

*Krystyna Kowalik-Bańczyk and Mirosław Wróblewski**

Application of the Charter of Fundamental Rights by Polish Courts and the Jurisprudence of the Polish Constitutional Tribunal

Abstract: *This text presents the application of the Charter of Fundamental Rights by Polish courts since the entry into force of the Charter in December 2009. As the Charter is an element of the ‘external’ constitution for the Republic of Poland, similar to the European Convention on Human Rights, the practice of the Polish Constitutional Tribunal is of particular importance in this analysis. Hence the referral to the Charter by common and administrative courts is rather briefly described and the main focus of the text is on the broader analysis of the way of and reasons for using the Charter by the Constitutional Tribunal. While the Charter is not treated as a model for the hierarchical analysis of norms in cases of constitutional complaints, it can however be offered as such a model in cases of abstract control and legal questions filed by the courts. The use of the Charter might be further clarified by an answer of the Court of Justice of the European Union to the first request for preliminary ruling made by the Polish Constitutional Tribunal in case C-390/15 RPO.*

Keywords: Charter of Fundamental Rights, Polish Constitutional Tribunal, common courts

*Prof. **Krystyna Kowalik-Bańczyk**, Ph.D. LL.M. MES (Bruges), Associate Professor at the Institute of Law Studies, Polish Academy of Sciences; **Mirosław Wróblewski** – Head of Constitutional, International and European Law Department in the Office of Commissioner for Human Rights in Poland, member of the Management Board of the European Union Agency for Fundamental Rights. Part 1 was written by Krystyna Kowalik-Bańczyk; Part 2 by Mirosław Wróblewski.

Introduction

The aim of this text is to show the general tendencies in the Polish jurisprudence to raise arguments based on the Charter of Fundamental Rights of the European Union (hereinafter the Charter or CFR)¹ during the six years since it entered into force as part of primary law of the European Union (on the 1st of December 2009).² In particular, the focus is directed on the practice of the Polish Constitutional Tribunal (hereinafter the CT) – a court which refers mainly to Constitution of the Republic of Poland³ but sometimes searches as well for an ‘external’ constitutional inspiration.⁴ While so far it has mainly referred to the European Convention on Human Rights (hereinafter the ECHR or the Convention),⁵ the CFR is also gradually gaining force in this respect. The practice of the Constitutional Tribunal might be an inspiration for other Polish courts to ‘take notice’ of the Charter and thus give it its proper impact on the Polish legal order.

1. General remarks on referrals to the Charter by Polish courts

While the Charter is raised to a lesser extent than the Convention, the scope of references to it keeps gradually increasing. Nonetheless, despite the fact that Polish courts do refer to sources of constitutional value that are external to the system – the European Convention on Human Rights and the Charter – the number of references to these external sources is not very high. The greater number of references to the ECHR is understandable considering Poland’s much longer participation in the Convention system (since 1993). Still, the highest courts of Poland don’t very often make such additional external references: the Constitutional Tribunal referred more often to the European Convention on Human

¹ Charter of Fundamental Rights of the European Union (OJ 2012 C 326).

² See broadly M. Wróblewski, *Stosowanie Karty Praw Podstawowych Unii Europejskiej przez sądy polskie – z uwzględnieniem oceny rozwoju tego orzecznictwa na tle wyroków Trybunału Sprawiedliwości Unii Europejskiej (Application of Charter of Fundamental Rights of the EU by the Polish courts – assessment in the light of jurisprudence of CJEU)*, Expert Opinion of INPRIS prepared for the Ministry of Foreign Affairs, 30.05.2015, Warszawa.

³ Act of 2 April 1997 – Constitution of the Republic of Poland (O.J. 1997 no. 78 pos 483 with amendments).

⁴ The ECHR constitutes in this sense the so-called ‘constitutional instrument of European public order’, cf: *Loizidou v Turkey*, A/310, [1995] ECHR 10, par. 75.

⁵ The Republic of Poland was the second post-communist country in the region to join the Council of Europe, on 26 November 1991. The European Convention on Human Rights was ratified by Poland on 19 January 1993 and entered into force on 1 May 1993.

Rights than to the Charter (this development will be broadly presented below),⁶ and the Supreme Court referred to the Charter in only in six cases.⁷ In contrast, the administrative courts are much more active in searching for inspiration in external constitutional texts, referring to the Charter in as many as 624 cases (including the references made by the Chief Administrative Court).⁸

The common courts do so less often, with only 162 references to the Charter.⁹ The manner in which the Charter is invoked in the judgments of national courts can be subdivided into five categories.¹⁰ First and foremost, the parties to the proceedings may refer to the Charter, without however provoking any reaction on the part of the courts. Second, the courts may react to the argumentation of the parties without stating the basis for the application of the Charter. Third, the courts may take the Charter into consideration and use it as an additional argument (next to, for instance, the ECHR), sometimes to strengthen their critical assessment of some national solutions in question. Fourth, the courts may apply the Charter alongside national solutions, sometimes *ex officio*. And fifth, albeit most rarely, in order to apply the Charter the courts may refer a preliminary question concerning the Charter to the Court of Justice of the European Union (hereinafter the CJEU).¹¹

⁶ According to the simplest way of research, the website with jurisprudence shows that there are seven judgments containing a reference to the Charter and sixteen judgments containing a reference to ECHR, cf: <http://otk.trybunal.gov.pl/orzeczenia> (last visited 17.12.2015).

⁷ <http://sn.pl/orzecznictwo> (last visited 17.12.2015). The database reveals just 24 cases in which the Supreme Court referred to the ECHR.

⁸ www.orzeczenia.nsa.gov.pl (last visited 17.12.2015). By comparison, the administrative courts referred to the ECHR in 1556 cases.

⁹ <http://orzeczenia.ms.gov.pl> (last visited 17.12.2015). By comparison, the common courts made 1550 references to the ECHR.

¹⁰ This catalogue of categories of referral stems from analysis of the jurisprudence and was presented for the first time in: K. Kowalik-Bańczyk, *Prawo do dobrej administracji z Karty praw podstawowych UE w postępowaniach krajowych (Right to good administration of the Charter of Fundamental Right of EU in the national proceedings)* in: *Unia Europejska w roli gwaranta praw podstawowych (European Union as a guarantor of fundamental rights)*, D. Kornobis-Romanowska (ed.), Currenda, Sopot 2016, pp. 160–161.

¹¹ According to statistics of the CJEU, the Polish Courts asked 74 preliminary questions until the end of 2014, Annual Report 2014, p. 122; available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/pl_eCJEU_annual_report_2014_pr1.pdf (last visited 17.12.2015). This number is already higher, for instance in case C-231/15 *Prezes Urzędu Komunikacji Elektronicznej, Petrotel sp. z o.o. w Płocku p. Pokomtel*, the Polish Supreme Court asked for an interpretation of art. 47 of the Charter as an additional argument for interpreting art. 4 of directive 2002/21.

