

# Is the European Charter of Local Self-Government an Effective Instrument for the Protection of Local Autonomy in Poland?<sup>1</sup>

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## ABSTRACT

**Purpose:** The objective of this research is to examine whether the European Charter of Local Self-Government is, in practice, an effective instrument for the protection of the autonomy of local government in Poland, as well as to define the contribution of the Polish case law and administrative practice to the understanding of the principles of the Charter. The importance of the subject is strengthened by the political context. For many years, Poland was considered a model country safeguarding extensive local autonomy. Recently, however, recentralization trends have emerged in government policies.

**Design/methodology/approach:** The research is based on the qualitative and quantitative empirical research of the case law and administrative practice with elements of doctrinal analysis.

**Findings:** The Charter is present in the case law of the Constitutional Tribunal (22 judgments), administrative courts (166), and public administration bodies supervising local governments (49). The number is high compared to other CoE countries. The administrative courts seem to be more eager to adjudicate in favour of local governments in the cases in which the Charter is referred to.

**Academic contribution to the field:** A specific Polish input to the application of the Charter is the frequent use of the principle of proportionality in the supervision of local governments, which serves the courts as a perfect tool for resolving 'hard cases' between the local government and central administration bodies. In several important judgments, Article 11

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concerning the judicial protection of local governments was invoked to effectively strike down the law limiting the local governments' access to court in specific cases.

**Practical implications:** The research may be useful for local government representatives in formulating their litigation strategies, especially in legal disputes with central authorities.

**Originality/value:** This research is the first all-embracing empirical research of the application of the Charter in a country's legal practice. It shows original ways of the practical use of the Charter not described in the literature so far.

*Keywords:* European Charter of Local Self-Government, local government, administrative courts, supervision of local government, local autonomy

*JEL:* H70

## 1 Introduction

One, common model of organization of Local Government and of the shape of local autonomy in European legal culture does not exist. In legal scholarship and political science there were some attempts to develop the typologies of local government systems. One of the most eminent is the division between Southern European systems, characterized by municipalities with a few functions and competencies, a low legal discretion and a high access of local politicians to the central (and regional) level of government and Northern European systems which are, on the contrary, characterized by a strong decentralisation of functions, a high level of distraction and low access of local politicians to the central state (Heinelt and Hlepas, 2006). Another typology distinguishes three types of organization of LG: 'Franco group' in which the 'main task of the local government is to form structures of territorial interest intermediation at the lower level of government'; 'Anglo group' in which local government has 'weak legal and political status, but is important in shaping and delivering public services' and 'The North and Middle European group' where 'strong emphasis is given to the shaping and delivering of public services', but local government enjoy also strong constitutional status and high financial independence. (Hesse and Sharpe, 1991). The sources of such geographical and political differentiations date back to the 18<sup>th</sup> and 19<sup>th</sup> process of emergence of modern national and democratic states (Page, 1991).

Given such circumstances, the need for common standards of assessment of local autonomy are particularly necessary. The European Charter of Local Self-Government (Charter), an international treaty adopted under the auspices of the Council of Europe in 1985 is perceived as the main source of such international standards for the functioning and protection of Local Self-Government (Ladner et al., 2019, p. 4). It was signed and ratified by all the countries members of CoE. Poland ratified the Charter in 1994. As Himsworth noticed, the Charter plays a very important symbolic role as 'a declaration of a shared commitment to a democratic ideal – the health of democracy at the local level'. However, he

underlined that it is an extraordinary treaty as it regulates governmental structures and their interrelationships at the international level, which provokes the natural caution of the countries' governments (Himsworth, 2015, pp. 4–5). It should be also added that this treaty, unlike e.g., European Convention of Human Rights, is not a basis for the proceedings before the international courts or organs. According to the Article 14 of the Charter, the countries parties are only obliged to forward to the Secretary General of the CoE relevant information concerning legislative provisions and other measures taken by them for the purposes of complying with the Charter's terms.

Therefore, the burden of direct application of the Charter is put on the internal courts and organs of countries parties. There is still little data concerning the application of the Charter in the reality of the administrative and judicial procedures. It is maybe because the Charter is often regarded in legal scholarship as an unknown and disregarded tool for the practitioners of law and administration (Boggero, 2017, p. 1). Recently, a brief report on the reception of the Charter in the caselaw of the national courts of last resort was published by the Council of Europe. This publication should be seen as very general as it covers the practice of all the CoE members on 16 pages only (Tanasescu and Moreno, 2019). The methodological framework applied in the report, based on both qualitative and quantitative analysis of legal practice serves as an inspiration for this paper. Main findings of the report were, *inter alia*, that in the vast majority (26 out of 33 investigated countries) there was caselaw citing the Charter, although it was not numerous. Only in one case the Charter was referred to by the court *ex officio*. In most countries (16) it was the Constitutional Court's role to apply the Charter. In 11 countries it was the Supreme Court (incl. its administrative chamber) while in three countries such caselaw came both from constitutional courts and from the administrative sections of the supreme courts (Tanasescu and Moreno, 2019, p. 6). Among the findings of the qualitative the report underlines that in most cases the courts find the Charter's norms 'too generic or vague' to be directly and autonomously applied. However, there were exceptions for that rule e.g., in Switzerland, Croatia and Latvia (Tanasescu and Moreno, pp. 8–10).

