

Keeping Safe Distance: Chapters from Randomised (Non)Application of the EU Charter of Fundamental Rights before Polish Constitutional Tribunal

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Abstract: *The question of the application and impact of the Charter of Fundamental Rights of the EU ('Charter') in quotidian practice of human rights protection and review is a strategic one. Given the predominantly decentralised effects of EU law and with the due account to the wide interpretation of the scope of the Charter's application (Art. 51(1)) presented by the CJEU (C-617/10 Fransson), the national dimension of the application of the Charter forms the crucial issue for the functioning of the EU system of fundamental rights protection. The Charter itself has a big potential to influence the content, nature and mechanisms of the fundamental rights protection at the national level. The present paper focuses on this phenomena in connection to the case-law, opinions and workload of the Polish Constitutional Tribunal ('TK'). It analyses the approach of TK towards the Charter in abstract manner as well as the (non)appearance of the Charter in the reasoning of the court in concrete cases. The article reports on the main cases and analyses the reasons of the aloof approach of the TK towards the EU human rights catalogue.*

Keywords: *case-law, constitutional review, EU Charter of Fundamental Rights, European Union, human rights, Poland, Polish Constitutional Tribunal*

1. Introduction: reflection of the Charter as a matter of fact

The motivation of any research related to the application of EU law at the national level is very simple. Let us imagine a legal system associated with the European integration and reality of its functioning as a certain game—such as football¹—which has certain set rules. EU law and the Court of Justice of the EU (hereinafter referred to as ‘CJEU’) as its chief interpreter provide the basic framework of that game. Matches, however, take place on stadiums and playgrounds within the Member States. This universe is a real place, where EU law is realised and enforced (Bobek, 2017). The effects of EU law are, in fact, widely decentralised. The Member States, or more precisely, their courts and public authorities must use and reflect the EU law in a very broad variety of situations. This covers the direct application of EU rules; the application and interpretation of national rules that serves as transposition of EU legal sources; enforcement of EU law based remedies; furthermore, it regulates the application of national rules which could lead to derogation of EU-based entitlements (mostly within the internal market); and, finally, the application/interpretation of national rules that relate to specific areas of Union’s competence (settled by concrete EU law provisions) in those (on a first view, domestic) situations which are in close relation—the exact proximity with the EU rules (Spaventa, 2016). In all of these situations, having in mind the postulate of a uniform practice and uniform level of application of the Union rules, the Member States must necessarily be subject to the uniform criteria of material constitutionality that are at the present time definitely represented by the Charter of Fundamental Rights of the EU (hereinafter referred to as the Charter). This is the core argument and reason why the Charter should penetrate into the national systems of human rights review. Obligation of the Member States to reflect the supranational material constitutionality has been shaped by the CJEU since the 1980s.² It was a clear reaction on the decentralisation impact mentioned above and served as a tool to promote the unified application of EU law based on the requirement of

¹ Similarly, French Foreign Minister Laurent Fabius responded to the last UK’s efforts for a special status in EU with the words: “Imagine Europe as a football team in which you participate, once you’re in you cannot say let’s play Rugby.” (The Guardian, 2013).

² *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [2013]; *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and others* [1996]; *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991]; *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* [1997].

having an equal single standard within the whole Union (Weiler, 1999). Charter, in its Article 51(1),³ simply confirms this development and necessity behind it.

Having two variables in a mind—(1) the decentralised applicability of the Charter, and (2) human rights review as the traditional domain of constitutional justice—we logically come to the problem of examining the impact of the Charter on the activities and decisions of national constitutional courts. Of course, we are aware of ongoing (and open) academic discussions on the role of constitutional courts in relation to the application and enforcement of EU law, and the Charter, in particular (Komárek, 2005; 2014; 2017; Dani, 2017; Deutscher & Mair, 2017). These discussions are essentially a continuation of the debate on constitutional pluralism within the EU and are based on the defence/rejection of the thesis of the autonomous coexistence of national and supranational constitutional arrangements. Differently to that, our analysis is based on the practical requirements of EU law. Our claim is connected to the necessity of effective system of remedies related to the fundamental rights protected by the Charter. There are several arguments for this claim, all of them capturing the question of the pertinence of the Charter in proceedings before the national constitutional courts as a pure matter of fact, systemic part of EU law system, rather than a theoretical “open” question.

In general, the European Union law establishes an overall obligation to apply/reflect the EU rules before all national courts in all of their procedural activities and does not distinguish between situations whether the application authority is part of the system of general judiciary or whether it is a special constitutional court (Bobek, 2008). This notion was recently (albeit indirectly) approved by the CJEU in “hard” constitutional cases such as *Stefano Melloni v. Ministerio Fiscal* [2013] and *Criminal proceedings against Ivo Taricco and Others* [2015]. Additionally, we must give due respect to the principles regulating national procedural autonomy, namely the principle of effectiveness and equal treatment. According to these principles, entitlements under EU law must be protected to the same extent and with the same quality as similar entitlements under national law (Stehlík, 2012). In addition, the Member States must adhere to the principle of effective judicial protection under Article 19(1) of the TEU and principle of sincere cooperation (Art. 4(3) of the TEU). As approved by the CJEU in its recent *ASJP* judgement, the Member States are “obliged [...] to provide remedies

³ “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law [...] and] to establish a system of legal remedies and procedures ensuring effective judicial review in those fields” (see *Associação Sindical dos Juizes Portugueses* [2018], para. 34). This duty is understood as an integral part of the rule-of-law protection within the EU and reflects the common values on which the EU is founded.

Despite this factual milieu, we are still standing at the initial phase of reflections of the Charter at the level of national constitutional review. The national authorities are in a position of “learning” the Charter, therefore also case-law and practice are still covered by the cautious approach. The present state was rightly labelled as the use of the Charter “in limbo” (Jeney, 2016). The Charter is sometimes neglected, sometimes used merely as a declaratory document (in a way of a *colorandi causa* note) or as the soft interpretation guideline (Burgorgue-Larsen, 2017; see also FRA EU, 2018). But besides that, we could also find also some examples of the first “snowdrops” growing in the form of application of the Charter as the direct standard of constitutional review at national level.⁴ Moreover, the presence of the Charter in EU’s constitutional edifice has been raising the awareness of individual applicants, who are seeking the protection of their fundamental rights covered by the Charter and thus creating the pressure on its deeper reflection by constitutional courts (Mazák *et al.*, 2016). With all these developments in mind, we could assume the multiplication of the Charter’s presence in constitutional jurisprudence in years to come.

2. Preliminary note: does the EU law in general serve as a standard for constitutional review before *Trybunał Konstytucyjny*?

The crucial issue which has been considered by the *Trybunał Konstytucyjny* (hereinafter referred to as TK) and which significantly affects the perspectives for the Charter’s application is the admissibility of indicating EU law (more precisely, provisions of EU Treaties) as a review standard in proceedings before the TK.

The main thesis in this regard has been formulated in the TK decision P 37/05 of 19 December 2006. The case was initiated by a court’s legal question. It concerned the compliance of the provisions of the Polish Excise Tax Act with

⁴ E.g., the Austrian Constitutional Court, in its decisions U 466/11-18 and U 1836/11-13 of 2012 or the Constitutional Court of Croatia in decision U-III-1095/2014 *Paolo Biasiol from Rijeka v. Leopold Kesten from Rijeka and Getro Plc* [2017].

the European Community Treaty (Art. 90). The TK decided to discontinue proceedings due to the inadmissibility of the ruling. The justification for such a resolution was based on two main arguments.

