

# **The Charter's links with national human rights law and its application at national level**

Mirośław Wróblewski

Equinet Seminar – Brussels,  
16 June 2015

# The Charter in national jurisprudence

The European Commission: “national judges are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter”.

‘Report from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions 2013 Report on the Application of the EU Charter of Fundamental Rights’, COM(2014) 224 final, Brussels, 14.4.2014.

# The Charter in national jurisprudence

- Preliminary questions related to the Charter:
  - 18 requests in 2010,
  - 27 requests in 2011,
  - 41 requests in 2012.
  - In 2013 9% (41) of requests to CJEU cited the Charter.
  - The Charter is used very often outside any context of preliminary proceedings (FRA 2013).

# The Charter in national jurisprudence

## Most frequent use of:

- asylum and immigration (see FRA report)
- Art. 47
- Art. 41
- Art. 51 and 52
- Art. 7, 24
- This mirrors the situation before the CJEU

# The Charter in national jurisprudence

- The Charter enter courtrooms not only by the initiative of the parties but also through the courts' own initiative.
- Often the Charter is superficially referred to as a means of interpretation or as an ornament (*ab abundantia*).
- Very often the Charter is used or referred to in cases that clearly fall outside the scope of EU law.

## The Charter as a Parameter for the Compatibility of National Measures with EU law

- Art. 51 (1) – the Charter applies also to the Member States only when they are implementing Union law.
- Case C-617/00 ***Akerberg Fransson*** of 26 February 2013 (preliminary ruling)
  - „applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter”.

# The Charter as a Parameter for the Compatibility of National Measures with EU law

- Case C-418/11, *Texdata*; C-206/13 *Siragusa* – application of the Charter requires „a certain degree of connection between EU law and the national measure“.

# The Charter as a Parameter for the Compatibility of National Measures with EU law

## Judgments of Austrian Constitutional Court

- cases U 466/11 of 14 March 2012 „principle of equivalence” (asylum for Chinese citizen)
  - case B166/2013
- Case G47/2012 (implementation of Data Retention Directive)

*Rights enshrined in the Charter can be brought to the CC as constitutionally guaranteed rights.*



# The Charter as a Parameter for the Compatibility of National Measures with EU law

## Poland – Constitutional Court

- Judgment of 16 November 2011, SK 45/09 - axiological common core of the Convention, the Constitution and the Charter.
- *Judgment of 30 July 2014 K 23/11 on intelligence surveillance (references to C-293/12 Digital Rights Ireland)*

# **The Charter as a Parameter for the Compatibility of National Measures with EU law**

## **Poland – Constitutional Court**

- **Case P 19/14 – legal question on penal law (art. 20 of the Charter)**
- **Case K 32/14 – ritual slaughter (Council regulation 1099/2009 on the protection of animals at the time of killing; art. 10 of the Charter)**
- **Case K 61/13 – ebooks – art. 20 of the Charter**

# The Charter as a Parameter for the Compatibility of National Measures with EU law

## Italy

Judgment of 22 May 2014 in case 11404  
(Cassazione, I sez. Civ.)

**art. 24 of the Charter has to be taken in consideration when interpreting the principle of the best interest of the child**  
(case concerned system of *kafalah*)

# The Charter as a Parameter for the Compatibility of National Measures with EU law

## Italy

Judgment of Constitutional Court (293/2011)  
art. 35 of the Charter (right to health care)

CC declared uncompatibility of national legislation with art. 35 and Italian constitution.

# The Charter as a Parameter for the Compatibility of National Measures with EU law

## Great Britain

Court of Appeal judgment of 5 February 2015  
case *Benkharbouche v Sudan and Janah v Libya*

Case involved two domestic workers bringing employment law complaints against the respective embassies of Sudan and Libya, which responded to the complaints by claiming state immunity, based on a UK Act of Parliament (the *State Immunity Act*)

## The Charter as a Parameter for the Compatibility of National Measures with EU law

Article 47 of the Charter guarantees the right to a fair trial, and some of the claims **concerned EU law issues** (the race discrimination and working time Directives).

The Court of Appeal also ruled that the relevant provisions of the *State Immunity Act* had to be **disapplied**, to the extent that they were applied as a barrier to the claims based on EU law.

Much stronger than the mere declaration of incompatibility with ECHR.

