

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU IN THE CZECH JUDICIAL DECISIONS: FALLING SHORT OF EXPECTATIONS?

Martin Madej*

Abstract: *Following the Lisbon Treaty, the Charter of Fundamental Rights of the European Union (“the Charter”) became a part of the primary law of the EU. Although one may expect intensified protection of fundamental rights on the European continent, many scholars suggested otherwise, pointing to considerable limitations posed on the Charter’s application. This is especially the case of the so-called third generation rights, which have been left under the exclusive disposition of the Member States.*

The essay begins with drawing attention to the Charter’s inherent limitations as interpreted by the CJEU. The author then focuses on the general use of the Charter in the case law of Czech courts, and proceeds to the assessment of its (in)application in particular cases concerning social and economic rights in order to examine the potential shift in the intensity of their protection. It is concluded that the evidence does not suggest any change in the analysed area after the Charter’s incorporation into the primary law.

Keywords: *Charter of Fundamental Rights of the EU, social rights, economic rights, scope of EU law, fundamental rights*

I. INTRODUCTION¹

For decades, the treaties establishing what would later become the European Union (EU) lacked a proper bill of rights. Although the idea of having one had been proposed, “*it was rejected on the grounds that this may be wrongly construed as an undue extension of the powers of the EEC when its primary goal was the attainment of economic integration by establishing a common market.*”² However, the compromise at the end of the debates on the future of Europe, especially the one in Nice,³ meant a significant step forward: a new, albeit non-binding, document: the Charter of Fundamental Rights of the European Union (“the Charter”). With the Lisbon Treaty, the Charter became a part of the primary law of the EU, and, therefore, a reference for the review of EU acts and Member States’ (“MS”) acts implementing EU law.

Considering the incomparable liberating force, the bills of human rights generally brought to democratic societies in the past, a reasonable observer might eagerly await a wave of progressive judicial decisions determined to shield the fundamental rights of EU citizens in an unprecedented way. In short, one may expect intensified protection of fundamental rights. That is, fundamental rights as conceptualised by the EU. This systemic

* JUDr. Martin Madej, Faculty of Law, Charles University, Prague, Czech Republic

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² PECH, L., GROUSSOT, X. Fundamental Rights Protection in the EU Post Lisbon Treaty. *European Issues*. 2010, Vol. 73, No. 1.

³ FUNK, L. A Legally Binding EU Charter of Fundamental Rights? *Intereconomics*. 2002, September/October.

change naturally ignites our curiosity about how the new EU law binds national legal orders and how they respond.

In the Czech Republic, a country central to this paper, the Charter complemented the national Charter of Fundamental Rights and Freedoms (“the CFRF”) and The Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) as the third list of fundamental rights in a system that would be described as “the triple-C triangle”.⁴ Taking into account the triple-C triangle, additional international human rights commitments and two courts supervising the whole structure, Czech legal scholars started to ask themselves: “*Did the Charter bring anything new at all?*”,⁵ “*Is it no more than a toothless summarising document without any legal significance?*”⁶

Their doubts should not be taken lightly. Despite the Charter’s inflated set of protected rights and freedoms, several limitations attract the continuous attention of European scholars. This is particularly the case of social and economic rights, which represented a controversial matter, where some consensus could only be reached by making a distinction between rights and – weaker and less judicially cognizable – principles.⁷ I, therefore, decided to study how the Charter influenced the protection of social and economic rights – as the group of rights with the largest potential for enhancement – in the Czech Republic. Knowing that without further concretisation, my area of interest may be deemed too broad, I should now explain what this paper *is not* about.

Firstly, I shall offer no in-depth analysis of the contents of rights and freedoms in any constitutional instrument as it is not vital for grasping the general picture of influence the Charter has on Czech jurisdiction. Secondly, only the case law of the courts of the highest instance⁸ will be taken into account. In fact, the lower courts’ judges are not always sufficiently educated in EU law, their judgments are usually inspired or over-ruled by higher courts and not available to the public on the internet. Thirdly, as much as I am aware of the procedural aspects of fundamental rights and freedoms and of the potential, with which the right to a fair trial (Art. 47 of the Charter) can stand as a guardian of social rights, I will set these procedural aspects aside and focus only on substantive changes. This paper is not about protection, which is merely derived. For at the end of the day, the protection of social rights can be contingent on the duties imposed on national authorities and other duty-holders either by substantive (e.g. who is the beneficiary, what conditions need to be fulfilled), or procedural provisions (e.g. *how* can the authority exercise its discretion, *what legal guarantees* does the beneficiary have while exercising her right – reduced court fees, legal advice?). This paper is concerned only with the former, the latter stems from the right to fair trial.