- First of all, the TK pointed out that the case, in fact, was about the interpretation of the Treaty provision. For this reason, the decision on the merits of the case could lead to entering the field of CJEU cognition.
- Secondly, the TK emphasised that the considered issue belonged to the sphere of legal application, not law-making. Therefore, it should be independently settled by the court that addressed the legal question. If the court decides that the statutory provision is incompatible with the EU law, it should abstain from its application and apply the EU norm instead. In the statement of reasons, the TK held that:

in principle, the preference should be given to removing conflicts between national and international standards at the level of applying the law. Leaving aside from purely doctrinal considerations, the mechanism of removing conflicts of standards at the level of applying the law is more operative and flexible than the control of legality exercised by the Constitutional Tribunal and, on the construction side, justified by the fact that, as a rule, the norm of international law will have a narrower scope than the national statutory standard—whether in a temporal, objective or subjective aspect. The application of the international standard in accordance with the principle of precedence does not abolish, not break or invalidate the norm of national law, but only limits its scope. Changing the content or losing the binding force of an international standard will change the scope of the national statutory standard without the need for activity on the part of the national legislator.⁵

On the one hand, the decision proves that the TK acknowledges the ‘community mandate’ of national courts and even accepts the partial decentralisation (deconcentration) of the constitutional review, in the broad sense (Bobek, 2012). On the other hand, the decision might be regarded as an illustration of constitutional courts’ strategy sometimes described as ‘splendid isolation’ (Bobek, 2012). The TK has formulated the thesis on two separate fields of cognition of the TK and the ECJ. The separation means that the TK tries to abstain from considering the EU law as the yardstick of review, at least in the specific review proceedings.

⁵ Para. III.3 of the Decision P 37/05.

The main thesis of the decision P 37/05 has not been changed yet, nevertheless, a gradual departure from the strategy of isolation is noticeable. The first preliminary reference made by the TK only confirms the phenomenon of increasing constitutional courts' self-awareness of their role as European courts. In effect, constitutional courts abandon the strategy of 'splendid isolation' and incorporate the EU law into yardsticks for constitutional review (Paris, 2017). The growing group of constitutional courts which decided to refer preliminary questions to the CJEU proves that it is a general trend in European constitutional adjudication (Kustra, 2015).

The case 61/13, which served as the basis for the (up to now the first and only) reference for a preliminary ruling was heard by the TK upon the Ombudsman's application for the declaration of several provisions of the Act of 11 March 2004 on the goods and services tax (hereinafter the VAT Act). The TK in the decision of 7 July 2015 decided to ask two questions on the validity of EU law. The CJEU in the judgment of 7 March 2017 (case C-390/15 *Rzecznik Praw Obywatelskich (RPO)*) did not share the TK's (and Ombudsman's) reservations. Nevertheless, meanwhile the arguments raised by the Ombudsman have already been recognised by the European Commission.⁶ After the CJEU judgment the Ombudsman decided to withdraw the application. Consequently, the TK in the Decision 38/A/2017 of 17 May 2017 discontinued the proceedings. Despite the fact that the case was not adjudicated *ad meritum*, it proves the TK's awareness of its role as the European court and willingness to start the direct dialogue with the CJEU and to apply EU law as a standard of review.

3. The Charter of Fundamental Rights in the case-law of the TK

The Charter of Fundamental Rights appears in the jurisprudence of the TK in three basic contexts. The first one concerns the analysis of the legal status of the Charter (and its significance in the Polish legal system). The second one, to some extent dependent on the first, is the issue of the admissibility of recalling the Charter as a standard of control in proceedings before the TK and, more broadly, its role in the process of applying the law in Poland. The third one fits in the more general phenomenon of using comparative reasoning by courts. With regard to the use

⁶ On 7 April 2016, the European Commission presented the Action Plan on Value Added Tax 'Towards a Single EU VAT Area. Time for Action' (Document COM(2016) 148 final), the aim of which is to resume discussion on the VAT regulation, and on 1 December 2016 announced a draft amendment providing for the equalisation of VAT rates for books and magazines in electronic and paper form.

of the Charter in the constitutional argumentation presented by the TK, the issue requires both analysis of taking the Charter and the CJEU case-law into account while interpreting the constitutional standards of fundamental rights protection and the merely ornamental evoking of the Charter in the process of judicial reasoning.

The issue of the legal status of the Charter has, somehow paradoxically, appeared and been so far comprehensively analysed in the case-law of the TK pertaining to the date of its entry into force and, in a much more extended form, also after the entry into force of the Charter. On the other hand, the question of the admissibility of appointing the Charter as a standard of control before the TK and the cases of evoking the Charter as the comparative argument in constitutional reasoning, concerns (at least to some degree) both case-law prior and after the entry into force of the Charter.

3.1 Dealing with the legal status of the Charter in the case-law of the TK

The analysis of the TK case law concerning the legal status of the Charter in Polish legal system should be preceded with at least a short introduction regarding the Protocol (no. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (Document 12008E/PRO/30). The initiative of designing such a document has been the result of political controversies in both Member States regarding the scope of the application of the Charter (Schönlau, 2005). The Protocol has been sometimes presented in the public opinion as an ‘opt-out’ clause (Belling, 2012) for Poland and Great Britain (who was the primary initiator of the idea). In fact, due to the wording of its provisions, it is a document of interpretative, clarifying or even declaratory character and has political rather than legal effects (Arnall, 2014; Barnard, 2008). Such interpretation of the Protocol has been also accepted by the CJEU in the Judgment of 21 December 2011 in the case C-411/10 *N.S.*⁷ The TK has not referred to the provisions of Protocol 30 in any of its previous rulings and has remained silent about its significance for the legal position of the Charter in Poland (Jaśkowski, 2013; Jóźwicki, 2019).⁸ Nevertheless, the political controversies prior to the ratification of the Treaty of Lisbon (and indirectly the Charter) by Poland, the unclear wording of the provisions of the Protocol itself and the academic discussion that arose around

⁷ CJEU in the Judgment of *N.S. (C-411/10) v. Secretary of State for the Home Department and M. E. and others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011].

⁸ As Jaśkowski notes, the TK has only cited the Preamble of the Protocol 30.

its legal effects might be one of the factors that increase the reserved attitude of the TK towards the Charter.

Even the TK has not dealt with the interpretation of the Protocol 30, it has considered the legal status of the Charter in a wider sense. We may recall the two cases (all of them decided prior to the entry into force of the Charter), in which the TK engaged into debate on the legal nature of the Charter in general and its position within the constitutional adjudication: the Judgment of 11 May 2005 on the Constitutionality of the Accession Treaty, the Decision SK 98/06 of 9 May 2007 regarding the constitutionality of the Customs Service Act.