The Charter is seen as a set of standards and benchmarks in comparative studies of Local Self-Government systems in Europe (Moreno, 2012; Brezovnik et al., 2021). The Monitoring Committee of the Congress of Local and Regional Authorities of CoE issues the regular reports concerning the observance of the Charter (following the "article by article" pattern) in each of the country which ratified the treaty (available on website of CoE: <https://www.coe.int/en/web/congress/congress-reports>). The reports are respected in the scholarship. They served, e.g., as one of the basic sources in comprehensive study measuring the local autonomy in European countries (Ladner et al., 2019). Until 2015 Poland was considered one of the leaders of local autonomy in Central and Eastern Europe (Swianiewicz, 2014, pp. 303–305; Ladner et al., 2014, p. 345). However, in the last report concerning Poland, the rapporteurs critically assessed the recentralization of public policies in Poland and its features such as the interferences by State authorities within the local independent functions,

overuse of the administrative supervision and lack of sufficient resources for local authorities. They found that Polish practice of Local Government does not comply with two sections of Article 4 of Charter concerning the scope of the Local Government, Article 8.3. introducing the principle of proportionality of supervision of local authorities and three sections of Article 9 concerning the local finances (Baro Riba and Mangin, 2019). The recentralization policies of the Polish central government after 2015 were even described by Polish scholars as 'centralistic shift' (Szesciło, 2019, pp. 171–175).

The main research questions of this paper are: 1) whether the Charter is in practice an effective instrument for the protection of local autonomy in Poland? 2) What is the contribution of Polish judicature and administrative practice for the understanding of the general principles of the Charter? The detailed questions are: whether the Charter is relied upon by the LGs during the administrative and/or court proceedings? Whether the Charter is applied or referred to in the organs' or courts' reasonings? If so, whether it is applied autonomously or in conjunction with the constitutional or internal legal norms? Which provisions and standards of the Charter are invoked most frequently? Which provisions most frequently serve as a pattern of striking down the country's laws or administrative decisions concerning the LG autonomy and competences and, to the contrary, which of them never or rarely play this role?

## 2 Methods

To answer research questions an empirical (qualitative and quantitative) research of the judicature of Polish courts and decisions of the organs of public administration was conducted. The research refers to the tradition of Empirical Legal Studies putting special emphasis on the law in action rather than law in books (Leeuw and Schmeets 2016, p. 2).

The following bodies' legal practice was examined:

1. Constitutional Tribunal, based on the 'Kelsenian model' whose task is to carry out the abstract hierarchical control of the compliance of lower-level legal norms with the higher-level norms. On the grounds of the Article 188 of the Constitution of Poland of 2 April 1997, the Tribunal is entitled not only to verify the constitutionality of the legal acts but also the conformity of the statutes, by-laws and other legal provisions to the ratified international agreements, e.g., to the Charter.
2. Administrative courts (16 regional courts in the first instance and Supreme in the second). According to Article 184 of the Constitution and to Articles 92–94 of the Local Government Act of 8 March 1990, their task is to control the actions of public administration (on the request of e.g., citizens, legal persons, or the prosecutors) and to resolve disputes over the legality of the LG's acts, esp. between the supervisory organs and LGs.
3. Supreme and ordinary courts, whose task is to administer justice in criminal and civil cases (LGs possess the legal personality also in private law).

4. Organs of public administration responsible, according to the Article 171 of the Constitution, for the supervision of the LG's acts, which are: in general matters voivodes, who are representatives of the central government in regions (voivodships) and are nominated directly by the Prime Minister and in financial matters the Regional Audit Chambers, whose members are appointed by the Prime Minister after the free, meritocratic contest for the job.

It then should be noted that the scope of the research is broader compared to the Tanasescu and Moreno review, as it covers also the regional administrative courts, ordinary courts, and organs of administration, while the cited authors focused on the national courts of last resort.

The official databases of the judgments of CT, administrative courts, ordinary courts (civil, criminal, labor law cases) and Supreme Court were searched in order to obtain all the judgments based on the Charter (for web addresses of databases see references). Because of the lack of a reliable official database equipped with a search engine, to get information about the application of the Charter in administrative practice the professional commercial searching engine (Lex, provided by Wolters Kluwer) was used. Lex database was also used for the purpose of the triangulation of data obtained through the public databases. The collected data date from the 1997 on in case of the CT, and from 2000 on in case of the other organs. According to the public and commercial professional databases all the judgments and administrative acts referring to the Charter issued during that period were examined.

Taking into consideration the role the Charter plays in international scholarship in terms of measuring local autonomy (described in the introduction to this paper), the results of this research may also contribute to more general research problem which is the condition of local autonomy in Poland's local government system.