At the same time as the Polish Courts are referring to the Charter in at least some of the above indicated manners, they are also using the provisions of the Charter in very different ways. First, they may use it as an ornament, meaning that the reference is not used as an argument, but just as a decoration with no real content.¹² Secondly, the courts sometimes refer to the provisions of the Charter as an additional argument.¹³ Thirdly, the Charter might be used as an interpretative aid.¹⁴ The fourth and the most advanced solution consists of the situation wherein a provision of the Charter constitutes a basis for excluding the application of a national law provision due to the fact that it is in collision with the Charter. The first preliminary questions asked by the Polish Constitutional Tribunal might lead to such a situation whereby the application of provisions of Polish law might be excluded due to their collision with art. 21 of the Charter.¹⁵ One can cite an example in the jurisprudence of CJEU in Austrian case C-112/13 *A*,¹⁶ in which the CJEU stated that article 267 TFEU is in conflict with a national law requiring that the courts, when adjudicating as a court of last instance and supposing that the law is in breach of the Charter, should ask the constitutional question to the Constitutional court instead of disapplying the law as being in breach of the Charter.¹⁷ It is perhaps worth noting that such cases occur in the practice of national courts even without initiation of the preliminary question procedure. In the British cases

¹² This is similar to the way references to ECHR are described by A. Paprocka, *Wpływ orzecznictwa ETPCz na rozumienie konstytucyjnych praw i wolności w Polsce – kilka uwag na marginesie orzecznictwa Trybunału Konstytucyjnego* (*Influence of the ECtHR jurisprudence on the interpretation of constitutional rights and freedoms in Poland*) in: *XV lat obowiązywania Konstytucji z 1997 r. Księga jubileuszowa dedykowana Zdzisławowi Jaroszowi* (*XV years of 1997 Constitution. Liber Amicorum of Zdzisław Jarosz*), M. Zubik (ed.), Wydawnictwo Sejmowe 2012, p. 87. With respect to this practice as far as the Charter is concerned, see for instance: judgment of CT of 24.11.2010 in case K 32/09.

¹³ Judgment of CT of 25.02.2014 in case SK 65/12.

¹⁴ Judgment of Chief Administrative Court of 20.11.2013 in case NSA I FSK 1313/12.

¹⁵ Cf. the pending case on VAT on e-books, described below in point II.3. of this article.

¹⁶ C-112/13 *A v. B and others*, ECLI:EU:C:2014:2195.

¹⁷ This situation resembles the judgment of CJEU in case C-188/10 *Melki et Abdeli*. For an indirect invocation of the Charter by Member States authorities, see C-562/12 *Liivimaa Lihaveis*, ECLI:EU:C:2014:2229; cf. J. Łacny, *Ochrona praw podstawowych w wydatkowaniu funduszy Unii Europejskiej* (*Protection of fundamental rights in spending the EU funds*), "Państwo i Prawo", No. 12/2015, pp. 25–45.

*Benkharbouche v Sudanese Embassy*¹⁸ and *Vidal-Hall v Google*¹⁹ the British courts excluded some national provisions from application due to their collision with the provisions of the Charter (respectively – art. 47; and arts. 7, 8, and 47 of the Charter). Some authors call this hypothesis ‘a direct horizontal application of the Charter’,²⁰ while others exclude the possibility of a horizontal application of human rights provisions in disputes between individuals.²¹ However it is called, this phenomenon of exclusion of application of national provisions that are in collision with provisions of the Charter is present in both the jurisprudence of the CJEU as well as in national jurisprudence.²²

The main problem with application of the Charter for the national courts in Poland is defining the material scope of its application.²³ In

¹⁸ [2013] UKEAT 0401_12_0410. In this case a cook at the Sudanese embassy and a member of the domestic staff of the Libyan embassy made claims arising out of their employment, which were fought against by pleading State immunity. The complainants argued that the plea of immunity denied them access to courts, in breach of both of art. 6 ECHR and art. 47 of the Charter. The British court felt bound by the principle contained in art. 47 of the Charter to disapply the domestic law in conflict with it.

¹⁹ *Google v Vidal-Hall* [2015] EWCA Civ 311. In this case three individuals alleged that Google had been collecting private information about their internet usage from its Safari browser without their knowledge or consent. Claims were brought under the tort of misuse of private information and under section 13.2 of the Data Protection Act 1998, which only allows for claims for pecuniary loss when the claimant establishes some form of pecuniary damage. The British court however departed from this requirement of Section 13 and stated that the distress alone was enough, basing this departure from the legislative requirement on arts. 7, 8 and 47 of the Charter.

²⁰ Cf. broader: J. Folkard, *Horizontal Direct Effect of the EU Charter of Fundamental Rights in the English Courts*, UK Constitutional Law Association, 23.09.2015, available at: <http://ukconstitutionallaw.org/2015/09/23/joshua-folkard-horizontal-direct-effect-of-the-eu-charter-of-fundamental-rights-in-the-english-courts/> (last visited 17.12.2015).

²¹ For an argument against this possibility, see M. Szpunar, *Kilka uwag systematyzujących na temat zakresu zastosowania Karty Praw Podstawowych Unii Europejskiej (Some systemic remarks on the scope of application of the Charter of Fundamental Rights of the European Union)*, “Europejski Przegląd Sądowy”, No. 10/2015, p. 5.

²² D. Miąsik, *Zapewnienie skuteczności wyrokom Trybunału Sprawiedliwości Unii Europejskiej poprzez odmowę zastosowania przepisu prawa krajowego sprzecznego z prawem unijnym (Ensuring effectiveness of CJEU judgments by refusal to apply national law provisions contrary to EU law)* in: *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym (Ensuring effectiveness of judgments of international courts in the Polish legal order)*, A. Wróbel (ed.), Wolters Kluwer, Warszawa 2011, p. 641.

²³ M. Szpunar, *Kilka uwag systematyzujących na temat zakresu zastosowania Karty Praw Podstawowych Unii Europejskiej (Some systemic remarks on the scope of application of the Charter of Fundamental Rights of the European Union)*, “Europejski Przegląd Sądowy”, No. 10/2015, pp. 4–10; K. Lenaerts, *The EU Charter of Fundamental Rights: Scope of Application and Methods of Interpretation* in: *De Rome à Lisbonne: les juridictions de l’Union européenne*

order to do this, one has to refer both to the wording of art. 51.1 of the Charter and to the jurisprudence of the CJEU interpreting this provision. Article 51.1 of the Charter provides: ‘The provisions of this Charter are addressed [...] to the Member States only when they are implementing Union law’.²⁴ The Polish Courts have not had much success in applying this provision. In 2014 the CJEU refused to answer three preliminary requests on interpretation of provisions of the Charter of three different Polish courts: the Regional Court in Rzeszów, the District Court in Częstochowa and the Regional Court in Płock. Case C-282/14 *Stylinart*²⁵ concerned the company Stylinart, which transported furniture to Germany and was expropriated from its ownership of a parcel of land by a decision of the voivodeship of the Podkarpacie region. Stylinart alleged that the damages paid were not high enough and instituted proceedings for damages. The court adjudicating the procedure at some point stated that the Polish law does not allow for the inclusion of damages for expropriation of both *lucrum cessand* and *damnum emergens*. This situation was assessed by the Polish court as a *lacuna* and the referring court thus pondered whether the provisions of arts. 16 and 17 of the Charter could not be used to fill the gap. In its answer, the CJEU stated that the fundamental rights stemming from the EU legal order should be protected in situations falling within the field of application of EU law but not beyond them.²⁶ In such a case of non-application of EU law, the CJEU did not feel competent to assess the conformity of national provisions with the Charter (para 17),²⁷ as the national court did not provide any arguments showing why, based on other EU law provisions, the Charter should be applied in this particular case

à la croisée des chemins, V. Kronenberger and M.T. D’Alessio, V. Placco (eds.), Bruylant, Brussels 2013, pp. 107–143.

²⁴ For the interpretation of this provision in the Polish doctrine, see A. Wróbel in: *Karta Praw Podstawowych. Komentarz (Charter of Fundamental Rights. Commentary)*, A. Wróbel (ed.), Warszawa 2013, p. 1311; N. Półtorak, *Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej (Scope of binding force of the Charter of Fundamental Rights for the Member States)*, “Europejski Przegląd Sądowy”, No. 9/2014, p. 19; R. Grzeszczak and A. Szmigielski, *Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych (Judicial application of the Charter of Fundamental Rights in Member States – reflections based on the CJEU jurisprudence)*, “Europejski Przegląd Sądowy”, No. 10/2015, pp. 11–18.