In the judgment on the Accession Treaty, one of the objections formulated by the applicants concerned non-compliance with the Constitution (from Art. 21 of the Constitution guaranteeing the right to property) of Article 17 of the Charter of Fundamental Rights. The TK has refrained from examining this question, pointing to the fact that the Charter represents the document with no binding force. As an act that has not yet come into force, it can not constitute an admissible subject of control in proceedings before the TK.⁹

In the Decision of 9 May 2007, Article 47 of the Charter (the right to an effective remedy) was indicated as one of the standards for review (a subsidiary one vis-a vis Art. 13 of the ECHR and constitutional right to a court granted in Art. 45 of the Constitution). According to the applicant, the remedies provided for in the Act on the Customs Service were characterised by ineffectiveness, and the control of dismissal of an officer on the basis of the challenged provision is in fact of an apparent nature. The TK recalled its previous case-law regarding admissibility of the constitutional complaint in the Polish legal system and pointed out that it did not provide for a challenge due to the inconsistency of a normative act with an international agreement. It followed the obvious conclusion that the standard of control in proceedings initiated by a constitutional complaint could not be ECHR nor the Charter.¹⁰ Nevertheless, the TK went a step further in considerations regarding legal status of the Charter and emphasised that:

the Charter of Fundamental Rights of the European Union does not constitute a ratified international agreement. For this reason, adjudicating on the compliance of statutory norms with it is unacceptable. Therefore, it is not within the competence of the Constitutional Tribunal to examine the conformity of the challenged

⁹ Point 18.8 of the Judgment of 11 May 2004.

¹⁰ Point 6 of the Decision.

*provision with art. 47 of the Charter of Fundamental Rights of the European Union.*¹¹

Another important preliminary comment refers not to the Polish law, but the Charter itself. According to Article 51(1) in judgement in the case of *Åklagaren v. Hans Åkerberg Fransson* [2013], the ECJ confirmed its previous case-law acknowledging the broad scope of the application of the Charter within the national legal system and held that: “in principle that fundamental rights protected in the Union legal order are applicable in all situations subject to Union law, but not outside such situations.”¹² It has pointed out also that: “the application of EU law means [...] the simultaneous application of fundamental rights protected under the Charter.”¹³ The interpretation of the Article 51(1) presented in the *Fransson* case leads to the conclusion that the considered provision imposes on the authorities of the Member States—including constitutional courts—the obligation to apply the Charter standards of protection whenever they use EU law in a broad sense, which will not necessarily mean only applying national law directly transposing EU standards (Thym, 2013). This CJEU decision had built a pathway for the deep penetration of the Charter into the national practice of human rights adjudication (Hamulák & Mazák, 2017; Fontanelli, 2014a) and opens a discussion about the federal temptation in relation to the Charter (Fontanelli, 2014b). It is worth mentioning here that until now the TK (as opposed to the German Federal Constitutional Court¹⁴) has not raised any objection to such broad interpretation of Article 51(1) of the Charter. This leads us to the conclusion that the TK is obliged to take into account the Charter (and its jurisprudential interpretation) at least as a comparative argument every time when it deals with a case related to EU law (within its scope). Secondly, it opens the question whether the TK is limited by Article 51(1) of the Charter, or whether the special role of this court within the national legal system means that it can disregard the scope of application of the Charter as interpreted by the CJEU case-law and apply the Charter freely (in a broad sense) in any case, even in a situation without any direct link to the EU law. These questions do not

¹¹ Point 6 of the Decision with indication of a previous decision in preliminary review of admissibility of the Charter as constitutional complaints with the same thesis, see the Decision (Tw 26/05) of 27 September 2005.

¹² Para. 19 of the Judgment.

¹³ Para. 21 of the Judgment.

¹⁴ In Counterterrorism Database case, 1BvR 1215/07, where FCC stated that “The decision [Fransson] must thus not be understood and applied in such a way that absolutely any connection of a provision’s subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union’s fundamental rights set forth in the [Charter].” For comments see *Common Market Law Review*, 2013.

have clear and easy answers. Nevertheless, every constitutional court should be at least aware of them and try to develop consistent case-law in this regard. It is significant that the issue of the legal status of the Charter within the Polish system of sources of law has not been further elaborated in the cases decided after its entry into force. It seems that the TK considers the question to be resolved. The general attitude towards the Charter is rather formalistic in the sense that the TK confined itself to a succinct statement that the Charter is not an international agreement. A laconic statement based on the very conservative approach towards the international treaties could be accepted before the date when Charter became legally binding. Contrary to that, following the entry into force of the Lisbon Treaty in 2009, the Charter has acquired the same legal status as the Treaties. Therefore, the situation is evidently different. Although the Charter itself has not been directly adopted as an international treaty, it cannot be denied such a status at least from a material point of view (Kühn, 2008). This assumption is based on several arguments. Firstly, the Charter has been negotiated and signed as an international treaty (more precisely, as part of an international treaty) in connection with the creation of the Treaty establishing a Constitution for Europe, and in the same form it was symbolically re-proclaimed on 12 December 2007. Secondly, the negotiation of the Lisbon Treaty implied also the negotiation of the Charter, as evidenced by the adoption of Protocol 30 and a number of declarations annexed to the Lisbon Treaty, which deals with the Charter.¹⁵ Thirdly, the wording and the formulation of the reference in Article 6(1) of the TEU implies the abovementioned shifts towards material understanding of the status of the Charter. The formula used in 13 language versions of contemporary Article 6(1) of the TEU introduces the legally binding force of the Charter by using the phrase “same legal value as the Treaties”¹⁶ The same legal value means not only placing the Charter at a certain level within the pyramid of the sources of EU law (i.e., primary law), but also the same legal status with all its consequences, that is, the understanding of the Charter as a (materially) binding international agreement.

¹⁵ Declaration (no. 1) concerning the Charter of Fundamental Rights of the European Union; Declaration (no. 53) by the Czech Republic on the Charter of Fundamental Rights of the European Union; Declaration (no. 61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union; Declaration (no. 62) by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom.

¹⁶ ES – *valor jurídico*, DA – *juridiske værdi*, DE – *sind rechtlich gleichrangig*, EL – *κῶρος* (‘validity’ but also ‘prestige’), EN – *legal value*, FR – *valeur juridique*, IT – *valore giuridico*, MT – *valur legali*, NL – *juridische waarde*, PT – *valor jurídico*, RO – *valoare juridică*, FI – *oikeudellinen arvo*, SV – *rättsliga värde*.

With these moves in mind, we could conclude here that the TK has ended its considerations at the point where the most important questions regarding the role of the Charter in the constitutional adjudication should be put. Perhaps the TK's omissions are, at least to some extent, caused by the CJEU's minimalistic attitude towards elaborating the legal status of the Charter with regard to national courts. The CJEU focuses on Articles 51 and 53 of the Charter regarding the scope of its application and avoids more general statements regarding the exceptional status of the Charter within the primary EU law.

3.2 The Charter as a yardstick of review—a zero chance game?

The potential of the Charter as the standard of control in constitutional adjudication is substantially determined by the TK's attitude towards it as part of the EU legal system. The aforementioned jurisprudential emphasis put on the lack of the status of the international agreement significantly limits the perspectives of applying the Charter as the yardstick of review. Nevertheless, even the very conservative statement of the TK in this regard does not totally preclude from such a way of applying the Charter within constitutional adjudication.

The analysis of the issue requires a few preliminary comments. First of all, the term “standard of review” may refer both to cases where the Charter is evoked as the direct (and exclusive standard) or, definitely more often, cases of evoking the Charter as the subsidiary (indirect or interpretative) standard of review. The latter type of applying standard is, due to the TK's position in regard to the legal status of the Charter within the Polish constitutional system, definitely prevalent in constitutional review motions.