### **3 Results**

#### **3.1 Results of the qualitative research**

This sub-chapter is composed of three parts. In the first part, the general statistics concerning the number of cases and decisions in which the Charter is referred to in the practice of the courts and administrative organs are presented, as well as the information concerning the geographical and historical distribution of such acts of application of law. In the second part, the focus is on the results of the cases in which the Charter was mentioned. In the third part the analysis concerns the specific articles of the Charter referred to in the reasonings of the organs and courts.

##### **3.1.1 Number of cases referring to the Charter**

The number of cases in which the Charter was referred to is significant and diversified between the different courts and organs of public administration. However, vast majority of such cases took place before the organs of admin-

administrative supervision over the LGs (voivodes, Regional Audit Chambers) and administrative courts.

Table 1. Number of cases/decisions in which the Charter is referred to

Court/administrative organ	Number of judgments/decisions
Administrative courts (Supreme and Regional) <sup>2</sup>	166
Voivodes	43
Constitutional Tribunal	22 (29) <sup>3</sup>
Regional Audit Chambers	6
Supreme Court	2
Ordinary courts	0
All	239

Source: Own calculation on the basis of data selected from official databases of Constitutional Tribunal, administrative courts, Supreme Court and ordinary courts, Lex search engine.

Most cases before administrative courts in which Charter is referred to are disputes between the organs of administrative supervision (voivodes, Regional Audit Chambers, and public prosecutors) and local authorities. There are several judgments concerning the cases between citizens and local authorities in which Article 3 of the Charter was invoked by the citizens (e.g., Judgment II SA/Rz 790/14, 10 December 2014, RAC in Rzeszów). Surprisingly, three judgments referring to the Charter were issued in the cases between the citizens and the organs of the central administration in which LGs were not the parties of the proceedings (e.g., Judgment IV SA/Wa 2904/12, 22.4.2013, RAC in Warsaw). Although, each year a few hundreds of disputes between the LGs and the supervisory authorities are resolved by the regional administrative courts. E.g., in 2018 this number amounted to 796, of which 421 cases were initiated by the complaint of the Local Government and 375 by the supervisory authorities. During that year only in 14 cases the Charter was invoked (Data according to Annual Information on the Activities of the Administrative Courts Report of Administrative Courts in 2018).

Most of the judgments of Constitutional Tribunal in which the reference to Charter was marked were issued in cases initiated by the LGs on the grounds of Article 191.1.3 of the Constitution, which permits the LGs to file a motion to Tribunal to verify *in abstracto* the constitutionality of an act which relates to

<sup>2</sup> If the Charter was referred to in the same case by both Regional (1<sup>st</sup> instance) and Supreme Administrative Court (2<sup>nd</sup> instance) it was counted as 1.

<sup>3</sup> 7 cases were redeemed for formal issues.

the scope of their activities. However, one case was started by the preliminary request of the District Court, one by the groups of the Members of Parliament and two on the motion of the Ombudsman. This fact should be seen as the proof of the appreciation of the importance of the local autonomy by other actors of the public scene in Poland, as their motions concerned the defense of LGs' rights as well as of the fact that the Charter is an appreciated legal act not only among Local Governments. It is worth mentioning that the motions came from various LGs, starting from little rural communes (E.g., Judgment K10/13, 12 February 2014, on the motion of the Council of rural Commune Kobierzyce) to the regional authorities (e.g., Judgment U1/10, 23 October 2012, on the motion of the Council (Sejmik) of the Mazowieckie Voivodeship which is the largest region in Poland). It must be stated that according to CT's official database since 1997 the LGs have filed 86 motions, 25 of which (29%) were based partially on the charge of inconsistency of the piece of legislation with the Charter. It shows that the Charter is widely known and appreciated among the society of Polish local authorities' members.

Only two judgments of Supreme Courts in civil law cases referring to the Charter were detected. Both invoked Article 4 concerning the scope of Local Self-Government as an argument for the LG's liability for damages (E.g., Judgment IV CSK 591/16, 20 July 2017, Supreme Court). No judgment of ordinary court referring to the Charter was found out. This fact may be explained in two ways. First is that the Charter's norms only to the very limited scale can be referred to the civil cases. Second, that the Charter is far less known among the judges of ordinary and Supreme Court who, contrary to their colleagues from the administrative courts, only incidentally cope with the cases in which LGs are involved.

The judgments referring to the Charter were issued in 15 out of 16 Regional Administrative Courts. However, the number of such cases varied from 3 (courts in Bydgoszcz and Kielce) to 21 (court in Opole). At the same time, only 5 out of 16 voivodes and 3 out of 16 Regional Audit Chambers referred to the Charter in their reasoning of their supervisory decisions. This may be provoked by the fact that the Charter by its essence serves to protect the LGs' autonomy, therefore the supervisory organs have no reason to invoke it contrary to the court, whose role is to independently adjudicate between the interests of the LGs and central administration.