²⁵ C-282/14 *Stylinart v Skarb Państwa – Wojewoda Podkarpacki, Skarb Państwa – Prezydent Miasta Przemyśla*, ECLI:EU:C:2014:2486.

²⁶ C-282/14 *Stylinart*, par. 17.

²⁷ It would have been different if EU law was applied; cf. C-617/10 *Åkerberg Fransson*, EU:C:2013:105, par. 19.

(para 20).²⁸ Therefore the CJEU refused to adjudicate on the submitted question as having no link with EU law.²⁹

In the case C-28/14 *Pańczyk*³⁰ a similar scenario occurred insofar as the possibility of application of the Charter is concerned. Mr. R. Pańczyk, a former employee of the security forces in Poland, obtained a reduced retirement pension due to the fact that part of his service was done during the 1980s, which implied a ‘collective responsibility’ of all security services workers, who are paid lower pensions for the work undertaken during this period. The referring court of Częstochowa found that the Polish law in question might be in breach of arts. 1, 17, 20–21 and 47 of the Charter. The CJEU again stated that it is not competent to assess Polish law provisions³¹ within the procedure based on art. 267 TFEU (preliminary question). It underlined that the national court did not give any arguments showing that the case in question falls within the field of application of EU law.³²

The third unsuccessful preliminary question about the Charter occurred in the order C-520/13 *Urszula Leśniak-Żaworska, Małgorzata Głuchowska-Szmulewicz*,³³ where two public prosecutors were questioning the reduction of their income due to a change in legislation which allowed for their discriminatory treatment in comparison to their younger and less experienced colleagues, possibly being in breach of Article 21 of the Charter. The CJEU stated that the request for a preliminary ruling was not formulated in a clear and precise way which would allow the CJEU to answer it in a useful manner.³⁴

In none of the above cases were the conditions of art. 51.1 of the Charter deemed to have been fulfilled. It requires above all that there exists a link

²⁸ C-73/13 *T*, EU:C:2013:299, par. 13, 14; C-265/13 *Torralbo Marcos*, EU:C:2014:187, par. 33, 38.

²⁹ The Polish courts are not alone in being refused in this way. Cf. other orders of the CJEU: C-498/12 *Pedone*, EU:C:2013:76, par. 14, 15; C-499/12 *Gentile*, EU:C:2013:77, par. 14, 15; C-555/12 *Loreti*, EU:C:2013:174, par. 17, 18; C-488/12 to C-491/12 and C-526/12 *Nagvi*, EU:C:2013:703, par. 16–18; C-224/13 *Lorrai*, EU:C:2013:750, par. 13, 14.

³⁰ C-28/14 *Pańczyk v Dyrektor Zakładu Emerytalno-Rentowego MSWiA w Warszawie*, ECLI:EU:C:2014:2003.

³¹ *Ibidem*, par. 33; C-339/10 *Estow*, EU:C:2010:680, par. 11; C-457/09 *Chartry*, EU:C:2011:101, par. 21.

³² C-28/14 *Pańczyk v Dyrektor Zakładu Emerytalno-Rentowego MSWiA w Warszawie*, ECLI:EU:C:2014:2003, par. 23.

³³ C-520/13 *Urszula Leśniak-Żaworska, Małgorzata Głuchowska-Szmulewicz v. Prokuratura Okręgowa w Płocku*, ECLI:EU:C:2014:263.

³⁴ *Ibidem*, par. 28.

between the case and the law of the European Union³⁵: either that the EU law is directly applied or the national provisions in question are an implementation of EU law. The link with EU law is usually defined by reference to the notion of ‘Community matter’ or ‘EU matter’: there is either a trans-border element in the factual situation of the case implying the application of EU law (though not every foreign element is enough; cf 282/14 *Stylinart*); an effectuation of trade between Member States; or a harmonization or direct application of EU law, including the provisions of the Charter. Such an application of the Charter might require, on the side of the Member State, an obligation to provide measures of effective legal protection in the domains covered by EU law.³⁶

The courts usually do not analyze whether, in a given case, the Charter of Fundamental Rights should be applied.³⁷ As the CJEU indicated in its order C-28/14 *Pańczyk*,³⁸ the lack of a clear explanation why the Charter should apply in a given case might exclude answering the preliminary question.³⁹ Despite this ruling, the Polish courts usually do not justify their reference to the Charter in a particular case,⁴⁰ thus ignoring a series of CJEU judgments where this lack of justification as to whether the Charter should be applied was called into question. The practice of the Polish Constitutional Tribunal proves, as is shown below, that it is no different in other Polish courts in this respect.

³⁵ C-457/09 *Chartry*, [2011] ECR I-00819; C-256/11 *Dereci*, [2011] ECR I-11315; C-28/14 *Pańczyk*, ECLI:EU:C:2014:2003, C-206/13 *Siragusa*, ECLI:EU:C:2014:126.

³⁶ C-617/10 *Åkerberg Fransson*, EU:C:2013:105.

³⁷ N. Półtorak, *Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej (Scope of binding force of the Charter of Fundamental Rights for the Member States)*, “Europejski Przegląd Sądowy”, No. 9/2014, nr 9, pp. 17–28; A. Wróbel, *Komentarz do art. 51 KPP (Commentary to Article 51 of the Charter)* in: *Karta Praw Podstawowych Unii Europejskiej. Komentarz (Charter of Fundamental Rights. Commentary)*, A. Wróbel (ed.), Warszawa 2013, pp. 1302–1308.

³⁸ C-28/14 *Pańczyk*, ECLI:EU:C:2014:2003.

³⁹ Cf. also this narrow interpretation in: C-198/13 *Julian Hernández*, ECLI:EU:C:2014:2055; C-390/12 *Pflegerer*, ECLI:EU:C:2014:281, par. 33.

⁴⁰ This is very visible in cases where the right to good administration is invoked – there is no explanation in the jurisprudence on why this provision of the Charter should be applied – K. Kowalik-Bańczyk, *Prawo do dobrej administracji z Karty praw podstawowych UE w postępowaniach krajowych (Right to good administration of the Charter of Fundamental Right of EU in the national proceedings)* in: *Unia Europejska w roli gwaranta praw podstawowych (European Union as a guarantor of fundamental rights)*, D. Kornobis-Romanowska (ed.), Currenda, Sopot 2016. The lack of such an analysis was also noted by J. Chlebny, *Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union Questionnaire Poland*, available at: <http://www.aca-europe.eu/colloquia/2012/Poland.pdf> (last visited 17.12.2015).

2. The Charter in the jurisprudence of the Constitutional Tribunal (CT)

2.1. The Charter in the Constitutional Tribunal's practice before and after its entry into force

The legal status of the Charter was the subject of the CT's case law even before it entered into force.⁴¹ In its decision of 2005, the CT stated that 'the Tribunal is not competent to analyse the compliance of the challenged provisions with Article 47 of the Charter of Fundamental Rights of the European Union. While the document was adopted by the heads of governments of the EU member states on 7 December 2000 in Nice, it was not included in the Treaty of Nice amending the Treaty on the European Union [...]. Therefore, it must be stated that the Charter of Fundamental Rights of the European Union does not constitute a ratified international treaty and it is not permitted to rule on the non-compliance of statutory norms with the Charter'.⁴² The Constitutional Tribunal later confirmed this view, recognizing that 'the Charter of Fundamental Rights of the European Union is not a ratified international treaty. For this very reason, ruling on the non-compliance of statutory norms with the Charter is not permissible. Therefore, the Constitutional Tribunal is not competent to analyse the compliance of the challenged provision with Article 47 of the Charter of Fundamental Rights of the European Union'.⁴³ The Charter was also recognized by the CT as a document that has no power to bind in a decision regarding the compliance of Poland's accession treaty⁴⁴ with the constitution. It must be noted that these decisions have ceased to be relevant since the Charter entered into force as binding primary EU law.