Secondly, the application of the Charter as a standard of review is significantly determined by the content of motions submitted to the TK, who operates within the principle of accusatorial procedure. It means that both the subject of review (reviewed provisions) and the standard of review are binding to the TK. Notwithstanding that, there is some space for flexibility in this regard, due to the principle of *falsa demonstratio non nocet*, which has been established in the case-law. The principle is based on the assumption that the TK cannot draw negative consequences from the fact of incorrect indication of the object or standard of review in the so-called *petitum* of the motion/complaint/legal question, if it only clearly follows from the justification what (correct) object or standard of review the initiator of the constitutional review indicates. In case of a constitutional complaint, this means that in practice, *falsa demonstratio non nocet* principle allows the TK to “translate” the “external” standards (ECHR,

Charter) into their constitutional counterparts.¹⁷ Nevertheless, in case of the Charter as the subsidiary standard of review it has constricted character.

Another factor which affects the potential scope of the Charter's application by the TK is connected to question of types of constitutional review proceedings. As mentioned afore, the Charter is excluded from admissible direct yardsticks of review in constitutional complaint procedure. With regard to other types of proceedings, the deciding element will be the final statement of the TK (Póltorak, 2017). Until now there is lack of such analyses in its decisions. The TK is rather aloof towards acknowledging the special status of the Charter as a legal source and reduces itself to the simple statement that the Charter is not an international agreement.

Previous TK case-law indicates that the Charter has been so far evoked mostly (and probably will further remain) as subsidiary standard of review (see case K 32/14). Such a role, however, often blends with treating the Charter (merely) as a comparative argument.¹⁸ Sometimes, the only difference is the fact, that the initiator of the constitutional review proceedings indicated the Charter as a subsidiary standard of review, whereas in the case of using the Charter as a comparative argument, it is an autonomous TK decision. It is worth noting that the latter type of applying the Charter is not detrimental to the principle of accusatorial procedure. The Charter is used as an argument in judicial reasoning, without being the formal standard of review. Yet, as mentioned above, the indication of the Charter as a subsidiary yardstick of review may lead to the same results: the interpretation of the constitutional standard in conformity with the EU one or simply use of the Charter as a plain ornamentation in judicial reasoning.

The analysis of the present TK case-law leads to the conclusion that so far the TK has not applied the Charter either as an independent, basic standard of review or a subsidiary one. There were several cases in which the initiators of constitutional review evoked the Charter as a standard. Nevertheless, they

¹⁷ In the Judgment of 22 September 2015, case SK 21/15, taking into account the established case-law (judgments of 8 July 2002 case SK 41/01; March 6 2007 case SK 54/06; February 24 2009 case SK 34/07), the TK has defined *falsa demonstratio* principle as follows: "Inaccurate assignment of the provisions of the Constitution to allegations does not constitute in itself grounds for discontinuation of proceedings, if in a specific factual and legal state the justification of a constitutional complaint indisputably allows to systematise accusations and reconstruct constitutional problems. In constitutional case law, the admissibility of applying the principle of *falsa demonstratio non nocet* to both the norms constituting the subject and the standard of review in the proceedings initiated by the constitutional complaint is admissible."

¹⁸ See the section below.

have been either dismissed due to not meeting the formal requirements or there have been decided *ad meritum*, yet with regard to the Charter, the proceedings were discontinued. These cases will be presented in the later part of this paper. They prove good will on the part of initiators of constitutional review (mostly courts and Ombudsman) to evoke the Charter as a standard within constitutional adjudication. Yet, it is definitely unlikely that the Charter will in a short time get such a position in constitutional adjudication in Poland as the ECHR has gained. This thesis results from several observations.

1. As mentioned above, the Charter is not understood as an international treaty (in a strict sense). This formalistic approach¹⁹ essentially disqualifies the Charter as a directly applicable instrument of constitutional review in general, and it distinguishes its status in comparison to ECHR.²⁰ Without a shift to material understanding of the status of the Charter (as *de facto* international agreement), it is hard to imagine that the Charter could serve as a yardstick within the constitutional review.
2. The second reason is connected to the relative scope of application of Charter in relation to the Member States as provided by Article 51(1) of the Charter. This deeply discussed provision limits the applicability of the Charter “only” to the situations in which Member States “are implementing Union law”. Despite criticism of this formula (Nagy, 2017; Fontanelli, 2014b), proposals to change the approach to its understanding (Chronowski, 2018; Jakab, 2017), and despite the somewhat broad interpretation by the CJEU (Hancox, 2013; Lenaerts, 2014), the Charter (as opposed to the Convention) is not universally applicable towards Member States and thus basically presupposes situations where it will not be able to serve as a human rights review tool.
3. The third (potential) reason of TK’s aloofness towards the Charter as the review standard may be connected with the more general phenomena referred to as the restraint of constitutional courts towards the application of EU law in their decision-making. (Hamulák & Sulyok & Kiss, 2019)

Such a reserved attitude towards EU law in general and the Charter in particular follows from the fear of having to initiate a preliminary ruling procedure in order to give the CJEU the opportunity to comment on the interpretation of such a control pattern. As the CJEU has the monopoly on interpreting the EU

¹⁹ The formalistic approach of the courts is the more general phenomena which float to the surface especially in connection with discursive questions (like the extent of application of the Charter). On judicial formalism, see further Cserne, 2015.

²⁰ On the status on ECHR (and international treaties in general) in Polish legal order, see further Łazowski & Wentkowska, 2010.

law, constitutional courts while applying EU law as a standard of review might lose (at least partially) autonomy in constitutional adjudication. Nevertheless, as regards the latter mentioned factor, the recent constitutional development within the EU proves that constitutional courts gradually abandon the strategy of isolation towards EU law. The growing group of constitutional courts who have decided to refer the preliminary questions to the CJEU is the best illustration of this phenomenon.²¹ The TK referred (for the first and until now the only time) in 2015. Therefore it seems that this reason of aloofness towards the Charter has been losing importance recently. On the other hand, the ongoing constitutional crisis in Poland which led to a hostile takeover of the TK by the ruling party (PiS) and the emerging practice of using the TK to legalise unconstitutional laws enacted by the parliamentary majority does not leave much illusions about the hypothetical increase of the Charter's significance as the yardstick of review.

3.3 Randomised acceptance of the Charter as a subsidiary argument in constitutional reasoning

As it is indisputable that the Charter forms an integral part of EU law, it is clear that national courts are (within the boundaries of Art. 51(1)) obliged to take its content into account whenever they are interpreting national law. The Charter clearly produces the so-called indirect effect, which serves as a major form of impact of EU law on constitutional adjudication (Hamulák & Kerikmäe, 2016). Here the Charter could be invoked as an interpretative yardstick or the comparative argument in a broad sense. The latter variable represents the way in which TK reflects the Charter the most. It thus confirms its “positive” relationship to the indirect effect of EU law standards, which plays an important role in its approach to EU law in general (see further Biernat & Kawczyńska, 2019). It is worth emphasising that the term ‘comparative argument’ is used in this paper with full awareness of the pluralistic nature of the constitutional order in the EU. EU law, including the Charter, has a significant impact on national constitutions. Nevertheless, the constitutional courts of the majority of Member States, including the Polish TK, quite strongly emphasise the systemic separation of EU and national constitutional law (see reports in Albi & Bardutzky, 2019).