There is no clear 'historical' tendency in citing the Charter. In the second decade of the 21<sup>st</sup> century (2011–2020) the number of the administrative court cases in which the Charter was referred to amounted to 89 compared to 72 in the previous corresponding period. However, the growth is far from being constant. E.g., in 2018 18 such verdicts were issued while in three following years put altogether – only 9. It should also be noted that last substantive judgment of CT referring to the Charter was issued in March 2014. Since then, 5 cases in which the treaty was invoked have been redeemed for formal issues (*inter alia*, because of the withdrawal of the motion by LG caused by the improper composition of the judicial panel). This fact must be regarded in the context of the decay of this court's independence and public trust provoked

by the chronic constitutional crisis in Poland started by the conflict over the composition of this crucial court (Sadurski, 2019). Based on the contents of the verdicts, it can be concluded that in 103 out of 166 cases the administrative courts invoked the Charter *ex officio* without the party's request. This fact is striking when confronted with the finding of Tanasescu and Moreno, that there was only one such case in the investigated 33 countries of CoE. As for the CT verdicts, all 22 references are based on the petitioners' requests, which is understandable considering the fact that according to the Article 67 of the Act on the Proceedings before the Constitutional Tribunal of 30 November 2016, the Tribunal is obliged to provide judgements only within the scope of the motion.

In only 44 supervisory decisions of voivodes and 6 such acts of the Regional Audit Chamber the Charter was invoked. It is a very low number when compared to the total number of such acts which every year amounts to c.a. 2–3 thousand (e.g., in 2018 – 2886 supervisory decisions of voivodes, none of them referred to the Charter). It is not possible to obtain information whether the LGs in the proceedings before the organs of supervision invoked the Charter, as the materials from the proceedings are not available.

### 3.1.2 Results of the cases in which the Charter was invoked.

**Table 2. Results of the cases in which the Charter was referred to from the viewpoint of Local Self-Government**

Court	Positive <sup>4</sup>	Semi-positive	Negative
Administrative courts	72	19	71
Constitutional Tribunal	3	2	17
Supreme Court	0	0	2
Supervisory Organs' decisions	5	0	44

Source: Own calculation on the basis of data selected from official databases of Constitutional Tribunal, administrative courts, Supreme Court and ordinary courts, Lex search engine.

In administrative cases, referring to the legal reasoning based on the Charter seems to be a successful litigation strategy for the LGs. In 57% of the cases in which the court referred to the treaty, the result was positive or semi-positive from the viewpoint of Local Government. This is a high proportion if it is considered that the general success rate of the LGs in the disputes against the supervision is roughly 25–30% (data based on the Annual Informations of the Administrative Courts). It means, above all, that relatively frequently admin-

<sup>4</sup> As 'positive' were classified the verdicts in which all the requests of LG's were upheld, as 'negative' – those in which they were overruled, as 'semi-positive' in which they were partially upheld partially overruled.

istrative courts find that the acts of supervision over the local government infringe the principles of the Charter and that the acts of LGs are legitimate because they fulfill Charter's norms. It should be underlined that such verdicts concerned a wide range of matters including commune's organizational acts (e.g., Judgment III SA/Gd 536/11, 23 February 2012, RAC in Gdańsk), organization and financing of public services such as education (E.g. Judgment II SA/Op 319/07, 26 July 2007, RAC in Opole) or water supply (E.g. Judgment III SA/Po 398/06, 20 July 2006, RAC in Poznań), changes of the streets' names (E.g. Judgment II SA/Wa 1131/18, 6. December 2018, RAC in Warsaw), spatial planning (e.g. Judgment II SA/Go 487/13, 4 July 2013, RAC in Gorzów Wielkopolski), environment protection (e.g. Judgment II SA/Po 883/04, 4 March 2005, RAC in Poznań) or personal issues such as dismissal of the councilors because of the breach of the *incompatibilitas* principle (e.g. Judgment III SA/Kr 973/07, 9 June 2009, RAC in Kraków).

Significantly different are the results of the cases before the CT. It is only in three cases that this court found some legal provisions inconsistent with the norms of the Charter. Two of them concerned the community's contractual freedom (Judgments K 1/06, 26 June 2006, and P 2/08, 2 October 2008), another specific regulations concerning the finances of the system of public education, in which the LGs play important role as the owners of schools (Judgment K 19/07, 18 December 2008). It must be stated that most of the principles of the Charter are similar to the constitutional provisions concerning the legal construction of the LG expressed in Chapters 1 and 7 of the Polish Constitution. It was rightly stated by a former judge of the Tribunal, who argued that the Tribunal does not give the essential and decisive meaning to the Charter's provision and uses them rather as enforcement of the legal reasoning based on the constitutional principles (Kieres, 2015, p. 98). Moreover, in many cases CT refers to the standards expressed in the Charter without naming explicitly this act. E.g., in the widely commented, landmark judgment, the Tribunal found that the obligation of the Local Government to cover the net loss of the hospitals it runs is unconstitutional. However, the court based the judgment solely on the art. 167 of the Constitution, which stipulates that the 'units of local government shall be assured public funds adequate for the performance of the duties assigned to them' while not referring (even in *obiter dicta* formula) to the Article 9.2. of the Charter introducing the similar norm (Judgment K 4/17, 20 November 2019).

In both cases in which the Supreme Court invoked Charter the result was negative from the viewpoint of the LG involved. In just 5 supervisory decisions of voivodes, Charter was referred to in favor of Local Government. In those cases, the principle of proportionality introduced by the Article 8.3. was invoked, based on which the voivode decided not to quash the LG's act infringing the law because of lack of the gravity of the infringement.

