the requirement of independence must be fulfilled by all the judges; the very possibility of making an appeal to a higher court (with only regular judges sitting in it) is not sufficient to satisfy the requirement of independent judiciary.

The Constitutional Court did not attach any importance to the formal provision according to which assessors were independent and are subject only to the Constitution and the statutes. It ruled that the very possibility of being dismissed by the Minister made the above-mentioned provision a mere declaration, devoid of any value. The Constitutional Court excluded that independence in two respects. Firstly, the act of nomination did not guarantee the independence, as no minimum term of office of assessors was provided for. There was no such minimum period of the entrustment of judicial tasks to assessors. Secondly, the very possibility for the Minister to dismiss an assessor was the main reason for the lack of independence of that office. The requirement of consent of the board of judges of a regional court was not regarded to be of importance, since that board is not a court itself, it is rather an organ of the administration of a court. The Constitutional Court also referred to art. 6 of the European Convention of Human Rights. That is why the provision according to which judicial tasks could have been entrusted to assessors was to lapse after 18 months from the date of the judgment of the Constitutional Court. On the other hand the Court secured stability of judgments given so far by assessors.

VI.6. The impact of the judgment on the Strasbourg proceedings

One could not imagine that the judgment of the Polish Constitutional Court would remain without any impact on the proceedings brought by Henryk Urban and Ryszard Urban in Strasbourg. The only point of discussion could be the extent of this influence. To begin with, the

claimants argued that they were deprived of a just trial because of the lack of independence of the court deciding their case. They did not make any remarks concerning in concreto the person who gave the ruling. Of course they cited the judgment of the Constitutional Court.

The main line of reasoning of the Polish Government was aimed at persuading the ECHR that the judgment of the Constitutional Court was not decisive for the judgment of the Strasbourg Court. The Government pleaded that the level of protection of the Polish Constitution was higher than the one of the European Convention. The position of the Constitutional Court and the ECHR differ. The latter has to deal with several systems, the former – with only one. The Government drew the attention to the fact that the Constitutional Court had no competence to deal with the application of provisions in individual cases. On the other hand, the ECHR is competent to deal with the violation of human rights in a concrete case. The Government pointed to many aspects of de facto assimilation of assessors to regular judges[69]. It stressed the fact that no assessor was dismissed by the Minister. It pointed also to the possible legal chaos which would result from questioning hundreds of thousands of judgments made by assessors.

The ECHR was not convinced by the above-presented arguments. The judgment of the Constitutional Court was the main, although not the only, point of reference, when deciding whether Polish assessors fulfilled the criterion of independence. The ECHR cited the relevant passages of the judgment of the Constitutional Court. It gave importance to the fact that the Constitutional Court referred to art. 6 of the European Convention. Although there had been no statement on the lack of conformity of the Polish statute with art. 6 of the European Convention, the ECHR did not treat this as the most important element. Especially since the constitutional standard was similar to the one of art. 6 of the European Convention[70].

The most important statement from our perspective was a passage (to be found also in paragraph 51 of the judgment), according to which the

[69] The present author could confirm such an assimilation at least from the perspective of the public. It is doubtful, however, if that perspective was really the one of a given assessor himself.

[70] See specially par. 51 of the Urban judgment.

ECHR would be ready to draw a conclusion opposite to the one of the Constitutional Court only if it were sure of the defects of the judgment of the latter. The ECHR mentioned in this respect: misinterpretation or misapplication of the Convention or the case-law of the ECHR or a complete unreasonable conclusion. It was not the situation in the present case. That is why the ECHR ruled that the person deciding the case of R. and H. Urban was not independent. So the breach of art. 6 of the European Convention was established.

The ECHR also examined whether the possibility of making an appeal to a court in which only judges sat was sufficient to eliminate the defect. The ECHR also in this respect referred to the judgment of the Constitutional Court which had given a negative answer to that question. The ECHR noticed that an appeal referring to the lack of independence of the assessor deciding the case in the first instance was dismissed. In fact, every appeal referring to that element would have been dismissed. That is why the possibility of making an appeal to an independent court in a full meaning of the term was not sufficient to cure the breach of art. 6.

Two elements deserve our attention. The first one was a kind of warning made by the government during the pleadings. It suggested that treatment by the ECHR of every statement of the Constitutional Court regarding a breach of constitutional standards as decisive for the determination of a breach of the European Convention, would bring about a chilling effect. It means – the Constitutional Court would be less rigorous with respect to the constitutional standards, if it were afraid of possible adverse effects of such judgments for Poland on the international level. As evidenced by the judgment, the ECHR was not persuaded by this argument. It would be rather an oversimplification, however, to say that the above-mentioned warning had completely no effect. The ECHR took care to deprive the claimants of all practical elements of their victory. They were denied any compensation and even the costs of the case were not imposed on Poland. It was a signal that the Strasbourg court does not welcome hundreds of thousands of probable cases from all "clients" of assessors from Poland. The ECHR is in no case a "slave" of possible judgments of constitutional courts. The best illustration thereof was the case of Mr. Wizerkaniuk.

