Comment on Katharina Pabel – The Right to an Effective Remedy in a Polycentric Legal System

By Adam Bodnar[*]

A. Introduction

The right to an effective remedy should not be interpreted and analysed individually, but rather in a broader context of the general right to a fair trial. The notion of an effective remedy is closely connected with the right to a fair trial and one should agree that Art. II-107 of the "Treaty establishing a Constitution for Europe" (CT) "*constitutes a more rounded-off version of Article 6 ECHR.*" Consequently, this comment focuses on Art. II-107(1) CT in a more general context.

B. The Theory of a Polycentric Legal System

It should be noted that recently the new theory was proposed in Poland to consider the place of EU law in the Polish legal system; the theory bears primarily on the relations between the systems, their impact on the protection of fundamental rights as well as the role that judges should fulfil in this system.[1] According to Prof. Łętowska, Member States no longer enjoy monopoly over what laws are binding within their territories. Consequently, individuals do not have a single set of legal instruments and legal remedies to enforce their subjective rights; they are rather subject to and benefit from a legal system which has many centers (the national center, the EU center, and ECHR center). An individual has a set of rights granted under every of these centers and enjoys correlate remedies to enforce them. However, the existence of different sets of rights and remedies does not mean that the individual is better protected, because remedies have different value for an

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[1] Ewa Łętowska, *Multicentryczność współczesnego systemu prawnego i jej konsekwencje (Multicentrism of the contemporary legal system and its consequences)*, 4 PAŃSTWO I PRAWO 3-10 (2005).

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individual and different scope of operation. Furthermore, the operation of the whole system is not fully clear and transparent to any individual concerned.

C. Effective Remedy in a Polycentric Legal System

The right to an effective remedy granted at the EU level is a natural consequence of this legal multi-centrism. An individual must have a remedy to enforce its subjective Union rights. However, although guarantees of subjective rights and remedies are on the same hierarchical level, the responsibility for their enforcement is on both the EU level and the national level. The question is whether an individual is in fact sufficiently equipped with effective remedies to claim its subjective rights and whether there are some gaps in the system of legal protection. The polycentric legal system will only work properly when at the end it will lead to the ultimate one and single solution of a particular litigation. However, on the EU level it seems that it might not necessarily be the case. In this context the existing lacunas in the legal protection should be mentioned. In particular, the scope of the action for annulment is of special concern.

I cannot agree with the comparison of the EU legal system to the federal systems as regards protection of fundamental rights.[2] In my opinion, the system of fundamental rights' protection in Europe cannot be compared to that of a federation because of its system of judicial remedies and the scope of application of fundamental rights. The primary judicial guarantor of the subjective rights on the EU level are national courts (and not courts on the EU level). The ECJ and CFI act only as a form of constitutional court to determine the compliance of laws with EU primary law. However, they are not hierarchically higher than the national courts. Furthermore, the fundamental rights guaranteed on the federal level do not have general application on both levels of government, but are applicable only when EU authorities act or insofar as the Member State is implementing EU law. Surely, the Charter of Fundamental Rights will have an impact on the national legal systems, but nevertheless the EU has its *Sonderweg* with respect to fundamental rights and does not resemble other federations.[3]

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[2] *See* Pabel, in this volume.

[3] Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945, 946 (2002).

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D. Is The Right to an Effective Remedy Really "Effective?"

I think that in Poland the most important problem with ensuring the right to an effective remedy will be the attitude of Polish courts towards application of the Community law. In fact, national courts (and not ECJ) will be the primary guarantor of the right to an effective remedy as their obligation will be to apply Community law, and in case of doubts as to its interpretation, to refer preliminary questions to ECJ. However, one may note the following problems in ensuring real effectiveness of Art. II-107(1) CT by Polish courts:

- Scarcity of competencies in interpreting and applying EU law as being part of the polycentric legal system;[4]
- Lack of ability to use and to apply the principles of the EU law and methods of interpretation specific to this system of law;[5]
- Lack of the legal means regulating the specific use of the preliminary reference procedure under Polish law[6] as well as enabling parties to compel Polish courts to refer the case to the ECJ;
- Technical problems with accessibility to the EU law.[7]

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[4]*See* the judgment of the District Court in Lubartów, Poland, Case IC 260/03, (2004) (Where the court applied the EU customs classification to analyze the issues related to the liability for damages. This was an example of the courage of Polish courts in using the Community law, but unfortunately, this use was grossly flawed). *See also* Ewa Łętowska, *Między Scyllą a Charybdą czyli polski sędzia między Strasburgiem I Luksemburgiem (Between Scylla and Charybda – the Polish judge between Strasbourg and Luxembourg)*, paper presented at the Council of Europe Information Office Conference, Nov. 2005.