3.1.3 Articles of Charter referred to in and decisions

Table 3. Articles of Charter referred to in judgments of the Constitutional Court<sup>5</sup>

Article	Legal norms found contrary to the Charter	Legal norms found compliant with the Charter	Total
3 (concept of local self-government)	1	7	8
4 (scope of local self-government)	3	5	8
5 (Protection of local authority boundaries)	0	4	4
6 (appropriate administrative structures and resources)	0	1	1
7 (free conditions of exercising LG duties)	0	1	1
8 (administrative supervision of LG)	0	1	1
9 (Financial resources of local authorities)	0	5	5
10 (Local authorities' right to associate)	0	0	0
11 (Legal protection of LG)	0	3	3
<b>Total</b>	<b>4</b>	<b>27</b>	<b>33</b>

Source: Own calculation on the basis of data selected from the official database of the Constitutional Tribunal, Lex searching engine.

Except for the Article 10, all the substantive articles of the Charter were invoked in the proceedings before the CT. However, only Articles 3 and 4 concerning the definition of LG and scope of its competences served as the 'effective' pattern for striking down the laws. It must be underlined that never in the history of the Tribunal the Charter was applied as the only pattern of the motion against the questioned legal act – it was always accompanied by the articles of the Constitution. E.g., in case, in which the Tribunal investigated the law on the municipal police, it was found inconsistent both with the Articles 15, 16 and 164 Constitution, which refer to the principle of local autonomy and Articles 3 and 4 of Charter (Judgment 38/97, 4 May 1998). It is also striking that none of relatively numerous trials to strike down the law with reference to the Article 9, which establishes the rules concerning the financial autonomy was successful, including cases concerning the unfair financial equalization procedures (Judgment K 13/11, 4 March 2013) and financing of the teachers' pensions (Judgment K 27/05, 18 September 2005).

<sup>5</sup> The number of the references is higher than the number of cases (Table 1 and 2) because in some cases more than one article was referred to.

Article 4, protecting the local government units' geographical boundaries did not prove its efficiency before the Tribunal in the cases concerning the government's decisions concerning the change of the boundaries despite the negative opinion of one of the LGs involved (Judgment K 01/03, 4 November 2003).

**Table 4. Articles of Charter referred to in judgments of the administrative courts<sup>6</sup>**

<b>Article</b>	<b>positive<sup>7</sup></b>	<b>Semi-positive</b>	<b>negative</b>	<b>Total</b>
3 (concept of local self-government)	28	16	20	64
4 (scope of local self-government)	8	1	23	32
5 (Protection of local authority boundaries)	2	0	1	3
6 (appropriate administrative structures and resources)	1	15	4	20
7 (free conditions of exercising LG duties)	1	0	2	3
8 (administrative supervision of LG)	32	20	3	55
9 (Financial resources of local authorities)	4	0	13	17
10 (Local authorities' right to associate)	0	0	0	0
11 (Legal protection of LG)	7	0	0	7
<b>Total</b>	<b>83</b>	<b>52</b>	<b>66</b>	<b>201</b>

Source: Own calculation on the basis of data selected from the official database of administrative courts, Lex searching engine.

Same as in the CT's practice, administrative courts referred to all the substantive articles of the Charter apart from the Article 10. Among 166 examined verdicts, no judgment was found in which the norm derived from the Charter was the only legal basis. However not always it was invoked in conjunction with the Polish constitution and statutes. In several cases the Charter's principles were invoked separately from other legal basis of the motions and judgments. Contrary to the practice of the constitutional court, the second

6 The number of the references is higher than the number of cases (Table 1 and 2) because in some cases more than one article was referred to.

7 As 'positive' were classified the references in verdicts in which all the requests of LG's were upheld, as 'negative' – those in which they were overruled, as 'semi-positive' in which they were partially upheld partially overruled.

most frequently invoked regulation was Article 8 defining the rules of the supervision of local authorities. It is understandable if we consider the nature of the cases before the administrative courts which, as mentioned above, usually concern the supervision and the LGs' charges against the supervisory authorities based on exceeding of their competences. Important issue in this matter was the principle of the proportionality of supervision enshrined in Article 8.3. of the Charter, not explicitly expressed in Polish internal legal acts including Constitution (e.g. Judgments II SA/Kr 862/18, 19 September 2018, RAC in Cracow, II SA/Bk 159/07, 12 April 2007, RAC in Białystok).

In recent years, the new phenomenon of referring to the Article 11 of Charter concerning the legal (esp. judicial) protection of LG emerged. It is caused by the Article 6c of the Decommunization Act which excluded the possibility of the appeal to the administrative court in case of the Order of voivode changing the name of street. In the series of judgments administrative courts found this legal provision unconstitutional and inconsistent with the Charter (e.g. Judgments II SA/Po 843/18, 17 January 2019, RAC in Poznań, III SA/Gd, 29 March 2018, RAC in Gdańsk, II SA/Bd 432/18, 29 May 2018 RAC in Bydgoszcz). The Articles 3 and 4 were referred to mostly in order to balance the values of the presumption of competence of the LGs and its obligation to act within the scope of the law. There were also several cases won by the LGs concerning their financial autonomy and defense of their geographical boundaries, although most of such cases were decided in favor of the organs of the administrative supervision.