In turn, it is important to emphasize that in the judgement⁴⁵ on the ability to inspect the compliance of EU secondary law with the constitution the CT has emphasized the existence of a common axiological core⁴⁶ in

⁴¹ This part of analysis is based on my earlier research in: M. Wróblewski, *Karta Praw Podstawowych UE w orzecznictwie Trybunału Konstytucyjnego – stan obecny i perspektywy (The Charter of Fundamental Rights of the European Union in the Constitutional Tribunal jurisprudence)*, „Europejski Przegląd Sądowy”, No. 10/2015, pp. 19–24.

⁴² Judgement of CT of 27 September 2005 (Tw 26/05), OTK-B 2005/5, item 182.

⁴³ Decision of the CT of 9 May 2007 (SK 98/06), OTK-A 2007/6, item 56.

⁴⁴ Judgement of the CT of 11 May 2005 (K 18/04), OTK-A 2005/5, item 49.

⁴⁵ Judgement of the CT of 16 November 2011 (SK 45/09), OTK-A 2011/9, item 97.

⁴⁶ As regards the axiological and content similarity in the area of protection of human rights between the Polish Constitution and the Charter, see R. Wieruszewski, *Provisions of*

the three legal documents that are of most significance for the Polish legal system and for the protection of human rights, that is: the Polish Constitution,⁴⁷ the Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union.⁴⁸ In this judgement, the Constitutional Tribunal ruled that *‘in line with Article 6(1) of TEU, the Union recognizes the rights, freedoms and the principles specified in the Charter of Fundamental Rights of the European Union dated 7 December 2000, in its wording as adjusted on 12 December 2007 in Strasbourg, whose binding power is the same as the power of the treaties. (...) In line with Article 6(3) of TEU, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law. The extensive catalogue of rights, freedoms and principles included in the Charter of Fundamental Rights is largely derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Republic of Poland is also a party to this Convention. In line with Article 52(3) and Article 4 of the Charter of Fundamental Rights, to the extent that the Charter contains rights corresponding to the rights guaranteed under the Convention, their meanings and scopes are the same as those of the rights granted by the Convention. Nothing prevents the Union’s law from granting a more extensive protection. To the extent that the Charter recognizes fundamental rights arising from the common constitutional traditions of the member states, these rights are interpreted in line with these traditions. However, pursuant to Article 53 of the Charter, «Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms,*

the Charter of Fundamental Rights in the light of the 1997 Constitution of RP and international agreements which are binding upon Poland in: J. Barcz (ed.), *Fundamental Rights Protection in the European Union*, Warszawa 2009, pp. 145–167.

⁴⁷ Polish Journal of Laws of 1997, no. 78, item 483, as amended.

⁴⁸ For an analysis of this decision, see e.g. S. Dudzik and N. Półtorak, *The Court of the Last Word. Competences of the Polish Constitutional Tribunal in the Review of European Union Law*, “Yearbook of Polish European Studies”, No. 15/2012, pp. 225–258; M. Kawczyńska, *Kontrola zgodności z Konstytucją aktów unijnego prawa pochodnego w postępowaniach przed Trybunałem. Konstytucyjnym (Control of constitutionality of the Union secondary legislation in proceedings before the Constitutional Tribunal)* in: *Prawo Unii Europejskiej (Law of the European Union)...*, op.cit., pp. 213–243.

and by the Member States' constitutions." Thus, the Constitutional Tribunal emphasized that the risk of divergence in the standards of protecting the guaranteed human rights in these acts is not high, and that each impacts on the other.

In at least several decisions the CT has mentioned the provisions of the Charter to strengthen its arguments, emphasizing once again the axiological similarity of the European and Polish protection standards. However, the provisions of the Charter did not serve as the basis for a decision nor as the fundamental reason for adopting a particular legal interpretation in a given case. To this end, it is important to indicate the judgement in which the Constitutional Tribunal, while assessing the compliance of Polish statutory provisions implementing the Union's regulations on the prevention of money laundering⁴⁹ with the Constitution, referred to the Directive 2005/60/EC. The CT stated that this Directive 'does not infringe the fundamental rights and is consistent with the principles recognized in particular in the Charter of Fundamental Rights of the European Union'⁵⁰ (it should be noted that this decision was issued before CFR became binding). In another judgement the CT ruled that the *nullum crimen, nulla poena sine lege poenali anteriori* principle is rooted not only in the Polish Constitution, but also in the Charter of Fundamental Rights.⁵¹ Interestingly, in the judgement on the compliance of the Treaty of Lisbon with the Constitution, the Charter was mentioned only once by CT, and then only *obiter dictum*, which might seem rather disappointing.⁵² In another judgment, pertaining to the compliance with the Constitution of a provision of the Labour Code⁵³ that regulated the ability of an employee to obtain an additional compensation on the grounds of the civil law, the

⁴⁹ Act of 16 November 2000 on counteracting the introduction of asset values originating from illegal or undisclosed sources into financial trading and on counteracting the financing of terrorism (Polish Journal of Laws of 2003 no. 153 item 1505 as amended).

⁵⁰ Judgement of CT of 02/07/2007 (K 41/05), OTK-A 2007/7, item 72

⁵¹ Judgement of CT of 25 February 2014 (SK 65/12), OTK-A 2014/2, item 14.

⁵² Judgement of CT of 14 November 2010 (K 32/09), OTK-A 2010/9, item 108. In contrast, the Czech Constitutional Tribunal, while deciding on the compliance of TL with the Constitution, analysed the Charter in detail in its decision of 26 November 2008 (19/08); see K. Witkowska-Chrzczonec and P. Chrzczonec, *Wybrane problemy zapewnienia skutecznej ochrony praw podstawowych w Unii Europejskiej po wejściu w życie Traktatu z Lizbony* (The selected aspects of effective protection of fundamental rights after the entry into force of the Lisbon Treaty), "Studia z Zakresu Nauk Prawnoustrojowych", No. 2/2012, p. 33–46.

⁵³ Act of 26 June 1974 – Labour Code (consolidated text: Polish Journal of Laws of 2014 item 1502 as amended), hereinafter referred to as LC.

CT directly quoted Article 30 of the CFR.⁵⁴ The Constitutional Tribunal recognized that it is obvious that protecting the right to work is connected with a guarantee that an employee cannot be deprived of work without reason or in breach of the law. In quoting the Charter, the CT interpreted the right to work very extensively, also considering protection in the case of an unjustified termination of employment. In turn, in a decision⁵⁵ in which CT ruled that a the provision of the social security pension⁵⁶ was not in compliance with the Polish Constitution to the extent that it made the award and enforcement of the right to a social security pension dependent on staying within the territory of the Republic of Poland, it stated that *'there is no doubt that the statutory condition of staying within the territory of the Republic of Poland as a requirement for gaining the right to a social security pension and to receiving it concerns both the rights of the applicant protected under the Constitution, like the right to social security, as well as the fundamental rights guaranteed in the legislation of the European Union, including the right of the applicant as a citizen of the European Union to freely move and stay in the territory of the EU member states (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)'*.