⁴ FONTANELLI, F. National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu? *Human Rights Law Review*. 2014, Vol. 14, No. 231, p. 239.

⁵ SMOLEK, M. Přinesla Listina EU (cokoli) nového? In: *Jiné právo* [online]. 25. 3. 2015 [2017-04-13]. Available at: <<http://jinepravo.blogspot.cz/2015/03/martin-smolek-prinesla-listina-eu.html>>.

⁶ VIKARSKÁ, Z. Jak ostré zuby má Charta základních práv EU? In: *Jiné právo* [online] 5.5.2014 [2017-04-13]. Available at: <<http://jinepravo.blogspot.cz/2014/05/zuzana-vikarska-jak-ostre-zuby.html>>.

⁷ KROMMENDIJK, J. Principled Silence or Mere Silence on Principles? The Role of the EU Charter’s Principles in the Case Law of the Court of Justice. *European Constitutional Law Review*. 2015, Vol. 321, No. 11, p. 328; PECH, L., GROUSSOT, X. *Fundamental Rights Protection*. p. 7.

⁸ Constitutional Court, Supreme Court and Supreme Administrative Court (SAC).

My analysis employs *empirical approach*. As aptly put by E. Andreevska, it is first and foremost the national judges who represent key actors in giving concrete effect to the rights and freedoms enshrined in the Charter, as they directly ensure that individuals obtain full redress in cases where fundamental rights within the scope of EU law have not been respected.⁹ From this perspective, the Charter can be seen as a tool in the hands of a judge, who may be more or less determined to use it. *Empirical approach* requires that any inquiry into the effects of the Charter on national law takes into account important (de)limitations in the legal mechanism foreseen by the Charter. Indeed, there are both limitations and delimitations, for any limitation, which is inherent in certain instrument, reveals simultaneously its scope (it defines it).

There are two groups of (de)limitations that inform the Charter's effects. Firstly, there are *self-restricting provisions of the Charter*. Regarding the social and economic rights, both the scope of EU law and the distinction between rights and principles will be of special importance. In fact, the scope of EU law must be established as the most important factor, because both rights and (more heavily) principles rely on the scope of EU law for their application.¹⁰ Since internal market and social policies fall within the shared competence (Art. 2 (2) and Art. 4 (2) (a),(b) of the Treaty on the Functioning of the European Union (TFEU)) and social policies are primarily to be coordinated rather than harmonised (Art. 5 (3) of the TFEU), the channels for the Charter's application will necessarily be limited.

The second (de)limitation that informs the Charter's effects relates to *the co-existence of three bills of rights*, which will necessarily overlap, complement one another and collide. Before examining the case law in the respective Member State, I must bear in mind the level of protection that was afforded to rights and freedoms by the Court of Justice of the European Union ("the CJEU"), the European Court of Human Rights ("the ECtHR") and national courts, each of them – separately or harmoniously – interpreting their charters. Here is to be found the reason why I picked the third-generation rights for my analysis. Given the length and depth with which the more traditional rights and freedoms were construed in the Czech Constitution and the European Convention, any enhancements thereof by Luxemburg's case law will be relatively exceptional. On the contrary, the social rights are not represented in the Convention¹¹ and they are subject to a mere rational basis test in the Czech constitutional adjudication.¹² Last but not least, given its history, the CJEU can reasonably be expected to rule on controversial issues of social and economic policies.¹³

⁹ ANDREEVSKA, E. The Applicability of the EU Charter of Fundamental Rights: National Measures. *Challenges of the Knowledge Society*. 2015, No. 5, p. 355.