Table 5. Articles of Charter referred to in the supervisory decisions of the voivodes and Regional Audit Chambers

Article	Number of decisions
3 (concept of local self-government)	12
4 (scope of local self-government)	24
5 (Protection of local authority boundaries)	1
6 (appropriate administrative structures and resources)	0
7 (free conditions of exercising LG duties)	4
8 (administrative supervision of LG)	7
9 (Financial resources of local authorities)	1
10 (Local authorities' right to associate)	0
11 (Legal protection of LG)	11
Total	60

Source: Own calculation on the basis of data selected from Lex search engine.

The pattern of use of the certain articles of the Charter in the administrative supervisory decisions was similar to the one of the administrative courts. Crucial principles of the Charter invoked by the voivodes were Articles 3 and 4 referring to the essence of the legal construction of the LGs' competences and Article 8 concerning the scope of the supervision. Although there is 'disproportionally' high use of Article 11, it was always invoked in conjunction with Article 4 in reasoning concerning the scope of the competences of the LGs. E.g., the voivode of Mazowieckie Region (Warsaw) issued a series of decisions based on these norms concerning the spatial planning, pointing out that the local autonomy is not absolute and must not exceed the its legal borders (e.g., Supervisory Decision of the voivode of Mazowieckie (Warsaw), LEX-I.4131.70.2015.MO, 28 April 2015).

## **3.2 Results of qualitative research**

In this subchapter the three predominant patterns of the use of the Charter detected during the research are subjected to more in-depth, qualitative analysis. Those problems are the proportionality of supervision on the grounds of the Article 8.3 of Charter, the question of legal protection of LG on the basis of the Article 11 and the issue of the tension of the principle of legality of the LGs' actions and its presumption of competences connected to the Articles 3 and 4 of the Charter.

### **3.2.1 Principle of proportionality of supervision**

Qualitative research has shown that in roughly one third of cases before the administrative courts and in numerous cases before the organs of administrative supervision, the Article 8 of Charter, which defines the scope of the administrative supervision of LG, was referred to. It should be regarded as the original input of the Polish legal practice to the understanding of the Charter, as Tanasescu and Moreno do not mention any case in which this Article was relied upon. The Article sets limits to the administrative supervision and states that it should be based only on the procedures provided by the constitution or statute (8.1.); should aim at ensuring compliance with law and constitution (8.2.); and should be exercised 'in such a way that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect' (8.3.). The expediency-based supervision is banned by Article 171 of the Polish Constitution.

The last section plays an important role in the practice of Polish legal practice as it has not an exact equivalent in Polish internal law. The principle of proportionality is not expressed in the Polish constitution. It is only implicitly and not precisely expressed in the laws on the local government, in which it is only stated that if the act of LG violates the law in 'insignificant way', the supervisory authority shall not quash it (Article 91.3. of Act on Local Government). Therefore, the Article 8.3. of Charter seems to be a useful instrument both for the organs exercising the supervision and the courts verifying the way in which the supervision is carried out.

The principle of proportionality was referred to in 34 cases before the administrative courts. In as many as 28 (82%) of them the result was positive or semi-positive from the viewpoint of the LGs. This is a significantly higher rate than in the whole population (see above). Moreover, in the two third of cases (23) the article was invoked by the court *ex officio*. It seems then that the clause of proportionality serves as a useful tool for the administrative court to decide 'hard cases' concerning the supervision in favor of the LGs. E.g., the voivode of Podlaskie Region (Białystok) quashed the financial act of LG on the grounds that the majority of the councilors who vote in favor of it, took oath of office in an improper way (they did not read aloud whole the text of the oath, but only said the words 'I swear, so help me God' after reading the oath by the other councilors). The RAC found such a supervisory intervention extensive and unproportioned (Judgment II SA/Bk 205/07, 17 April 2007, RAC in Białystok). In the series of judgments, the RAC in Krakow rejected as disproportional demands of the prosecutors to strike downs the Local Schemes on the Protection of the Homeless Animals on the grounds that they do not indicate the concrete vet responsible for the care over such animals but only contract a firm whose task is to ensure such care (e.g., Judgment II SA/Kr 1036/17, 11. October 2017, RAC in Cracow).

In landmark judgment, the RAC in Gliwice dismissed the complaint of the inhabitant of the commune on the local spatial planning act on the grounds that the act concerned the area where the plot of land was owned by the family of one of the councilors. The court indicated that in fact it was a breach of the rule that the councilor cannot vote in the case in which his own interest is at stake. However, it stated that striking down the act would be disproportionate because of two factors: one is that the vote of the mentioned councilor was not decisive, and the act was passed by the overwhelming majority; second is that 'from the files it is evident that the plan enjoyed a huge public popularity (Judgment II SA/Gl 877/18, 26 November 2018, RAC in Gliwice).