It is also worth noting that the Constitutional Tribunal referred to a decision issued by the European Court of Justice,⁵⁷ wherein the said Court recognized an act of secondary EU law as invalid due to its non-compliance with the Charter of Fundamental Rights of the European Union, yet failed to refer to the Charter itself in this context. Thus the literature has noted that the CT should have referred to the Charter in certain cases.⁵⁸ This applies not only to the judgement of the CT of

⁵⁴ Judgement of CT of 22 May 2013 (P 46/11), OTK-A 2013/4, item 42.

⁵⁵ Judgement of CT of 25 June 2013 (P 11/12), Polish Journal of Laws of 2013, item 804.

⁵⁶ Act of 27 June 2003 on social security pensions (Polish Journal of Laws no. 135 item 1268 as amended).

⁵⁷ CT in the decision of 30 July 2014 (K 23/11), OTK-A 2014/7, item with reference to the decision of the Court of Justice of 8 April 2014 in the case C-293/12, *Digital Rights Ireland*, EU:C:2014:238. See more in J. Podkowik, *Niezależna kontrola udostępniania danych telekomunikacyjnych* (An independent control of an access to telecommunication data), "Przegląd Legislacyjny", No. 2(92)/2015, pp. 23–40.

⁵⁸ M. Górski, *Skutek Karty Praw Podstawowych Unii Europejskiej po wejściu w życie traktatu z Lizbony w orzecznictwie Europejskiego Trybunału Praw Człowieka, Trybunału Konstytucyjnego Rzeczypospolitej Polskiej i Trybunału Sprawiedliwości Unii Europejskiej* (An effect of the Charter of Fundamental Rights of the European Union in jurisprudence of the European Court of Human Rights, the Constitutional Tribunal of the Republic of Poland and the Court of Justice of the European Union) in: *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich* (Law of the European Union and constitutional law of member states), S. Dudzik

13 December 2010 on the organisation of the fisheries market, but also to CT judgment of 11 March 2015 (P 4/14) on gambling.

One should also note that it is significant that the CT is remaining silent in all its decisions as regards the legal and normative value of Protocol No. 30 (the so-called British and Polish Protocol),⁵⁹ which is widely discussed in the legal literature and has become the subject of decisions issued by Polish courts.⁶⁰ One may ponder the reasons for such silence.

The parties themselves present rather unanimous views on the normative value of the Protocol. For instance, the Ombudsman continues to repeat that actually the problem was already solved by the CJEU in the *N.S.* judgment.⁶¹ An interesting aspect of the Protocol was raised by the Appeal Court in Gdańsk in the proceedings in case P 19/14.⁶² The Appeal Court stated, in commenting on the position of the Sejm undermining the normative significance of the Charter, that adding the Protocol to the Lisbon Treaty confirms the primary law status of the Charter, since the Protocol could not be added to a non-international law instrument.

It seems that CT's silence on the Protocol arises from the assumption that it is better not to enter into a hotly contested legal and political debate. Also, since the Charter has not been the sole basis for any CT decision yet, the CT may see it as unnecessary to enter into the dispute on the normative value of the Protocol. However, it may seem slightly problematic for parties that this potential enigma remains yet to be solved in the future constitutional jurisprudence. And it is difficult to exclude any possibility, including acceptance of the limiting power of the Protocol, which may adversely affect Polish citizens and other subjects.

and N. Półtorak (red.), Warszawa 2013. p. 330, with reference to the judgement of CT of 13 December 2010 on the organisation of the fisheries market. A similar opinion is expressed in a dissenting opinion to that judgement by judge S. Biernat.

⁵⁹ Protocol (no. 30) on the application of the Charter of Fundamental Rights of the European Union towards Poland and the United Kingdom (Official Journal EU C 13 of 2010).

⁶⁰ See M. Wróblewski, *Karta Praw Podstawowych Unii Europejskiej w polskim sądownictwie – problemy i wyzwania* (The Charter of Fundamental Rights of the European Union in Polish judiciary – problems and challenges), "Kwartalnik Krajowa Rada Sądownictwa", No. 2/2015, pp. 17–23.

⁶¹ Judgment of the Court (Grand Chamber) of 21 December 2011 *N.S.* (C-411/10 *v Secretary of State for Home Department and M.E. and Others* (C-493/10) *v Refugee Applications Commissioner and Minister for Justice, Equality and Reform*).

⁶² Ruling of 8 September 2015.

2.2. The Charter as the model for analysing norms in the procedure before the Constitutional Tribunal

Despite the multiple decisions of the CT that refer to the Charter, the CT has yet to clearly and finally rule whether the Charter of Fundamental Rights of the European Union may serve as a model of the hierarchical analysis of norms in its procedure.

There are some judgments in which the CT has already ruled on a motion referring to the Charter's provisions. These cases pertain, e.g., to the compliance of the act on protecting animal rights⁶³ with the Constitution, in light of the fact that these provisions do not allow for the ritual slaughter of animals for the needs of local religious communities (as a model, the abstract motion filed by the Commissioner for Human Rights⁶⁴ specified Article 10 of CFR on freedom of religion). In its ruling of 3 November 2015 (case K 32/14), the CT ended the proceedings without a decision on the merits, stating the case was already well resolved by the CT in its earlier jurisprudence. As regards the Charter, the CT stated that the Ombudsman invoked only art. 10.1 of the Charter, while art. 10.2 of the CFR was relevant in the case. On this basis the CT decided the model was not well founded. Leaving aside the legal quality of the CT's argument in this case, one should emphasize however that the CT has not excluded the Charter as a model of hierarchical control of norms in constitutional adjudication. By criticising the wrong (in the CT's opinion) choice of art.10.1 of CFR instead of art. 10.2, it sent a signal that the Charter may be invoked as a model, but only when it is applied precisely.

It must be noted that there are other cases which are currently under consideration by CT where the Charter has been directly referred to as the model for the hierarchical analysis of norms. An example of such a case is the case commenced on the basis of a legal question filed in the CT by the Court of Appeal in Gdańsk⁶⁵ regarding the compliance of Article 92a of the Criminal Code⁶⁶ with the provisions of Article 20 of the CFR.

At this point the question should be posed whether the Charter should be treated uniformly as a model for both concrete and abstract

⁶³ The Act of 21 August 1997 on the protection of animal rights (consolidated text: Polish Journal of Laws of 2013, item 856, as amended).

⁶⁴ Motion of the Commissioner dated 24 October 2014 (VII.5601.1.2014.AWO/MW).

⁶⁵ The case is under consideration by the CT (P 19/14).

⁶⁶ Act of 6 June 1997 – Criminal Code (Polish Journal of Laws no. 88 item 535 as amended) (CC).

procedures. It seems that it is necessary to introduce a certain distinction in this respect.

In line with the case law of CT, a constitutional complaint (Article 79 of the Polish Constitution) may specify only constitutional rights and freedoms as models. Therefore, the CT declared that such models cannot be constituted by the provisions of international treaties (including, e.g., the ECHR). Basing the constitutional complaint only on the models included in the Polish Constitution also excludes the possibility to formulate claims based on the models of procedure of the Charter in the procedure before CT initiated by a citizen under Article 79 of the Polish Constitution. However, the axiological similarity of the Charter of Fundamental Rights and the Polish Constitution does not exclude the possibility to reconstruct constitutional models in light of the provisions of the CFR as interpreted in the case law of the Court of Justice. Comparing the situation in this area with that of other EU member states, it should be noted that similar limitations exist in the jurisdiction of the German Federal Constitutional Court (DE: *Bundesverfassungsgericht*),⁶⁷ while in Spain on the other hand the Constitutional Court may analyse the compliance of the provisions of national law with the Charter under the procedure for considering constitutional complaints filed by the citizens.⁶⁸

The restriction imposed by Article 79 of the Polish Constitution does not apply to abstract conclusions and legal questions filed by the courts. Therefore, it seems that the entities submitting the motions and the courts will be able to refer to the provisions of the Charter in the procedures commenced before the CT with respect to the hierarchical analysis of norms. In considering how the Polish Constitutional Tribunal may react in terms of analysing the future potential role of the Charter as a model of analysis in a procedure before it, it would seem worth noting how it has treated the ECHR in this respect. Due to the fact that the entity that most often refers to the Convention is the Commissioner for Human Rights, it would seem beneficial to pay attention to the resolutions of those procedures commenced or participated in by the Polish Commissioner

⁶⁷ M. Derlatka, *Skarga konstytucyjna w Niemczech* (Constitutional complaint in Germany), Warsaw 2009, p. 158.