¹⁰ Importantly, the 'accordance with Union law and national laws' (or comparable wording) is a condition that prevails among the vast majority of social and economic rights.

¹¹ The ECtHR does not apply the European Social Charter.

¹² Note that Art. 52(3) Charter does not apply to the rights that find no counterpart in the Convention. In cases of most of the Charter's social rights and principles, the CJEU has the unfettered power to determine their meaning and scope.

¹³ As it did recently in cases C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] 2 CMLR 46 or C-426/11 *Mark Alemo-Herron and others v Parkwood Leisure Ltd* [2013].

Before I continue I need to make two conceptual points. First, how do I define social and economic rights? Social rights are generally described as ‘constitutionally protected entitlements that impose substantive, legally binding obligations on the state to provide for the basic material needs (e.g. housing, health and education) of people’, which ‘should be distinguished from mere legislative welfare entitlements’.¹⁴ Purportedly, some rights have both economic and social features, whose close interconnectedness does not invite separate treatment. The Czech CFRF that concentrates all economic, social and cultural rights in one chapter (ch. IV) is a prime example of this solution. On the other hand, there is the innovative classification of rights in the Charter, where Title IV (Solidarity) is accompanied by Title II (Freedoms), which covers both classical political and civil liberties and some clearly social and economic rights (Art. 14), and Title III (Equality), which covers fundamental rights that were mostly part of primary law before the Treaty of Lisbon, including some additional social rights.¹⁵

For the purposes of this paper, social and economic rights include all of the Charter’s rights (or principles) that relate chiefly, directly and specifically (and not accessorially, indirectly or generally) to an individual’s economic and social position in the community, namely all rights contained in Title IV, Arts. 12 (trade unions), 15, 16, 25 and 26, as well as their derivatives. Within this category, cross-border and non-cross-border social rights will be distinguished.¹⁶

My second conceptual point concerns the division of social and economic rights into two categories: ‘cross-border social rights’ and ‘non-cross-border social rights’.¹⁷ **Cross-border social rights** are an integral part of the free movement rights and, therefore, are only available to those EU citizens who use their free movement rights by moving from one Member State to another. Having developed together with free movement of workers, cross-border social rights are a typical element of EU law. Their underpinning principle is that migrants must not lose their right to social security benefits or have the level of these benefits reduced because they have exercised the right to free movement.¹⁸ This principle is neither universal, nor absolute.¹⁹

Cross-border social rights fall under the EU law at the moment of discrimination on account of nationality.²⁰ It follows that a typical mechanism for guaranteeing cross-border

¹⁴ KATROUGALOS, G., O’CONNEL, P. Fundamental Social Rights. In: Mark Tushnet (ed.). *Routledge Handbook of Constitutional Law*. London and New York: Routledge, 2015, p. 375.

¹⁵ Art. 25; MAZÁK, J., JÁNOŠÍKOVÁ, M. Prienik Charty základných práv Európskej únie do vnútroštátneho práva na príklade Slovenskej republiky. *AUCI*. 2016, Vol. 62, No. 2, p. 22.

¹⁶ For the sake of simplification, ‘social and economic rights’ will sometimes be abbreviated to ‘social rights’.

¹⁷ GOUDAPPEL, F. *The Effects of EU Citizenship: Economic, Social and Political Rights in a Time of Constitutional Change*. Hague: Asser Press, 2010, p. 79.

¹⁸ C-515/14 *Commission v. Cyprus* [2016] EU:C:2016:30, para 34.

¹⁹ In a non-social-right case *Konstantinidis*, it was argued by AG Jacobs that, where the victim is an immigrant from another EU country, any infringement of human rights is a matter for EU law: his reason was that EU citizens would be less willing to move to another Member State if their human rights might be infringed there. The Court did not, however, accept this argument (see Trevor C. Hartley (n 22) 156). There is no reason for it to accept the argument in social-right issues.