In voivodes' practice the Article 8.3. was invoked too. In several decisions the Article 8.3. (principle of proportionality of supervision) was referred to in order to state that however the LG's act infringed the law, the infringement was so insignificant that it is not enough to quash the act (Supervisory Decision KN.I-4131.2.17.2012.4, 31 May 2012, Voivode of Wielkopolskie (Poznań) Region).

On the other hand, the Mazovia voivode in the supervisory decision quashing the act on the local referendum in Warsaw concerning the government's plans to broaden the city's administrative borders invoked the rule of proportionality as the argument in supporting his decision. He justified it by stating that 'the Warsaw's city council's act is not only contrary to the law, but also would cause noticeable financial effects which are unnecessary, as the citizens of Warsaw did not expect such a referendum (Supervisory Decision LEX-I.4131.45.2017, 9 March 2017, Voivode of Mazovia (Warsaw) Region).

### 3.2.2 Legal Protection of Local Government

Another important trend in the direct application of the Charter is the reference to its Article 11, which provides the local authorities with the 'right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.'

This article started to be applied in practice not earlier than in 2018, when the administrative courts faced the wave of the complaints of the LGs against the decisions of voivodes who, on the grounds of the Decommunization Act, changed the names of streets which, in their view, 'promoted the communist system'. Moreover, the Article 6c of the Act effectively forbade the LGs from filing motions against such decision to the administrative courts. This provoked LGs to base their complaints against the decisions solely on the provisions of Charter and Constitution. The administrative courts in every verdict issued in this subject agreed with the LG's arguments. E.g., RAC in Poznań explicitly indicated that 'the essence of the Article 6c of the Decommunization Act is in simple contradiction with the Article 165.2 of the Constitution and Article 11 of the Charter which leads the Court to the direct application of the Constitution and Charter' (Judgment II SA Po/843, 17 January .2019, RAC in Poznań) Similar reasoning was presented in the judgments of the courts in Gdańsk and Łódź. Numerous courts shared this view but without naming explicitly the Charter.

The Supreme Administrative Court applied Article 11 in the case concerning the complaint of the LG against the negative opinion of the curator of education (nominated by the minister of education) concerning the organization of schools in the city. The court stated that the lack of the possibility of the appeal to the court would be the violation of the Charter. It is worth to note that the court applied this article autonomously, without conjunction with the constitutional principle (Judgment I OSK 2480/17, 20 April 2018, SAC).

### 3.2.3 Scope of local autonomy/presumption of the competences

The articles of Charter, which are most frequently referred to in the judgments and decisions are the Articles 3 and 4. They entail, *inter alia*, the definition of local self-government as 'the right and the ability of local authorities to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population' (Article 3.1.) as well as the assertion that the powers and responsibilities of the LGs shall be prescribed by the constitution and law (Article 4.1.), and the clause of the presumption of the competences in the matters 'which are not excluded from their competence.' (Article 4.2.) Those norms create a sort of a natural tension between the basic principle of the rule of law that any action of public authority should have legal basis (enshrined also in Article 7 of Polish Constitution) and the principle of presumption of competences of LGs when it comes to the local affairs (Article 163 of Polish Constitution as well as the Article 6 and Article 7 of the Act on the Local Government). This dilemma was explicitly described e.g., in the Judgment III SA/Lu 335/13, RAC in Lublin of 24 September 2013.

It is also reflected in the judicature based on the Articles 3 and 4 of the Charter. In majority of such cases the courts firmly follow the 'legalistic' way of understanding of the scope of the local self-government and underline that its autonomy is not absolute and should be exercised within the limits of law. Such approach was presented e.g., by the Court in Gorzów Wielkopolski, which found the Local Act on the Alcohol Sale unlawful because it forbade the sale of the alcohol in such a non-fixed points with no exact statutory authorization even though the LG's resolution aimed at fulfilling the law's intention (Judgment II SA/go 282/14, 14 May 2014, RAC in Gorzów Wielkopolski). There are plenty of verdicts based on such philosophy concerning such issues as e.g., budgeting (e.g., Judgment IV SA/Wa 1059/07, 19 March 2007, RAC in Warsaw), private law obligations of LGs (e.g., Judgment II SA 710/12, 3. August 2012, RAC in Gliwice) or salaries of LG employees (e.g., Judgment IV SA/Wr 279/07, 18 July 2008, RAC in Wrocław).

On the other hand, in several judgments another concept of the presumption of competences of LGs prevailed. As example of such reasoning may serve a series of judgements of the court in Olsztyn in which, contrary to the motion by the prosecutor, numerous clauses of the LG acts concerning the rules of functioning of its auxiliary entity of LG (sołectwo) were upheld (e.g. Judgment II SA/OL 712/15, 29 September 2015, RAC in Olsztyn). Similar judgment was issued by the court in Wrocław, in the case concerning the local spatial planning act in the context of the rules on the localization of the wind power plants. Voivode stated that the regulation of the plan was too flexible. However, the court was of another opinion saying that LG is free to choose the method of regulation in the plan because of its presumption of competences stemming from the Article 3 of the Charter (Judgment II SA/Wr 129/10, 30 June 2010, RAC in Wrocław).