⁶⁸ M. Kłopotcka-Jasińska, *Skarga konstytucyjna w Królestwie Hiszpanii* (Constitutional complaint in the Kingdom of Spain), Warsaw 2010, p. 58. The Spanish Constitutional Court had already referred to the Charter before it became binding; see the judgements of 30 November 2000 (STC 292/2000) and 27 February 2002 (STC 53/2002).

in this respect.⁶⁹ Unfortunately, this issue is complex and far from unambiguous.⁷⁰

Thus it seems that the above-mentioned and on-going procedure commenced by means of a legal question filed in the CT by the Court of Appeal in Gdańsk (P 19/14) is the most advanced case to be considered by CT wherein a provision of the Charter has been referred to as the important model for analysis. The Gdańsk court challenged Article 92a of the Criminal Code, stating that it created a discriminatory legal situation with respect to persons convicted by courts in those states which are not EU member states, and therefore that it infringes Article 32 of the Polish Constitution and Article 20 of the CFR. According to the court, 'the provisions on concurrent sentences that are binding in Poland does not provide for a situation that would prevent issuing a concurrent sentence that considers convictions of Polish courts and courts in other countries, if these sentences are to be executed in Poland'.⁷¹ It is important to mention that the case law of the Polish Supreme Court (SC)⁷² has also expressed its doubts as to the compliance of Article 92a of the Criminal Code with Article 20 of the Charter, as filed by the Court of Appeal in Gdańsk. The circumstances that make this case advanced enough to be considered are based on the fact that all parties to the procedure have provided the CT with their positions⁷³ in the case. It is important to note that the Polish Sejm believes that the procedure before the CT as regards the compliance of the Criminal Code with the Charter should be discontinued. According to the Sejm, the Charter is not a permissible model of analysis, as it is not a ratified international treaty. This opinion is very controversial, including in the opinion of the Court of Appeal in Gdańsk.⁷⁴ Out of the

⁶⁹ See M. Wróblewski, *Wykorzystanie Konwencji o ochronie praw człowieka i podstawowych wolności i orzecznictwa Europejskiego Trybunału Praw Człowieka w sferze ustawodawczej oraz w postępowaniu przed Trybunałem Konstytucyjnym (European Convention on Human Rights and European Court of Human Rights' jurisprudence in legislation and proceedings before the Constitutional Tribunal)* in: *Obywatel w Radzie Europy i Unii Europejskiej. Nowe wyzwania po dwudziestu latach od przystąpienia przez Polskę do Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności. VII Seminarium Warszawskie (A citizen in the Council of Europe and the European Union. New challenges after twenty years of Polish accession to European Convention on Human Rights. VII Warsaw Seminar, Warsaw 2014, p. 99–116,*

⁷⁰ See A. Wróbel (ed.), *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym (Ensuring effectiveness of international courts' judgments in the Polish legal order)*, A. Wróbel, Warsaw 2011.

⁷¹ Decision of the Court of Appeal in Gdańsk of 7 May 2014.

⁷² Decision of SC of 9 October 2014 (V RK 232/14), OSNKW 2015/2, item 18.

⁷³ Position of 18 December 2014 (BAS-WPTK-1166/14).

⁷⁴ Ruling of 8 September 2015.

many arguments raised by the Sejm, one must mention in particular the fact that the Charter was not proclaimed by the EU member states, but by three Union institutions, i.e. the European Commission, the Parliament, and the Council of the European Union. According to the Sejm, the recognition of the legal value of the Charter as the same as the Treaties included in Article 6(1) of TEU raises doubts, as making it a part of the Treaties (as was originally planned, so that it would become Part II of the Treaty establishing a Constitution for Europe) would unquestionably make the Charter an international treaty. The Sejm emphasizes that the adopted structure providing for the separation of the Charter and the Treaties reflected the clear intention of the member states, therefore it cannot be assumed that the CFR constitutes a part of international law. It would seem that this argument, i.e. treating the Charter as primary EU law while at the same time depriving it of the features of international law in the understanding of the Polish Constitution, is too tortuous and sophistic. However, one should also note that under the same procedure the Prosecutor General also noted that the Charter is not an international treaty,⁷⁵ although the Prosecutor did not see in this statement any obstacles preventing an assessment on the merits of the compliance of the Criminal Code with the provisions of the CFR.

It must be noted that the CT is generally rather quite reluctant to rely in its decisions on the Charter. In a case – which already has become famous in Europe – concerning the constitutional assessment of the December 2015 amendment of the law on the operation of the CT itself, the Charter was invoked as a model (art. 47) in the proceedings. The Ombudsman, in his motion directed to the CT,⁷⁶ stated that the limitation of the CT's powers in the amendment lies within the scope of application of EU law (art. 51.1 CFR), since according to the CJEU jurisprudence the CT operates as a European court. Such an approach is strengthened by the fact that the CT reserved its powers to control the constitutionality of EU secondary legislation (in its judgment in case SK 45/09), and it also cooperates with the CJEU by sending preliminary questions within the art. 267 TFEU procedure. The Ombudsman concluded that the legal limitations placed on the CT's powers in the amendment fall within the scope of application of EU law and thus the Charter may be relevantly invoked. The amendment is an infringement of art. 47, as the right to court (in this case – to the CT, especially via the procedure of constitutional complaints) was severely limited, affecting the very essence of the right itself.

⁷⁵ Position of the General Prosecutor of 27 October 2014 (PG VIII TK 44/14), p. 29.

⁷⁶ Motion of the Commissioner of 8 January 2016 (VII.510.1.2016.ST).

It is however slightly disappointing that CT has not assessed on the merits the allegations based on the Charter. In its judgment of 9 March 2016 (K 47/15) the CT stated that there is no new normative content in art. 47 of the CFR when comparing it to art. 45.1 of the Polish Constitution (right to court). Apart from this one sentence the CT has neither explained nor compared the normative content of both provisions. It is very likely that the CT, operating in very difficult conditions and under pressure, was reluctant to enter into sophisticated legal issues when the very existence of the effectiveness of constitutional adjudication in Poland was at stake. This is quite understandable, but nevertheless the CT lost a major opportunity to link its constitutional jurisprudence closer with the EU judicial system of fundamental rights protection. One may legitimately think that perhaps it was the right moment to do so.

2.3. Concurrent non-compliance of a provision of national law with both the Polish Constitution and the Charter

The problem of concurrent non-compliance of national provisions with both the Polish Constitution and the Charter of Fundamental Rights of the European Union is nothing out of the ordinary in a multi-centric legal system. Moreover, these problems may be even more complex in European states due to the functioning of the Strasbourg system and due to other international instruments for the protection of human rights⁷⁷ existing in the national legal orders. However, particular attention must be paid to the interaction of constitutional law and the Charter if a national legal act constitutes a direct implementation of the Union's law, in particular of a EU directive.