²⁰ GOUDAPPEL, F. *The Effects of EU Citizenship*. p. 79.

rights is the social security coordination system.²¹ But in no manner does the coordination system *affect ‘the material and formal differences between the social security systems of the various Member States’* and hence *‘it does not affect differences in persons’ rights either’*.²² Indeed, *‘it is for each Member State to determine the conditions governing the right or duty to be insured with a social security scheme, the level of contributions payable by insured persons and the income to be taken into account when calculating social security contributions’*.²³

Contrary to the social rights discussed above, **non-cross-border social rights** do not contain the element of migration. Their aim is not to remove the constraints on free movement, but rather to regulate the welfare policies of the Member States. It goes without saying that non-cross-border social rights are relatively rare. This is especially the case in the sphere of social security and social assistance, where so far no harmonisation on the EU level has occurred.²⁴ The EU is much more courageous with respect to, for instance, improving working conditions or various forms of discrimination.²⁵ In such areas, every EU citizen is entitled to invoke their social rights within the limits of the respective secondary EU legislation and accordingly entitled to invoke the Charter, without the need to leave the country of origin.

How is this distinction relevant for the application of the Charter in social rights adjudication? To begin with, the cross-border rights are – *ex definitione* – exercised by EU immigrants to the Czech Republic (prior border-crossing necessary). A foreign national then claims their EU rights before the Czech court. However, what she is effectively relying on is her right not to be discriminated based on nationality, which follows from the Treaties.²⁶ Hence, it is better to think of the cross-border social rights as mere social extensions of the freedom of movement. My research will be focused on the impact of the Charter on the social rights purely in internal situations.

Furthermore, the usage of non-cross-border social rights is comparatively more dependent on invoked secondary legislation. The reason is that – unlike cross-border rights, which (a) were already covered in the Treaties and must be applied in compliance with respective provisions²⁷ and which (b) will usually be activated in cases of discrimination

²¹ The prime example is Regulation on the coordination of social security systems, which serves to determine under which country's system an EU citizen should be secured where two or more countries are involved (Regulation (EC) No 883/2004 of the European Parliament and of the Council, on the coordination of social security systems [2004] OJ L 166).

²² PEETERS, B., VERSCHUEREN, H. The Impact of European Union Law on the Interaction of Members States' Sovereign Powers in the Policy Fields of Social Protection and Personal Income Tax Benefits. *EC Tax Review*. 2016, Vol. 25, No. 5-6, p. 264.

²³ *Ibid.*

²⁴ PEETERS, B., VERSCHUEREN, H. *The Impact of European Union Law on the Interaction of Members States' Sovereign Powers in the Policy Fields of Social Protection and Personal Income Tax Benefits*. p. 263.

²⁵ See the *Working Time Directive* or the *Equality Framework Directive*, where Art. 2 states explicitly that there shall be no direct or indirect discrimination whatsoever, regardless of the cross-border element.

²⁶ For an example of such a claim, see the case known as *Krakovský koncipient*, Czech Constitutional Court's judgment of 25 October 2016, no. II. ÚS 443/16.

²⁷ See for example Art. 15 (2), which deals with the three freedoms guaranteed by Articles 26, 45, 49 and 56 of the TFEU, or Art. 21 (2), which corresponds to the Art. 18 (1) TFEU.

of foreign EU nationals²⁸ – the protection of non-cross-border (social) rights relies on secondary EU legislation. Without it, they are not located inside the scope of EU law and the Charter may not be applied.²⁹

In which circumstances can implementation and application of secondary legislation in Member States affect the non-cross-border social rights? Firstly, and most obviously, there are EU social policies (social security, social assistance, labour law etc.) touched upon above. The application of the *Transfer of Undertaking Directive* may affect social rights of workers to collective bargaining, as well as entrepreneurs' freedom to conduct business.³⁰ Application of the *Working Time Directive* may infringe the right of workers to fair working conditions.³¹

However, sometimes social rights are affected only indirectly. In the area of tax legislation, Peeters and Verschueren point out that some groups of taxpayers enjoy advantages with a clear social goal. Sometimes these tax advantages may result in negative taxes.³² In such cases, Member States conduct their social policy partly through tax measures.³³ As a result, Member States applying EU tax legislation (and thus acting within the scope of EU law) need to comply with social rights recognised by the Charter.