The mentioned indirect impact of the Charter could be considered in three variables or three levels of intensity. A very common form of reflection of the

²¹ As the prominent examples we could mention the preliminary questions submitted by German FCC (*Peter Gauweiler and Others v. Deutscher Bundestag* [2015]), for comments see Hamulák & Kopal & Kerikmäe, 2016; Spanish TC (*Stefano Melloni v. Ministerio Fiscal* [2013]), for comments see De Boer, 2013; or Italian CC (*Criminal proceedings against M.A.S. and M.B.* [2017]), for comments see Piccirilli, 2017.

Charter is the reference on its content in some ornamental way. Here the Charter serves as a pure comparative argument, often only in ornamental sense with no real impact on the decision or reasoning of the TK. Secondly, the Charter may be used as an additional or supportive argument (Póltorak, 2015) to conclude that a national source of law or action by public authorities does or does not comply with the Polish constitutional standards—here we could speak about a certain quasi-indirect effect, because the Charter itself (the reference on its text) does not affect the final nature of the TK decision, but it has certain significance for the reasoning. Thirdly, there may be cases where the Charter could be used as an interpretative guide in the interpretation of Polish constitutional standards, i.e., as an interpretative guideline which has a clear influence on the outcome of the proceedings. The Charter here could serve as the “binding constitutional argument” (Bobek & Kühn, 2010). Here we speak about the pure indirect effect of the Charter when its existence and later reflection by the TK determine the result of the case.

Before the entrance into force of the Charter, the TK invoked it in such a way in the Judgment of 2 July 2007 on constitutionality of Polish law on money laundering implementing the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (hereinafter Directive 2005/60/EC). The constitutional issues in that case focused on statutory provisions, which were of an executive character and did not refer to the directive objectives, but to the manner of its implementation. Therefore the issue of indirect review of the directive itself via the implementing act was only hypothetical (Kustra-Rogatka, 2018). Despite the fact, while arguing for constitutionality of statutory limitations of the secret of communication with representatives of public trust professions providing legal assistance, the TK decided to emphasise that:

the content of Directive 2005/60 / EC, which currently regulates the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and defines its obligations, including in particular recital 48, stating that: “This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Nothing in this Directive should be interpreted or implemented in a manner that is inconsistent with the European Convention on Human Rights”.²²

²² Para. III, 11.4. of the Judgment.

Another example of a typically ornamental recall of the Charter is the Judgment of July 5 2011 in the case P 14/11. The resolved case concerned the provision of the law on compensatory proceedings in entities of special importance for the Polish shipbuilding industry, which differentiated the situation of women and men entitled to obtain the benefits guaranteed in the Act in terms of compliance with the principle of equality. While interpreting the constitutional standard, the TK noted that:

*the directional requirement of ensuring equality between men and women in all areas, including employment, work and remuneration, is also due to Art. 21 and Art. 23 of the Charter of Fundamental Rights of the European Union. It expresses a general European standard in combating discrimination and unjustified unequal treatment.*²³

In this way, the TK emphasised that when interpreting constitutional standards of fundamental rights, it also takes into account the standard of protection guaranteed by the Charter. Nevertheless, there is no in-depth analysis of the content of Articles 21 and 23 of the Charter indicating that in this case it was only ornamental.

The most extensive argumentation so far referring to the Charter contains the Judgment of 16 November 2011 in the case SK 45/09 which concerned the compliance of several provisions of the Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with the Polish Constitution (more precisely, the principle of equality and right to the fair trial). In the highly controversial judgment, the TK decided to review the constitutionality of the challenged provisions, despite the fact that they were part of the EU secondary law. Being fully aware of the problematic character of the decision, especially with regard to the scope of the CJEU competences, the TK pointed out that the protection of fundamental rights is of high rank in EU law and the EU law does not arise in a European space, abstract and free from the influence of Member States and their communities which reduce the risk of different standards of protection of fundamental rights (Kustra, 2017).

With regard to Charter as currently the most important EU legal instrument in the sphere of fundamental rights protection the TK emphasised that:

the comprehensive catalog of rights, freedoms and principles set out in the Charter [...] is largely derived from the European Convention

²³ Para. III 4.3. of the Judgment.

for the Protection of Human Rights and Fundamental Freedoms; the Republic of Poland is also a party to this Convention. Pursuant to Art. 52(3) and 52(4) of the Charter [...], to the extent that the Charter contains rights that correspond to the rights guaranteed in the Convention, their meaning and scope are the same as the rights conferred by this Convention. This is not an obstacle to EU law granting wider protection. To the extent that the Charter recognises fundamental rights resulting from the common constitutional traditions of the Member States, these rights are interpreted in accordance with these traditions. However, pursuant to Art. 53 of the Charter, none of the provisions of the Charter shall be construed as restricting or violating human rights and fundamental freedoms recognised in their respective areas of application by Union law and international law and international conventions to which the Union or all Member States are parties, in particular by the Convention and by the constitutions of the Member States.

Thus, the Charter of Fundamental Rights, the Convention as well as the constitutional traditions of the Member States set a high level of protection of fundamental rights (human rights) in the European Union.²⁴

The emphasis put on the substantial axiological convergence of Polish and EU law has been used by the TK to soften the general thesis on TK competence to review the constitutionality of the EU regulation. The TK pointed out that the mentioned axiological convergence does not mean, however, the identity of legal solutions in both legal orders. It would be difficult to assume that EU law will contain norms fully coinciding with the norms of Polish law, which results from the differences in the way of creating EU law, with the participation of all Member States, as well as the different character of both compared legal orders.²⁵

Another example of reference to the Charter as an auxiliary and supportive argument is the Judgment of 25 June 2013 in the case P 11/12. The resolved case concerned the provision of the Social Pension Act, to the extent to which it made the granting and implementation of the right to a pension from the beneficiary's stay on the territory of Poland. The TK decided that it violated the Constitution. The case was initiated by the court in concrete review proceedings. The referring court, however, indicated only constitutional provisions as standards of review.

²⁴ Para. 2.10. of the Judgment.

²⁵ See para. 2.10. of the Judgment.

Therefore, the TK did not even have the option of applying the Charter as a subsidiary standard of review (Jóźwicki, 2019). Nevertheless, in the reason, the TK held that there is

no doubt that the statutory condition of staying on the territory of the Republic of Poland, as a condition of acquiring the right to a social pension and its payment, affects both the constitutionally protected rights of the applicant, such as the right to social security and guaranteed by EU law, fundamental rights, including the right Applicant, as a citizen of the European Union, to move and reside freely within the territory of the Member States of the Union (Article 21(1) of the Treaty on the Functioning of the European Union, Article 45(1) of the Charter of Fundamental Rights of the European Union).²⁶

The last example of reference to the Charter used as an auxiliary argument contains the Judgment of 25 February 2014 in the case SK 65/12. The case, initiated in the constitutional complaint procedure, concerned the constitutionality of the provision of the Polish Penal Code, which penalises hate speech. The complainant argued that the challenged provision, by using imprecise terms, infringes the principle of *nullum crimen, nulla poena sine lege poenale anteriori* and poses a threat to freedom of speech and scientific research. While analysing the first of the indicated constitutional standards, the TK noted that the principle of *nullum crimen* is rooted not only in the Constitution, but also in the binding acts of international law, including the Charter. It is worth adding that the TK, recalled the Charter, among other international regulations, as an additional argument confirming the thesis on the constitutionality of the challenged penal code. Nevertheless, the TK did not indicate significant differences between the scope of the application of the Charter and other recalled international documents, i.e., the ECHR, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights.