This issue has already been considered in the case law of national constitutional courts (France, Austria), and it was also considered by the Court in Luxembourg. In the case *Melki and Abdeli*,⁷⁸ the Court of Justice had to decide on the manner of proceeding in the case of concurrent claims of non-compliance with the Constitution and non-compliance with Union law at the rank of a treaty. The Court of Justice in its decision stated that 'Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of

⁷⁷ M. Safjan, *Dialog czy konflikt? O relacji Trybunału Sprawiedliwości Unii Europejskiej i sądów konstytucyjnych w dziedzinie zastosowania praw podstawowych (Dialogue or conflict? About the relation of the Court of Justice of the European Union and constitutional courts in the area of application of fundamental rights)*, "Zeszyty Naukowe Sądownictwa Administracyjnego", No. 1(58)/2015, pp. 75–89.

⁷⁸ Judgement of CJEU of 22 June 2010 in joint cases: C-188/10 and C-189/10, *Aziz Melki and Selim Abdeli*, EU:C:2010:363, ECR 2010, p. I-5667, case *Melki i Abdeli*.

national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling.’ The Court of Justice also ruled that such national legislation may operate only if the remaining national courts remain free to file any question to the CJEU they deem necessary and to adopt, at any stage of the procedure – even after the interlocutory procedure of review of constitutionality concludes – any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union’s legal order; and secondly to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law.

With respect to the most interesting issue, the CJEU emphasized that the procedure before a national constitutional court for the review of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, cannot undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, as the purpose of that jurisdiction is to guarantee legal certainty by ensuring that EU law is applied uniformly (sec. 54 of the CJEU judgement).⁷⁹ According to the CJEU, to the extent the interlocutory procedure for the review of constitutionality leads to repealing a national law, the content of which merely transposes the mandatory provisions of a European Union directive, due to the non-compliance of the said act with the national Constitution, the Tribunal would be in practice deprived of the ability to conduct – at the request of the courts from the given member state that decides on the merits – a review of the validity of that directive in the light of the same claims pertaining to the requirements of primary law, in particular – the rights recognized by the Charter.⁸⁰

The CJEU concludes in its reasoning that before the interlocutory review of the constitutionality of a law – the content of which merely transposes the mandatory provisions of a European Union directive – can be carried out in relation to the same grounds which cast doubt on the validity of the directive, national courts against whose decisions there is no judicial remedy under national law are, as a rule, required – under the

⁷⁹ Sec. 54 of the judgement in the case *Melki i Abdeli*.

⁸⁰ Sec. 55 of the judgement.

third paragraph of Article 267 TFEU⁸¹ – to refer to the Court of Justice a question on the validity of that directive and, thereafter, to draw the appropriate conclusions resulting from the preliminary ruling given by the Court, unless the court which initiates the interlocutory review of constitutionality has itself referred that question to the Court. As the CJEU emphasized, ‘in the case of a national implementing law with such a content, the question of whether the directive is valid takes priority in the light of the obligation to transpose that directive’.⁸²

A similar problem was faced by the CJEU in the case *A v B and others*, commenced pursuant to a preliminary question filed by the Oberster Gerichtshof (Austria).⁸³ One of the reasons for submitting the question was the fact that an established line of authority required it, in recognition of the primacy of EU law, to refrain on a case-by-case basis from applying statutory provisions that were contrary to EU law. However, in the judgment concerning granting asylum to Chinese nationals, the Austrian Constitutional Tribunal (DE: Verfassungsgerichtshof) waived this case law principle, stating that the review of the compliance of national acts of law with the constitution under the general procedure of review of acts of law (DE: Verfahren der generellen Normenkontrolle) pursuant to Article 140 of the constitution should also be expanded to include the Charter of Fundamental Rights of the European Union.⁸⁴ Under this procedure, a right guaranteed by the ECHR may be referred to as a right at the rank of the Constitution. Therefore, according to *Verfassungsgerichtshof*, the equivalence principle requires that the review of acts of law also pertains to the rights guaranteed under the Charter. Moreover, according to the Constitutional Tribunal, if a right guaranteed by the Austrian Constitution has the same scope of application as the right guaranteed by the Charter, no question to the CJEU should be filed pursuant to Article 267 TFEU. In such a case, the problem of the non-compliance of a national provision with the CFR is not relevant to deciding on the subject of the request to determine its non-compliance with the Constitution, as the said decision may only be issued on the basis of the rights guaranteed under the Austrian Constitution. Therefore, the above problem of the concurrent non-compliance of national law with both with the Charter and the national constitution should, according to the Austrian constitutional tribunal, in the case of the ascribing the same scope of application to the

⁸¹ Official Journal C 326 of 2012 p. 47.

⁸² Sec. 56 of the judgement.

⁸³ Judgement of CJEU of 11 September 2014 in the case C-12/13, *A v B and others*, EU:C:2014:2195.

⁸⁴ Judgement of 14 March 2012 in joint cases U 466/11-18 and U 1836/11-13.

rights arising from the Charter and the Constitution, be resolved only in terms of its constitutionality, without considering the resolution of the conflict between the national law and the Charter.⁸⁵

The Court of Justice ruled that the ‘Union’s law, in particular Article 267 of TFEU, must be interpreted in such a way that it does stand in the way of national provisions, according to which national courts of the second and last instance must seek a ruling from the constitutional tribunal to repeal the act, effective *erga omnes*, instead of refraining from ruling in the given case, if the priority character of this procedure as regards the review of constitutionality stands in the way of enforcing by those courts their right to file questions to the Court or of meeting their obligation in this respect, both before filing such a request to the national court that reviews the constitutionality of acts of law and, in the given case, after a decision is issued with respect to that request by the subject court.’ In the judgement issued in the case *Kernkraftwerke Lippe* the CJEU added that a national court cannot be deprived of its right to file a question due to the fact that an interlocutory procedure to review constitutionality is on-going.⁸⁶ As regards the concurrent application of fundamental rights guaranteed by the national constitution and the rights guaranteed by the Charter with respect to national legislation implementing EU legislation in the understanding of Article 51(1) of the CFR, the CJEU clearly indicated in the case *A v B* that the priority nature of the interlocutory procedure for the review of compliance of a national law with the constitution, the content of which merely transposes the mandatory provisions of a European Union directive, cannot infringe the competences of CJEU, which is the only authority competent to rule on the invalidity of an act of the Union, and in particular of directives, competences intended to assure legal certainty by enforcing the uniform application of EU law.

The Polish Constitutional Tribunal faced similar problems as the consequence of a motion filed by the Commissioner for Human Rights⁸⁷ in a case where the Commissioner claimed the non-compliance of Annexes 3 and 10 to the Polish Act on VAT⁸⁸ with the Constitution. This pertains

⁸⁵ The judgment was criticised both by CJEU and the Austrian Supreme Court – see M. Frahm and A. Mayer, *The Legal Importance and Implementation of the Charter in Austria* in: *Making the Charter of Fundamental Rights a Living Instrument*, G. Palmisano (ed.), Leiden–Boston 2014, p. 267.

⁸⁶ Judgement of CJEU of 4 June 2015 in the case C-5/14 *Kernkraftwerke Lippe*; for the Polish translation of the motives of the judgement see A. Wróbel and P. Wróbel, “Zeszyty Naukowe Sądownictwa Administracyjnego”, No. 4/2015, pp. 81–86.

⁸⁷ Motion of the Commissioner dated 6 December 2013 (RPO-697281T/13/NC).