# The Charter as a Parameter for the Compatibility of National Measures with EU law

## Application of the 'horizontal direct effect' of Charter rights

Case C-176/12 of 15 January 2014 *AMS v CGT* – CJEU

Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision.

Court of Appeal – art. 47 is sufficiently precise to challenge national legislation.

# **The Charter as a Parameter for the Compatibility of National Measures with EU law**

## **Ruling of the Federal Social Court in Germany** (case B 11 Al. 5/14 of 6 August 2014)

Art. 21 and 26 of the Charter form rights which have to be guaranteed not only to unemployed persons with disabilities, but also to people with disabilities who have a job and want to make career change.



# Preliminary questions from Polish courts

1. District Court in Płock – art. 21 of the Charter (equal treatment of prosecutors in employment)
2. Regional Court in Częstochowa (IV U 1470/12) – art. 1 of the Charter (dignity in social security schemes as regards former communist secret services officials)
3. District Court in Rzeszów (XI C 152/14) – art. 17 of the Charter (land expropriation)

# Preliminary questions from Polish courts

4. Supreme Court (III SK 28/13) - directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

Art. 16 of the Charter (freedom to conduct a business)

# The Charter in national jurisprudence

G. Toggenburg (FRA) on different sort of discussions invoked by the Charter:

- Quite sceptical attitude (GB, Protocol No. 30)
- Embracing practice (Austria)
- Promising practice

# Relationships between the Charter and National Standards of Protection

Case C-399/11 *Melloni* – preliminary reference from Spanish Constitutional Court:

- Interpretation of art. 53 – „by virtue of the principle of primacy of EU law rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State”.

# Relationships between the Charter and National Standards of Protection

Case C-399/11 *Melloni* – „It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, **provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised**”.

# **Infringement proceedings by the European Commission**

**2013 – 5 proceedings**

**2014 – 11 proceedings**

**Mainly asylum and immigration, also education  
of Roma children**

# Protocol No. 30

*Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom*

- *genesis*
- legal status
- impact

# Protocol No. 30

*Interpretation of the Protocol by the Advocates  
General and the CJEU*

Advocate General, Verica Trstenjak opinion in cases  
C-411/10 and C-493/10 N.S.

„the question whether Protocol No 30 is to be regarded as a general opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland can be easily answered in the negative”.



# Protocol No. 30

## *Interpretation of the Protocol by the Advocates General and the CJEU*

CJEU: „Art. 1(1) of Protocol (No 30) explains art. 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions”.

# Protocol No. 30

Case C-489/10 *Bonda* Advocate General Juliane Kokkot opinion delivered on 15 December 2011

Judgment of 5 June 2012, C-489/10 *Criminal proceedings against Łukasz Marcin Bonda*.