Cases in which the Charter is used as an auxiliary argument often do not have any element linking them with EU law. This means that at least in this respect, the TK “detaches” the Charter from its scope of application determined by Article 51(1). While in cases of applying Charter as a (subsidiary) standard of review, this practice may raise some doubts, the application of the Charter as an auxiliary argument does not raise such questions.

The TK aims to show that it recognises the presence of the Charter in the European system of human rights protection. Nevertheless, the present case-law

²⁶ Para. III 3.1 of the Judgment; see also Jóźwicki, 2019.

of TK in this respect shows the far-reaching randomness of recalling the Charter as an auxiliary argument. In comparison with the ECHR, the Charter is rarely invoked as a comparative and supporting argument. It seems to be another proof of the court's aloofness towards the Charter.

3.4 Missed opportunities: cases of non-application of the Charter

The analysis of the place of the Charter in constitutional adjudication in Poland requires also drawing attention to the issue of missed opportunities, i.e., cases in which TK could or should have taken into account the Charter and had not done it (Górski, 2013). This practice is not only a Polish speciality. We could observe several similar examples even in cases of other central European constitutional courts.²⁷

Two such cases will be indicated in this paper. Both relate to the constitutional review of Polish law implementing EU law (in the broad sense). In those cases, the TK should have turned its attention to the Charter as part of the auxiliary argumentation. The presentation of these cases should be preceded by one important remark. The TK belongs to the still growing (for various reasons) group of constitutional courts, which are considered to be competent to carry out a full review of the constitutionality of laws implementing EU law. In contrast to *i.a.* the French Constitutional Council, the TK does not recognise the so-called partial constitutional immunity of laws implementing EU law. In other words, the TK accepts that it is also possible to review those provisions of implementing acts that are not purely enforceable and repeat the content expressed in the directive (Kustra-Rogatka, 2018). However, the full constitutional review of national law implementing the EU law may in practice lead to an indirect control of the constitutionality of the directive itself (via the provisions of the implementing act), which stands in clear opposition to the CJEU position on the principle of primacy and autonomy of EU law.

If the allegations against the implementing law refer to its compliance with fundamental rights, the attention of the constitutional court should always be revised on the application of the Charter.

One missed opportunity in this regards presents the Judgment of 13 October 2010 in case Kp 1/09 regarding the concerns the constitutionality of the statutory authorisation to issue an executive regulation, the content of which was to be blank (Maśliński, 2015). The authorisation included in the Act of 5

²⁷ See further Svobodová, 2018 (for Czech Republic); Mazák & Jánošíková *et al.*, 2016 (for Slovakia); and Sulyok & Kiss, 2019 (for Hungary).

December 2008 on the organisation of the fish market was to regulate issues related to fishing, sales and landing of fish, which require increased protection. This provision aimed to implement requirements on these issues, which were set out in the EU regulation (Council Regulation 2371/2002; see on this topic Jóźwicki, 2019).

The TK ruled that the challenged statutory provision violated the constitutional prohibition of blanket statutory authorisations for issuing the executive regulation (Jóźwicki, 2019). Nevertheless, the TK noticed the wider EU context of the case and emphasised that

*competence in running the common fisheries policy belongs exclusively to the bodies of the European Union. The legal regulations of the European Union relating to the fish market are included primarily in regulations, which pursuant to Art. 249 para. 1 of the Treaty establishing the European Community are directly and directly applicable. In exceptional cases and only under specific EU legislation with appropriate authorisations, Member States may introduce relevant regulations in this area. In some cases, Member States are required to introduce specific national institutional or competence frameworks enabling the implementation of EU legal regulation.*²⁸

It is worth adding that the challenged statutory provision aimed to implement such authorisation contained in the EU regulation. However, the TK accepted that it was not competent to examine the compliance of the Polish law with the EU secondary law.²⁹ The thesis about the missed opportunity to refer to the Charter is connected with the fact that, apart from other constitutional standards, the President as the applicant (the case was initiated in *ex-ante* review proceedings) also indicated Article 22 of the Constitution which guarantees economic freedom. Although the President did not refer to the Charter itself in the motion, the TK had (a missed) opportunity to consider the influence of the Charter on the constitutionally guaranteed standard of freedom of economic activity (Jóźwicki, 2019).

The Judgment of 30 July 2014 in case K 23/11 on constitutionality of statutory provisions implementing the Data Retention Directive (Podkowik, 2015) is another example of missed opportunity to invoke the Charter in the judicial reasoning. The numerous provisions challenged by several applicants (the

²⁸ Para. III 2.1 of the Judgment.

²⁹ Para. III 5 of the Judgment.

cases were considered jointly) did not implement the Directive directly.³⁰ However, TK emphasised that they were functionally related to the Directive.³¹ Although none of the applicants indicated the Charter as a benchmark (as opposed to Art. 8 of the ECHR), the judgment was delivered after the CJEU judgment of 8 April 2014 in the case of *Digital Rights Ireland* C-293/12 in which the Directive was annulled. This fact was noted: the CJEU judgment was a “decision-making background” for the TK.³² Nevertheless, TK did not refer to the Charter itself at all. Furthermore, it seems that the aim of the TK was to fully separate the national constitutional review from the result of “EU law review” provided by the CJEU, as the TK held that if the challenged provisions did not directly implement the Directive, than the CJEU judgment did not directly bind the TK in the process of constitutional review of national provisions.³³

4. The Charter within the wider constitutional adjudication: beyond the TK’s judgments

While analysing the place of the Charter in constitutional adjudication in Poland, one should also take a wider perspective by going beyond the TK decisions and paying attention also to the behaviour of the participants of the proceedings in this respect, mostly initiators of the constitutional review. As mentioned above, whether the applicant will indicate the Charter as a standard of review has a significant impact on invoking the Charter in the TK decisions. The principle of accusatorial procedure within the constitutional review proceedings in Poland, due to its quite a restrictive formula, strongly limits the TK in the hypothetical possibilities of recognising the Charter as a standard of review (in contrast to much more freedom in the sphere of invoking the Charter as a supporting argument).

Despite the fact, the TK case-law proves that applicants, although rarely, decide to indicate the Charter as a review standard. In all cases, except one (K 47/15), they have invoked the Charter together with the ECHR and no analysis whether the challenged provision falls within the scope of application of EU law within the meaning of Article 51(1) of the Charter has been

³⁰ Cf. para. 3.2.3. of the Judgment.

³¹ See para. I 3.2.3 of the Judgment.

³² See para. pkt I 3.2.3 of the Judgment.

³³ See para. pkt I 3.2.3 of the Judgment.

provided.³⁴ Therefore, applicants seem to disconnect the Charter from its functional context of the Act protecting fundamental rights in the EU (with one exception, Ombudsman, which will be further elaborated). The motions for constitutional review (in a broad sense) containing the Charter as the invoked standard come from differentiated types of subjects: courts,³⁵ deputies,³⁶ complainants,³⁷ Ombudsman.³⁸ The range of the invoked provisions of the Charter is also quite wide, e.g., Articles 47³⁹, 11⁴⁰, 10⁴¹, 7 and 8 in conjunction with Articles 52(1)⁴² and 17(1)⁴³.

