CHAPTER 12

The Legal Value and Implementation of the Charter of Fundamental Rights in Poland

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1 Introduction

This study on the legal value and implementation of the Charter in Poland provides an overview of the impact of the Charter on the Polish legal order as well as on national policies, in particular on the legal status of the Charter in the legislation, the implementation by the national judiciary (case law) and independent human rights institutions, and also the perception of the Charter by academia and relevant stakeholders.

It must first be noted that in Poland the value and legal importance of the Charter of Fundamental Rights of the European Union have been overshadowed by the so-called British-Polish Protocol, annexed to the Treaty of Lisbon, because the applicability of the Charter in Poland is analysed through the lens of the disputable content of Protocol No. 30. The decision of the Polish authorities to join the Protocol, negotiated earlier by the British delegation, invoked a high level of uncertainty concerning the Charter’s status in Poland. The Protocol seemed to be an opt-out clause. Unfortunately, with the passing of time this situation has changed only partially. Scarce jurisprudence of the Court of Justice of the European Union (CJEU) and Polish courts has not helped much to clarify the scope of the application of the Charter in Poland. That is why i.a. the implementation of the Charter in Poland is quite limited. It is also for the same reasons premature to predict the real potential it has and may have in the Polish legal order. This specific situation, which is similar

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

only (with toutes les proportions gardées) to one in the UK, makes all Charter assessments for Poland very difficult.

2 Accession to the Protocol

The Protocol was negotiated by the United Kingdom (UK) in response to political and legal reservations, concerning mainly justiciability of social and economic rights enshrined in the Charter. According to Lord Goldsmith, British negotiator of the Charter, the UK Government’s objectives in the Charter Convention negotiations were threefold:

1. it agreed with the need to make fundamental rights applied by the Court of Justice more visible, principally to act as a constraint on the EU institutions should it be necessary;
2. but in cataloguing existing rights the Charter should be careful not to create new rights;
3. it should not make economic and social rights justiciable where they are not already justiciable.

Poland joined the Protocol at the very last moment, with no room for negotiation of its content or to have any influence on its wording, and thus ensured itself a specific position as regards the Charter. It is interesting that the parliamentary negotiation mandate for the Polish government did not mention the possibility to join the Protocol at all, a fact that was assessed by renowned scholars as an action contrary to Polish raison d’état. Yet Polish motives for joining the Protocol were completely different from those of the UK. One has to agree with opinions underlining the importance of political, not legal, mo-