VI.7. The Wizerkaniuk case[71]

The applicant, Mr. Jerzy Wizerkaniuk, was a chief editor of a local newspaper[72]. In 2003 two journalists of this newspaper interviewed a local Member of Parliament (M.P.) about his public and business activities. The interview lasted about two hours and was recorded. As a verbatim text of the interview was as long as 40 pages, an abbreviated text of about 3 pages was made and presented for so-called authorization. The latter institution was the main point of reference in the case and deserves our attention here.

The authorization (autoryzacja in Polish) is an institution of the Polish 1984 Press Act. Its art. 14 (2) read as follows: "It is obligatory for a journalist to submit the text of a statement cited verbatim, if it has not been published previously, for authorization by the person providing the information."[73] Although the English translation would suggest (quite rightly) that it is a kind of permit or consent; in fact the source of the term in Polish refers rather to the person of the author of a given statement. Suffice to say that an author can denounce his/her right to demand authorization. If no, however, the above-mentioned requirement is really a kind of permit to print an interview. What is more important, a criminal sanction was provided for possible breaches of the cited provision. According to art. 49 of the Press Act a fine or a penalty of limitation of liberty was provided for.

In the case at hand when the M.P. was presented the three-page text he declined to give such an authorization, arguing that the text did not respond to the entire conversation. The newspaper published the interview, however, not in the three-page version but in a form of fragments of verbatim records. The M.P. informed the public prosecutor about the case and the prosecutor brought the case to the criminal court, which found the applicant guilty of an offence consisting of printing the text without the authoriżation of the interviewed M.P. Mr. Wizerkaniuk was not formally sentenced but his proceedings were conditionally discontinued. He was

[71] Wizerkaniuk v. Poland, nr. 18990/05, judgment of 5 July 2011.
[72] Description of the case on the basis of: Wizerkaniuk case, par. 6-17.
[73] Translation and presentation of the Press Act after: Wizerkaniuk case, par. 20.

also obliged to pay a certain amount of money to a charity and ordered to bear the costs of the proceedings. This judgment was upheld subsequently by the regional court.

VI.8. The judgment of the Polish Constitutional Court

The applicant brought a constitutional complaint to the Constitutional Court. He argued that the above-mentioned provisions of the Press Act were contrary to the constitutional provisions on freedom of expression (art.54) and the principle of proportionality (art. 31 of the Constitution). The judgment was given on 29 September 2008[74]. The Constitutional Court ruled that no inconsistency existed in this respect.

A few elements of the reasoning are of importance for us. Firstly, the Constitutional Court stressed the fact that the requirement applied only to statements quoted verbatim. "It does not restrict or limit journalists' right to inform the public on the content of such a statement by summarizing it"[75]. It was an argument that the requirement – evidently limiting the freedom of expression – was not of such a nature as to deprive it of its very essence. Secondly – the dilemma whether the requirement of authorization was constitutional – was somehow assimilated to a conflict between the right of dignity and the right to freedom of expression. It was emphasized that the former did not allow for exceptions, while the latter did. The Constitutional Court pointed out the dangers connected with possible alterations of the words of interviewed persons. It was ready to see in the requirement of authorization a guarantee not only of personal rights of people cited but also of the public – which could be sure that "statements purportedly made in the context of interviews are really authentic"[76]. Suffice to remind in this context that one of the judges – prof. Rzeplinski – presented a completely differing view in his separate opinion. It was rather that separate opinion then the judgment itself that could have inspired the ECHR, assuming that it really needs any inspiration.

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74 Description of the judgment in Wizerkaniuk case, par. 20-24.
75 Wizerkaniuk case, par. 22.
76 Wizerkaniuk case, par. 22.

VI.9. The judgment of the ECHR

The ECHR found a breach by Poland of art. 10 of the European Convention. Some elements of its reasoning are of special importance for us.

The ECHR underlined the importance of freedom of expression. It admitted that it was subject to exceptions but they "must, however, be construed strictly, and the need for any restrictions must be established convincingly"[77]. The ECHR applied the same test as that referred to in the Hutten-Czapska case. The first test – legality was passed, as both the requirement of authorization and penalties for its breach were provided for by law. As regards the second question, whether the interference served a legitimate interest, the ECHR was somehow ambiguous. Although it answered it in a positive way, it was rather a formal admittance, bearing in mind a decisive importance of the answer to the third test.

The third question was to ascertain, whether the interference was necessary in a democratic society. The answer was presented in 25 paragraphs (par. 64-88 of the judgment), the last of them stating unequivocally that "there has therefore been a violation of Article 10 of the Convention". The ECHR admitted (quite in a general way) that the obligation to verify the accuracy of texts based on statements quoted verbatim was justified. It will remain a mystery whether the very requirement of authorization was acceptable as such. The ECHR could not oversee, however, that the applicant was sentenced not because of the inaccuracy of the statements quoted but because of the very lack of authorization. It was a kind of an automatic criminal sanction for a mere formal omission. It was just the criminal nature of the sanction that gave rise to serious doubts and caution by the ECHR. It pointed to the fact that the M.P. was a public person and "his views and comments were indisputably a matter of general interest"[78]. A politician "inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public in large and he must consequently display a greater degree of tolerance."[79] The ECHR underlined the fact that there had never been any charge of any distortion of the words of the

[77] Wizerkaniuk case, par. 58.
[78] Wizerkaniuk case, par. 72.
[79] Wizerkaniuk case, par. 73.

cited politician by the applicant. The source of his problems was a formal breach of the formal requirement of authorization. In fact, it acted as a carte blanche for interviewed persons, including public persons. It gave them a possibility to block the publication – by denying the authorization or even by delaying it for an undetermined time.