Until now, the Ombudsman has been the most active initiator of constitutional review in this regard. This fact should be, at least partially, connected with the intra-institutional support within the Ombudsman office, as there is a special department whose work is devoted to constitutional review proceedings and international law. It should be emphasised that Ombudsman, as the only subject deciding to indicate the Charter as a subsidiary standard of review, in each case fulfilled the condition according to which the challenged provisions of national law should remain within the scope of the application of EU law. Although, as mentioned above, the applications did not analyse the content of Article 51(1) and did not present the argumentation defending the thesis that the condition set by Article 51(1) is fulfilled, *de facto*, in each of the cases, it was.

Courts, in turn, seem to be far from effectively converting the Charter as a

³⁴ TK Decision of 4 November 2015, case P 102/15; TK Decision of 21 March 2017, case K 23/16; TK Decision of 3 November 2015, case K 32/14; TK Decision of 9 May 2007, case SK 98/06; TK Decision of 3 April 2007, SK 85/06; TK Decision of 6 June 2018, case K 35/16; TK Decision of 17 October 2018, case P 7/17 (together with Protocol 1 to the ECHR); TK Decision of 13 December 2016, case K 13/16.

³⁵ TK Decision of 4 November 2015, case P 102/15; TK Decision of 17 October 2018, case P 7/17;

³⁶ TK Decision of 21 March 2017, case K 23/16 (group of Senators); TK Decision of 13 December 2016, case K 13/16 (group of Members of Parliament—first Chamber Sejm).

³⁷ TK Decision of 9 May 2007, case SK 98/06; TK Decision of 3 April 2007, SK 85/06.

³⁸ TK Decision of 3 November 2015, case K 32/14; TK Decision of 6 June 2018, case K 35/16; TK Judgment of 9 March 2016, case K 47/15 (case joint with three other cases initiated by other constitutional subjects).

³⁹ TK Decision of 4 November 2015, case P 102/15; TK Decision of 9 May 2007, case SK 98/06; TK Decision of 3 April 2007, SK 85/06; TK Judgment of 9 March 2016, case K 47/15.

⁴⁰ TK Decision of 21 March 2017, case K 23/16; TK Decision of 13 December 2016, case K 13/16.

⁴¹ TK Decision of 3 November 2015, case K 32/14.

⁴² TK Decision of 6 June 2018, case K 35/16.

⁴³ TK Decision of 17 October 2018, case P 7/17.

subsidiary control pattern or supporting argument. The 10 years of experience of application of the Charter by Polish courts proves that so far they still have problems with correct application of the Charter within their proceedings (see in detail Kowalik-Bańczyk & Wróblewski, 2015; Wróblewski, 2015; Koncewicz & Podolska, 2014; Jóźwicki, 2019). Therefore, even if we acknowledge the position according to which constitutional courts are not bound by the scope of the Charter's application set in Article 51(1) (which would mean that they may apply the Charter as a review standard or use it as a supportive argument independently of the EU law context of the case), the courts are generally less prepared to be a competent interlocutor within the constitutional discourse over the role of the Charter within the Polish legal system.

In this part of the article, two cases initiated by the Ombudsman in which the Charter has been (unsuccessfully) invoked as an subsidiary standard of review, will be subjected to a deeper analysis. They will give a better basis for formulating more general conclusions regarding the role of the Charter in constitutional adjudication in Poland. The chosen cases regarded ritual slaughter⁴⁴ and the very controversial and grossly unconstitutional amendment of the statute law on the TK (K 47/15).

In the case K 32/14, the Ombudsman challenged statutory provisions governing ritual slaughter and invoked Article 10 of the Charter as the subsidiary standard of review (together with various constitutional provisions regarding the religious freedom and the equivalent ECHR standard—Art. 9). The TK decided to discontinue the proceedings in the face of the earlier judgment of 10 December 2014, case K 52/13, regarding the same constitutional problem. In the aforementioned judgment, the TK ruled on the compliance of the controversial regulation with the Constitution what has been criticised by eminent constitutionalists (Sadurski, 2019a; 2019b). Nevertheless, the Ombudsman argued that the TK did not recognise the accusation of unconstitutionality of the ban on the ritual slaughter in its entirety in the previous judgment, because it omitted the issue of the dedication of meat derived from such slaughter, which can only be the needs of local religious communities.⁴⁵ In the case 52/13, the issue of compliance of the challenged provisions with the Charter did not appear at all, as the Charter was not indicated in that case as a standard of review.

With regard to the Charter, it is worth noting that despite the discontinuation of the proceedings, the TK referred to this aspect of the Ombudsman's motion and argued that he invoked a wrong provision (the Ombudsman indicated Art. 10(1)

⁴⁴ K 32/14, Decision of 3 November 2015.

⁴⁵ See para. 9 part I of the Decision.

while in the TK's opinion he should have indicated Art. 10(2) as the standard of review and to justify violation against it). Putting aside the weakness of the TK's argumentation in this regard, the analysed decision may be interpreted as an open gate for reviewing the national law through the prism of compliance with the Charter (as a subsidiary standard of review).

The case K 47/15 regarded the constitutionality of the controversial Act of the 22 December amending the Act of 25 June 2015 on TK (hereinafter the Amendment Act of 22 December 2015). The Act was one of several inglorious legislative chapters of Poland's constitutional breakdown (Gliszczyńska-Grabias & Sadurski, 2016), starting with the capture of the TK. The Amendment Act of 22 December 2015, proceeded at a hectic pace in the Parliament, was aimed to block the TK, at least until the "courtspacking" plan would be completed (Kustra, 2016).

The Act has been challenged by several subjects. Besides the Ombudsman, motions for constitutional review have been filed by President of the Supreme Court, National Council of the judiciary of Poland and two groups of MPs. All applicants motioned for the whole Amendment Act to be pronounced as unconstitutional due to the violation of constitutional standards regarding legislative process. Moreover, they have challenged numerous statutory provisions due to their incompatibility with various material constitutional guarantees. Nevertheless, only the Ombudsman challenged the compliance of several provisions of the challenged Act not only with the constitutional standards, but also with international ones. Besides Article 45 of the Constitution which guarantees the right to fair trial, he indicated Article 47 of the Charter as equivalent of EU law. With regard to the new composition of the full court sitting and the obligation to handle the cases according to the date of receipt (without any exception), the Ombudsman noted that these newly introduced rules of adjudication, will i.a. lead to excessive length of court proceedings in cases in which courts were sent a legal question to the TK and, in consequence, the violation of the constitutional right to fair trial (more precisely the right to hear the case within a reasonable time by the court).⁴⁶ With regard to the EU law equivalent which was Article 47 of the Charter, the Ombudsman noted that this standard provides for in the event of violation of rights or freedoms guaranteed by EU law. The Ombudsman argued that the TK is subject to the standards resulting from Article 47 of the Charter as it examines the legal questions of courts related to EU law and has competence to review EU secondary law in constitutional complaint procedure.

⁴⁶ See paras. 30–31 of the Judgment.

The “prophetic” position of the Ombudsman was based on the assumption of a very broad interpretation of Article 51(1) of the Charter, in fact, wider than the one adopted by the CJEU in the Åkerberg Fransson case. Motivations hidden behind the indication of the Charter as a review standard will remain only in the sphere of conjectures. However, one of the possibilities could be the will to show the broader European dimension of the case. The indication of the Charter as the review standard can be considered as a tool given to the TK with the intention of transferring the case to the level of EU law (by preliminary reference), which TK has not done for various reasons. (One of which was definitely the huge dynamics of the political and legal situation in Poland, which prompted the TK to resolve the matter as soon as possible).