⁸⁸ Act of 11 March 2004 on the goods and services act (consolidated text: Polish Jour-

to imposing VAT on electronic publications (e-books) at the basic 23% rate, while the paper editions with the same content are taxed at 5 per cent or 8 per cent.⁸⁹ During the procedure, the Commissioner also claimed in a later-submitted pleading⁹⁰ that the EU provisions on VAT tax⁹¹ were not in compliance with Article 20 CFR (the equality principle). The Commissioner for Human Rights pointed out the problem of the potential invalidity of the EU provision on VAT, including the directive, due to their non-compliance with the Charter, suggesting to the CT that it was necessary to file a question with the CJEU regarding the validity of the secondary EU law. The Commissioner noted that the CJEU, pursuant to Article 267 TFEU, is the only body in the European Union that is entitled to recognize the non-compliance with the primary law (i.e. to rule on invalidity) of secondary law adopted by the Union institutions. In such a procedure, the Court of Justice reviews the legality also in terms of fundamental rights, i.e. determines the (in)validity of secondary Union laws with respect to their (non)compliance with the Charter of Fundamental Rights⁹² of the European Union, serving in this sense as an internal constitutional court⁹³ of the Union.

The Commissioner noted that the problem of infringing fundamental rights is rooted not in the Polish VAT Act, but in the Union directive itself. In this way, a Europeanisation of sorts was elaborated with respect to the issue in contention, by indicating that the problem in the given case is not solely an exclusively internal problem of the Polish legal system, but a problem that should be resolved at the level of EU legislation.

In its decision of 7 July 2015 the Constitutional Tribunal lodged the first preliminary request, consisting of two legal questions, in this case in the CJEU. The first issue pertains to following the procedure concerning

nal of Laws of 2011 no. 177 item 1054 as amended), hereinafter referred to as the VAT Act.

⁸⁹ The case is being considered by CT (K 61/13).

⁹⁰ Pleading of the Commissioner dated 19 November 2014 (V1L715.11.2014.NC/MW).

⁹¹ Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (Official Journal UE L 347 of 2006 r., p. 1) and implementing regulation of the Council (EU) no. 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (Official Journal L 77 of 2011, p. 1).

⁹² E.g., in the judgement of 8 April 2014 in the case *Digital Rights Ireland* CJEU the repealed the EU directive on the retention of telecommunications data due to its non-compliance with the provisions of the Charter.

⁹³ M. de Visser, *National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape*, "Human Rights Review", No. 2014, pp. 40–42.

the enacting of the directive of the Council 2006/112/EC, while the second legal problem pertains to whether the said EU directive of the taxation respected the neutrality principle (in this question, the CT also drew attention to Article 20 CFR). It must be noted that in item 3 of its decision, the CT detailed the reasons for lodging the questions with the CJEU. The Constitutional Tribunal emphasized that the national provisions challenged in the procedure before it constitute an implementation of the directive concerning which the questions were lodged. Additionally, the CT referred to the duties of national courts arising from the judgement of CJEU in the *Melki and Abdeli* case.

It would also seem important to consider in greater detail what the underlying reasons were behind the CT's action. The case-note commented on the CJEU judgment in the case *Melki and Abdeli*, in which the Court analysed the situation where constitutionality of national legislation transposing EU directive is declared.⁹⁴ The CJEU stated that it 'could be deprived of the ability to review the validity of the directive transposed by means of such an act from the viewpoint of the primary legislation, in particular with the fundamental rights protected under the Charter.' The author of the case-note specifies that the issue pertains to those 'situations where the non-compliance of the act with the national constitution, and in particular with the fundamental rights listed in it, arises from the infringement by the directive implemented in those acts of the same fundamental rights protected within the EU legal system'.⁹⁵ It must be added that the decision on the non-compliance of such an act with the constitution by the national constitutional court would rather have, indirectly, negative consequences both to ensuring the cohesion and consistency of EU law and to the level of protection of fundamental rights all over the Union. These comments must also be accompanied by the conclusion that both the motifs of the judgement in the case *Melki and Abdeli* and the doctrine comments pertaining to these conclusions refer to the procedure where it is the relevant national court that directs a question to the national constitutional court. The logic behind the conclusions of the CJEU is based on the assumption that if the constitutionality of the challenged national act of law is confirmed, the court will no longer be interested *a quo* in filing a question to the CJEU later. However, if a decision is made by the national constitutional court as a result of an

⁹⁴ M. Jarosz, *Pierwszeństwo kontroli konstytucyjności a prawo UE – uwagi na tle wyroku TS w sprawach Melki i Abdeli (Primacy of constitutional control and the EU law – remarks on the CJEU judgment Melki Abdeli)*, "Europejski Przegląd Sądowy", No. 8/2011, p. 28.

⁹⁵ *Ibidem*.

abstract motion (like in the subject case brought by the Commissioner), the applicant will not have the opportunity to later launch a question procedure. The refusal to forward a question to the CJEU by the CT would thus definitely deprive the judges in Luxembourg of the opportunity to confirm or reject the claims of infringement of fundamental rights by the provisions of the directive.

Hence, it seems that in its preliminary request the Constitutional Tribunal listened to the words of the Court of Justice in the *Melki and Abdeli* judgement, accepting 'the principle, according to which constitutional courts of the member states should lodge questions pertaining to the validity of the directive, when they decide on the constitutionality of a national act of law implementing binding provisions of such directive, and the claims against the said act are based on fundamental rights protected by both the national and Union legislation'.⁹⁶

This decision and the action taken by the CT is grounded in the earlier constitutional case law. In the decision on ENA⁹⁷ the CT accepted the principle of division of competences, in line with which the CJEU is not entitled to rule on the validity of the national acts of law, and the national constitutional courts are not competent to review the compliance of the acts of EU law with the Polish constitution.⁹⁸

To sum up with respect to the application of the Charter of Fundamental Rights of the European Union by the Polish constitutional court, it must be stated that the Charter is appearing more and more often in the CT's case law. This statement is true regardless of the fact that some voices in the doctrine emphasize that the Charter is not treated by the Constitutional Tribunal on equal terms with the ECHR, as the latter document is referred to by the Court of Justice much more often. The Constitutional Tribunal has had, until now, no opportunity to clearly rule on the role that the Charter may play as a model for review of Polish normative provisions. The response granted to the question filed by the Court of Appeal in Gdańsk might be the opportunity to do so.

However, in the case pertaining to the taxation of e-books, the questions lodged by the CT and the decision of the Court in Luxembourg will surely help to clarify this issue at the level of the entire EU, and if the position of the Polish Commissioner and the CT is shared, it might lead to revoking relevant EU provisions.⁹⁹ As the CJEU noted in its judgement

⁹⁶ Ibidem, p. 29.

⁹⁷ Judgement CT of 24 April 2005 P 1/05, Polish Journal of Laws of 2005 no. 77 item 680.

⁹⁸ See A. Kalisz, *Wykładnia i stosowanie prawa wspólnotowego (Interpretation and application of the Community law)*, Warsaw 2007, p. 109.

⁹⁹ A. Kustra comments that: 'It remains to be seen whether the decision of 7 July 2015

in the *Melki and Abdeli* case, national courts ‘should learn the lesson from the judgement of the Court’; that the determination of validity or invalidity of a EU directive will restrict the judgemental freedom of the constitutional court filing the question, which will later need to decide on the constitutionality of the Polish tax act.

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will become a one-off gesture towards judicial dialogue, or instead the starting point of a jurisprudential strategy that puts stronger emphasis on constitutional court’s application of EU law’ – A. Kustra, *Reading the Tea Leaves – The Polish Constitutional Tribunal and the Preliminary Ruling Procedure*, “German Law Journal”, Vol. 16, No. 6, p. 1567.

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