What is of special importance for us are the references to the Constitutional Court. The ECHR did not want evidently to criticize its judgment as such. However, some elements of it were criticized very strongly. For example, the ECHR called a statement of the Constitutional Court paradoxical, according to which journalists "could summarize or otherwise convey the content of statements made in the context of interviews" instead of asking for authorization. The ECHR observed that it was paradoxical that "the more faithfully journalists rendered the statements of interviewed persons, the more they were exposed to the risk of criminal proceedings being brought against them for failure to seek authorization"[80]. What was a kind of demonstration on the part of the ECHR were references to other actors of the domestic proceedings – the Ombudsman (who brought the case to the Constitutional Court) and the judge Rzeplinski.

VII. Conclusion

The picture of the domestic judiciary acting against human rights is fortunately remote from reality. It does not change the fact that the role of the ECHR is of utmost importance. Its position is to some extent beyond doubt, it acts as a rule as the court of the last resort. Secondly however, the ECHR is a very specialized court. The domestic ones have much more aims and interests, human rights being just one of them. It is important but not the only one. What is of special importance is a growing role of the Strasbourg case-law in the Polish legal argumentation. As it was shown above – the impact is not only in one direction. Bold, courageous judgments of the Polish Constitutional Court have a chance to act as a source of inspiration for the ECHR, which however always has its own opinion and nobody can count on dictating the verdict for it.

[80] Both citations from par. 86 of the judgment.

SUMMARY

The Polish Experiences with the Multi-Level Guarantees of Fundamental Human Rights

PRZEMYSŁAW SAGANEK

The article of professor Saganek presents the role of the Polish courts in the protection of human rights. What is underlined is an open attitude of the Polish Constitution towards international law and human rights, treaties in particular. In fact they are applied directly and are given priority over acts of Parliament. However, there are still many obstacles to their full effectiveness before ordinary courts. Those obstacles can be found in the minds of judges and the general nature of many rules on human rights. That is why it is the Constitutional Court that plays a crucial role in this field. What is more, we can see an interplay between the Polish Constitutional Court and the European Court of Human Rights (ECHR). The text analyses three judgments of the ECHR – delivered in the cases of Hutten-Czapska, Urban and Wizerkaniuk. What can be seen is a kind of automatism on the part of the Strasbourg Court to qualify the rules objected to by the Polish Constitutional Court as breaches of human rights. As it is evidenced by the Wizerkaniuk case, the ECHR has always the last decision as regards the rules not objected to by the Constitutional Court.

RESÜMEE

Polnische Erfahrungen über die sich auf mehreren Ebenen realisierenden grundlegenden Menschenrechte

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Die Studie von Professor Saganek analysiert die Rolle der polnischen Gerichte beim Schutz der Menschenrechte. Der Beitrag betont, dass die polnische Verfassung gegenüber dem internationalen Recht und insbesondere gegenüber internationalen Übereinkommen, die sich mit den Menschenrechten beschäftigen, offen ist. Es kann festgestellt werden, dass diese Abkommen auf direkt geltend gemacht werden und sie Vorrang vor den Gesetzen haben. Trotzdem gibt es zahlreiche Hindernisse, welche diese Effizienz hemmen. Diese Hindernisse sind teilweise in der Auffassung und Attitüde der Richter zu finden, teils darin, dass sie in ihrer Arbeit überfordert sind, und teilweise im allgemeinen Charakter zahlreicher Rechtsvorschriften in Bezug auf die Menschenrechte. Gerade deshalb kommt dem Verfassungsgericht eine Schlüsselrolle in diesem Bereich zu. Es kann sogar eine Wechselwirkung zwischen der Tätigkeit des polnischen Verfassungsgerichts und des Europäischen Gerichtshofs für Menschenrechte (EGMR) beobachtet werden. Die Studie analysiert drei Urteile des Europäischen Gerichtshofs für Menschenrechte. Diese sind die folgenden: der Fall Hutten-Czapska, der Fall Urban und der Fall Wizerkaniuk. Es kann ein gewisser Automatismus beobachtet werden, dass das Gericht mit Sitz in Straßburg die Verletzung der Menschenrechte im Falle von Rechtsvorschriften feststellt, in denen auch das polnische Verfassungsgericht etwas auszusetzen hatte. Der Fall Wizerkaniuk ist zugleich ein Beweis dafür, dass im Falle derjenigen Rechtsvorschriften, deren Adäquatheit vom polnischen Verfassungsgericht nicht in Zweifel gezogen wurde, immer der Europäische Gerichtshof für Menschenrechte das letzte Wort hat.