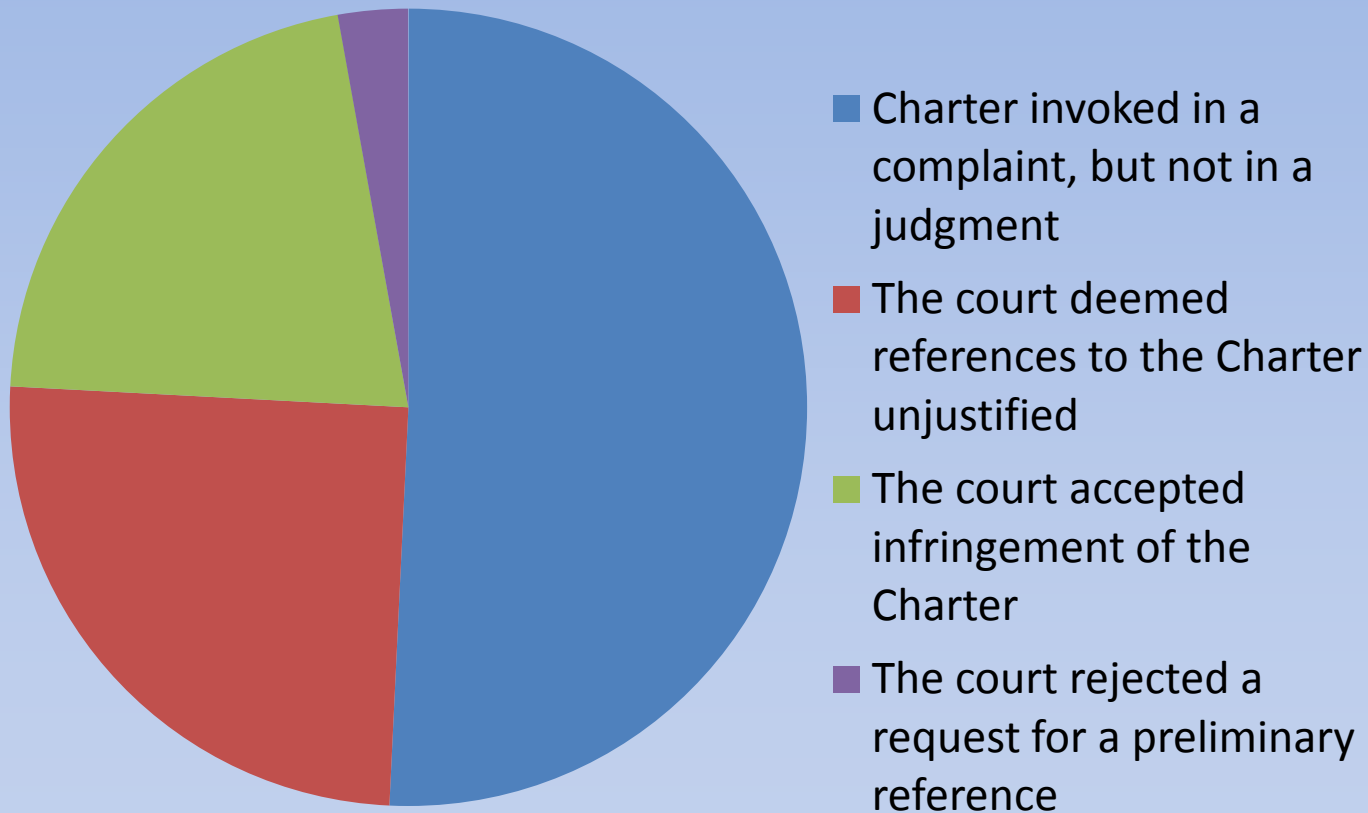
# ***Relations between the Charter and the Polish Constitution***

## **Differences?**

- Art. 3.1 – free and informed consent of a person, prohibition of eugenic practices, prohibition on making the human body and its parts as such a source of financial gain, prohibition of reproductive cloning of human beings;
- Art. 5.1 – prohibition of slavery;
- Art. 5.3 – prohibition of trafficking of human beings;
- Art. 25 – rights of the elderly;
- Art. 27 – workers' rights to information and consultation within the undertaking;
- Art. 36 – access to services of general economic interest;
- Art. 41 – right to good administration;

# *Administrative courts case law*

## References to the Charter (214 judgments 2001-2013)



## ***Common (general) courts case law***

- ***References to art. 1, 2, 4, 10, 11, 17, 30, 34, 35 and 47 of the Charter***
- Supreme Court judgment on penalties in the telecommunications law (SC judgment of 18 May 2010, I UK 79/10 Lex nr 661514; SC judgment of 10 November 2010, III PK 38/10, SC judgment of 23 November 2010, I UK 274/10; SC judgment of 21 June 2011, III UK 18/11)

## *Polish jurisprudence – some conclusions*

- Poor understanding of the Charter's scope of application
- The Charter as an ornament or one of many international documents

# The Charter in Legislation

- Parliamentary legal process
- Opinions of the Government Centre of Legislation
- Opinions of the Legislative Council
- Opinions of NGOs

# The Charter in the Ombudsman's (HRD) activities

- The European Commission's questionnaire - the Charter was used in litigation by a quarter of all non-judicial bodies, but only four could give explicit examples.
- The Charter is used by Polish HRD in general statements and strategic litigation – but rather exceptionally.



# The Charter in the Ombudsman's (HRD) activities

- **E-book case:** HRD suggestion to the Constitutional Court that the directive on VAT is incompatible with art. 20 of the Charter.

# Conclusions

- The Protocol obscures rather than illuminates how the Charter should be interpreted and applied.
- The Charter is still perceived by many as yet another ineffective soft declaration of human rights
- Much potential for the effective application of the Charter.

# Mirosław Wróblewski

[m.wroblewski@brpo.gov.pl](mailto:m.wroblewski@brpo.gov.pl)

[mirekwroblewski@tlen.pl](mailto:mirekwroblewski@tlen.pl)