#### **4 Discussion**

This research has shown that the European Charter of Local Self-Government seems to have a potential of being an important tool in protecting the LG's autonomy in Poland in terms of the recentralization tendencies. There are numerous cases of its effective application in the proceedings before the courts and organs of public administration. It is a noticeable fact that in the proceedings before the administrative courts in which the Charter is referred to, the LGs are roughly twice as likely to win as in the average case against the supervisory organ of central administration. Although the number of cases in which the Charter is invoked is much higher than in the cases described by Tanasescu and Moreno, it is still low when compared to the general number of court and administrative cases in which the LGs take part.

Among the regulations of the Charter most frequently invoked in the caselaw are the articles which, according to report by Baro Riba and Mangin, are not respected in Poland, i.e., Articles 4, 8 and 9. These findings may serve as a confirmation of the fact that the local authorities and courts understand those provisions as violated or at least endangered by the central government's

representatives' actions. However, only in the case of Article 8 most of the judgments give positive or semi-positive results from the point of view of local authorities. To the contrary, Article 9 safeguarding the financial independence of the local authorities seems not to be effective legal instrument.

Contrary to the findings of Tananescu and Moreno, the Charter was applied both by the CT and the administrative courts. In the caselaw of the latter it was treated in a more autonomous way and proved to be more effective. Although it was not applied as the only legal basis in any judgment, in numerous judgments it played a crucial role in the legal reasoning of the administrative courts. In some of them it was even applied without conjunction with the Polish Constitution. It is also worthy of approval that in most cases before the administrative courts apply the Charter *ex officio*, without the request of the party. It seems to be outstanding when compared to the practice in other countries and is a sign of extraordinary conscience of international standards among the judges of this type of courts.

As specific input of Polish legal practice to the understanding of the Charter and its practical application should be seen the case-law concerning the principle of proportionality of the supervision of the LGs, which was crucial in quashing several dozens of the disproportional supervisory decisions. The doctrine of proportionality developed in some judgments is original and inspiring as it includes e.g., considering the public opinion when assessing the LGs' acts and not taking legalistic view on the scope of its competences. It is of great importance if we take in consideration the just view that any form of supervision of LG's actions should be carefully analyzed as it may threaten the very essence of the local autonomy (Moreno, 2012, p. 20). This way of applying the Charter may be also considered within the broader discussion concerning the proportionality seen as the cornerstone of 'culture of justification' in exercising the administrative power as opposed to 'culture of authority' (Gardbaum, 2014, p. 4).

From the point of view of the essence of the Local Government the question of the character of the legal basis required for its organs to issue administrative acts is crucial. It seems that on the grounds of Article 3 and 4 two types of jurisprudence have been developed. One, more 'legalistic' states that for any act of local government the specific legal basis is needed. The other, more 'liberal' points out that the principle of the presumption of competences should prevail and LG should exercise its autonomy freely if the law does not forbid it. Those tendencies fit with the two approaches of regulation the LG's discretionary powers described in the contemporary commentary to the Article 4.2. of the Chapter (Wiener, 2020, p. 18). In recent years there were cases in which the Article 11 guaranteeing the legal and judicial protection of LG served as the single or predominant legal basis for not applying the statutory rule limiting the LG's access to the court.

## **5 Conclusion**

To conclude, it should be stated that the meaning of the Charter as an instrument of protection of local autonomy is important. However, the scale of applying the principles of the Charter in the court and administrative proceedings still could be higher. The original input of Polish legal practice to the understanding of the Charter is esp. the broad application of the principle of proportionality of administrative supervision of Local Governments, the dual understanding of the Articles 3 and 4 in terms of the legal basis required for issuing the administrative acts of LG and the firm application of the Article 11 concerning the legal protection of LG. The Charter was present in jurisprudence of all types of courts of last resort, however the landmark judgments based on this treaty were issued only by the administrative courts resolving the disputes over the supervision of Local Governments exercised by the administrative organs subordinate to government.

Research brings ambiguous conclusions from the point of view of the general condition of the local autonomy in the Polish local government system. On the one hand, the growing scale of the application of Charter *ex officio* by the administrative courts, especially in the cases concerning the supervisory acts, proves that the local autonomy is endangered by the central governments' representatives' actions. On the other hand, the innovative application of the Charter's articles which had not been previously triggered such as the Article 10 referring to the legal protection, prove that the relevant institutions of the judiciary branch of government are ready to respond to new threats to local autonomy. Therefore, the situation is far from being unequivocal and Poland might be seen as the battleground state from the point of view of the struggle between the recentralization policies and strong local resistance to them.

This paper may serve as an invitation to carry out more in-depth empirical studies of the administrative and judicial practice concerning the application of the Charter in other countries of the Council of Europe. Only by conducting such research it shall be possible to obtain a realistic view of the meaning of Charter in the legal systems of the states which ratified the treaty, because the words of the classic of the legal realism that 'the distinction between legal theory and judicial administration is often a very real and a very deep one' (Pound, 1910, p. 15) seem to be true to this day.

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