In the pivotal judgment of 9 March 2016, the TK decided that the whole Amendment Act of 22 December 2015 was non-compliant with various constitutional rules regarding parliamentary legislation procedure and struck down numerous provisions of the Act, among others the two aforementioned procedural rules challenged by the Ombudsman because of their incompliance with the right to fair trial. Nevertheless, with regard to the Charter as a review standard, the TK held that the Ombudsman did not raise any new arguments beyond those that he formulated in the motion with regard to the violation of Article 45 of the Constitution. Hence, the TK decided to discontinue the proceedings regarding the Article 47 of the Charter as the standard of review.⁴⁷ The Judgment of 9 March 2016 is therefore another example of some hesitation regarding the status of the Charter as a potential standard of review. As well as in the previously presented case K 32/14, the TK did not explicitly rule out the Charter from the scope of potential standards of review, but decided to discontinue the proceedings as far as the compliance with the Charter is concerned due to appearance of shortcomings in the Ombudsman’s arguments.

As far as the ongoing Poland’s democratic backsliding is concerned, the Charter and, more precisely, the principle of effective judicial protection granted in Article 47 becomes an increasingly important reference point for constitutional standards. The constitutional crisis turned out to be an element that has, for the first time, detached, at least in constitutional context, the application of the Charter from the ECHR and given it great importance for the national system of protection of individual rights. Not only the have the cases of *Minister of Justice and Equality v. LM* [2018]⁴⁸ (as the Irish case with strong Polish legal context)

⁴⁷ See para 5.2.2. of the Judgment.

⁴⁸ CJEU Judgment of 25 July 2018, case C-216/18 PPU.

and *Commission v. Poland* [2019]⁴⁹ been based, i.a. on Article 47, but also the still growing number of preliminary references of Polish courts, including those referred by the Supreme Court and the Chief Administrative Court. In all cases Article 47 of the Charter plays a significant role in establishing the European standard of an independent judiciary with an emphasis on the need for national legislatures to meet certain threshold conditions in the field of shaping the legal framework for the functioning of courts.

5. Final remarks

It is undisputable that the Charter represents a crucial document within the development of EU constitutional nature. Its adoption plays a momentous (and eternal) symbolic role for the so-called “out-put” democratic determination of the EU, or better said for whole integration process (Lenaerts & Cambien, 2009). The Charter stands as the key instrument of legitimation and democratisation of EU activities and governance, but to be able to meet these objectives and to influence the practice of human rights promotion and review, it must be understood and applied properly also (and maybe mostly) at national level. For this reason, it is indispensable to analyse the details of its application and to reflect and discuss the details of practice in relation to its application.

Additionally, yet importantly, the Charter brought a kind of new federal impetus⁵⁰ into the EU system and opened discussions about more ‘bounding’ tendencies within the integration project (Eeckhout, 2002; Knook, 2005; Hamulák, 2016; Spaventa, 2009). The supranational catalogue of fundamental rights reaches the spheres of the Member States as they are included in the list of “negative” addresses, thus standing as the entities obliged to respect the Charter. The Charter as the catalogue of the “centre” binds the several parts of the Union (states) and attributes one standard all over the entire community. A very important provision, which has to be mentioned in connection to these federal impacts, is Article 51(1) of the Charter. It defines the addresses of obligation to respect the rights included in the Charter. There are two categories of addresses, which have an obligation to respect the Charter—the European Union and (relatively) also its Member States. It is indisputable that the Charter enters the waters of national practice and as an undividable part of the sources of EU law it enjoys all the qualities and characteristics of EU law which must be respected even

⁴⁹ CJEU Judgment of 24 June 2019, case C-619/18.

⁵⁰ Not immune from the critics, see, e.g., Di Fabio, 2001.

by the constitutional courts. It is therefore not possible to ignore the Charter within the constitutional review. Here one may consider several forms of work with this document: The Charter either (a) supplements the national norms, i.e., it is used as a new source/yardstick of constitutional review laying outside the national constitutional system or (b) can move the traditional interpretation of national standards, i.e., it is used as a source of euro-consistent interpretation or (c) it confirms national constitutional standards, i.e., it is used as a “convincing” argument.

- The first option (a) counts with the active use of the Charter as a primary source of constitutional review of the national law or practice of the national public authorities. This is a “hard” impact of the Charter. Here the question is whether constitutional courts are willing to carry out a constitutional review by using the Charter (like, e.g., The Austrian Constitutional Court, in its decision U 466/11-18 and U 1836/11-13 of 2012), or they tend to maintain priority of their own national standards and thus protect and preserve the autonomy of their own national constitutional review.
- The second option (b) of work with the Charter is its use as a source of euro-consistent interpretation of national constitutional law. This effect (unlike the first variation) is not merely a manifestation of voluntary willingness to reflect the Charter as a source of certain fundamental rights. This is a consequence of the duty of loyalty, as is set out in EU law. In this form there is room for possible constitutional tension between the traditional national and European Union interpretations.
- The mildest effect (c) of the Charter in the constitutional review at the national level is the use of this catalogue as an additional argument for the constitutional court’s conclusions that would otherwise arise from the norms of the constitutional order. This “soft” impact of the Charter does not bring any changes in the level and scope of constitutional review, because the Charter serves only as a confirmation of what would be true even without its existence.

A picture of a far-reaching aloofness towards the Charter emerges from the analysed TK decisions regarding its application within the constitutional review proceedings. This conclusion becomes even more vivid if we compare the TK case-law regarding the Charter with the rest of the case-law relating to Poland’s membership in the EU and the application of EU law in the Polish legal order. The TK clearly avoids firm statements and regarding the legal status of the Charter in Poland and the possibilities of invoking it as an effective standard of review. As mentioned in the previous parts of this paper, those two elements are interrelated. The use of the Charter within the constitutional adjudication in

Poland has been *de facto* limited to ornamental and often random supportive arguments. At the same time, the TK detaches the Charter from its “natural environment” and its scope of application specified in Article 51(1). In this context the Charter has been treated as “one of many” international law documents. Nonetheless, there is no sense in comparing the application of the Charter with the ECHR as the latter has gained much more significance within the interpretation of constitutional standards of fundamental rights protection and is regarded as the first choice point of international law reference.

At least to some extent, the initiators of constitutional review themselves are also responsible for this state of affairs. First of all, Polish courts, generally do not cope well with the correct application of the Charter. Secondly, other initiators of constitutional review also perceive the Charter as a typical instrument of international law whose application in the national legal order is independent of the relationship of the case to EU law. An exception in this regard is the Ombudsman, and especially his motion in case K 47/15. Although in this case the TK discontinued the proceedings with regard to the Charter as the standard of review, the case K 47/15 is one of the elements showing a new trend in the application of the Charter in relation to the ongoing constitutional crisis in Poland. The recent preliminary references from Polish courts regarding the controversial reform of the Polish judicial system are a proof that they have finally trusted the Charter and Article 47 of the Charter starts being an important point of reference in the process of establishing the European standard of an independent judiciary and setting the threshold constitutions for national legislatures in this regard.

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