[5]*See* the judgment of the Supreme Court on the "golden share," Case IV CK 713/03, (2004). On this decision for Sept. 30, 2004, the court referred to jurisprudence of the ECJ in this area, but could not apply and interpret the principles stemming from this judgment.

[6]*See* Maciej Szpunar, *Wpływ członkostwa Polski w Unii Europejskiej na sądownictwo – zagadnienia wybrane* (*The Impact of the Poland's membership in the EU on the judiciary – selected issues*], *in* PRZYSTĄPIENIE POLSKI DO UNII EUROPEJSKIEJ. TRAKTAT AKCESYJNY I JEGO SKUTKI (*Accession of Poland to the EU. The Accession Treaty and its Consequences*) 277-302 (Biernat et al. eds., 2003). *See also* Aleksandra Wentkowska, *Sądownictwo polskie w przeddzień przystąpienia do Unii Europejskiej – uwagi de lege ferenda* (*The Polish judiciary before Poland's accession to the EU*), *in* PRZYSTAPIENIE POLSKI DO UNII EUROPEJSKIEJ. TRAKTAT AKCESYJNY I JEGO SKUTKI, 277-302 (Biernat et al. eds., 2003).

[7] *See* Agnieszka Frąckowiak, *Wpływ członkostwa Polski w Unii Europejskiej na sądownictwo polskie – spojrzenie ze strony praktycznej* (Impact of Poland's membership in the EU on the Polish judiciary – a practical view), *in* PRZYSTAPIENIE, *supra*, note 6.

The Polish example indicates that the Art. II-107(1) CT may not be sufficiently guaranteed due to lack of abilities, technical and structural problems. In such a case we may have a real example of the asymmetry of legal systems concerned: on the one hand Polish courts not being highly effective in application of Community law and – on the other hand – German or French courts, competent and professional in applying Community law. Of course, individuals may seek relief in such a situation by claiming from the state liability for damages, even if such damages were caused by courts (as the *Köbler* case indicates[8]). But such a possibility is not equivalent to the right to an effective remedy under CT. It only alleviates the problem in certain exceptional cases or circumstances – and underlines the need for changes – but does not resolve the problem alone.

E. Potential of the Right to an Effective Remedy in Reforming of the Polish Judicial System

Despite the above criticism, there is some potential for rights enshrined in Art. II-107 CT in reforming the Polish judicial system. It should be noted that there is some dissatisfaction in Poland with the Strasbourg system of human rights' protection, in particular with guarantees of Article 6 ECHR. Following the *Kudła* judgment,[9] Poland has adopted the so-called Polish Pinto Act,[10] introducing into the Polish law the complaint on the prolongation of proceedings. However, the jurisprudence of the Supreme Court under this new law indicates that there is some reluctance in providing individuals with effective remedy against the prolongation of proceedings and the new law may dissatisfy Polish individuals and will not lead towards the rapid enhancements in the judicial system in Poland. Furthermore, although first steps were taken to change this,[11] Poland still has an ineffective system of legal aid.[12] One may hope that the right to an effective remedy as guaranteed under Art. II-107 CT will help in further reforms of the Polish judicial system in these two areas.

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[8] Case C-224/01, Köbler v. Austria, 2003 E.C.R. I-10239.

[9] Kudła v. Poland, App. No. 30210/96, 2000-XII Eur. Ct. H.R. 512 (2000).

[10] Act of June 17, 2004 on the complaint of a party to proceedings on their right to determine a case in court proceedings within reasonable time (Journal of Laws of 2004, No. 179, item 1843).

[11] The Polish government has prepared a draft law of March 7, 2005 on the access to free legal aid granted by the state to individuals. It is interesting to note that the grounds for this law refer to the Polish obligations stemming from Art. 6 ECHR and Art. 47 para. 1 of the Charter of Fundamental Rights.

[12] *See* ŁUKASZ BOJARSKI, ACCESS TO LEGAL AID IN POLAND – MONITORING REPORT, HELSINKI FOUND. HUM. RTS. (2003).

Polish courts are in fact "Community" courts, when they use or apply the Community law. Therefore, it is obvious that the standards of the Polish courts' functioning should correspond to the requirements stemming from Art. II-107 CT. Accordingly, the EU may require Poland to introduce similar standards of protection as exist in other EU countries, in order to secure the effective implementation and application of EU law in the Member State. Therefore, the EU may be stronger in compelling Poland to reform its judicial system than currently the ECHR is. One example would be by publication of the reports of independent experts. One may also imagine a complaint of an individual claiming that he cannot enforce his EU law subjective rights because proceedings in his case were prolonged or s/he was not provided legal aid (in breach of Art. II-107 CT).