In this introductory part, I have given reasons for selecting the effects of the Charter's social rights in the Czech case law for my analysis (the contrast between our potentially and simultaneously high and low expectations of the Charter's effects), presented my approach to the analysis (empirical approach) and narrowed my focus down to what I described as non-cross-border social rights.

I will now continue with a tentative summary of the limitations posed on the Charter's application by the EU constitutional doctrines, as well as by itself (**part II**). Only with the aforementioned conceptual and contextual remarks in mind, the practice of application of the Charter in the Czech Republic can be analysed in an informed manner (**part III**).

II. THE CHARTER AS A "SELF-RESTRAINING ORDER"

We may say that just as it reportedly took God six days to create the Earth and everything upon it, it took the EU six decades to develop its own catalogue of fundamental rights and freedoms. According to T. C. Hartley, the EU concept of human rights was a result of disputes between the European Court of Justice ("the ECJ") and *Bundesverfassungsgericht* ("VerfG")³⁴ over the compliance of EU legislation with the German Constitution.³⁵ In order

²⁸ GOUDAPPEL, F. *The Effects of EU Citizenship*. p. 79.

²⁹ See Art. 51 (1) Charter.

³⁰ C-426/11 *Mark Alemo-Herron and others v Parkwood Leisure Ltd* [2013].

³¹ C-14/04 *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* [2005] EU:C:2005:728.

³² PEETERS, B., VERSCHUEREN, H. *The Impact of European Union Law on the Interaction of Members States' Sovereign Powers in the Policy Fields of Social Protection and Personal Income Tax Benefits*. p. 263.

³³ *Ibid.*

³⁴ German Federal Constitutional Court.

³⁵ ANDREEVSKA, E. *The Applicability of the EU Charter of Fundamental Rights: National Measures*. p. 344.

to head off a possible “rebellion”, the ECJ ruled in *Stauder*³⁶ that fundamental rights form an integral part of the general principles of EU law. For many years, the general principles served as the exclusive guiding norms to ensure the protection of fundamental rights within the EU. In the end, even the BVerfG became satisfied and famously proclaimed that it would no longer review EU measures to ensure that they did not infringe human rights, because the ECJ can be trusted to do the same (*Wünsche Handelsgesellschaft*).³⁷

However, the absence of an explicit, written catalogue of fundamental rights, binding on the European Community, and easily accessible to citizens, remained an issue of concern.³⁸ After the proposal to accede the Convention was ruled out by the ECJ, the decision was made to draft a new document. As a result, the Charter of Fundamental Rights of the EU was created and later incorporated into the Treaties with Art. 6 (1) of the TEU to be the primary source of EU law.³⁹ Nevertheless, its actual legal effects and, most importantly for my analysis, legal effects of its social rights provisions remained to be clarified.

At first it appeared that the EU concept of human rights was not directly binding on the Member States.⁴⁰ However, in the course of time,⁴¹ it started to be accepted that not only the measures of EU institutions, but also the measures of Member States acting as agents of EU law must observe the human rights respected by EU law.⁴² Firstly, and most obviously, Member States are indirectly bound by the EU concept of human rights whenever that concept is used to interpret provisions in the Treaties or EU legislation. In *Wachauf*,⁴³ the ECJ clarified that national authorities, when implementing EU measures (such as passing legislation), must comply with the EU fundamental rights. In *Lindqvist*⁴⁴ we learn that the EU fundamental rights bind Member States not only when they adopt administrative or legislative acts in order to implement EU rules, but – more generally – when they interpret or apply any domestic legal provision that falls within the scope of EU law. It was not until the *ERT* case⁴⁵ that the Court accepted its jurisdiction to review a national measure derogating from a fundamental freedom. Specifically, the Court concluded that fundamental rights obligations are binding on member states not just when they implement EU law, but every time domestic norms *do fall within the scope of Community law*. According to Fontanelli, “*this wording foreshadows a shift from a subjective*

³⁶ Case C-29/69 *Erich Stauder v City of Ulm – Sozialamt* [1969] EU:C:1969:57, para 13.

³⁷ Case BVerfG 73, 339 *Wünsche Handelsgesellschaft* (or *Solange II*) [1986].

³⁸ ANDREEVSKA, E. *The Applicability of the EU Charter of Fundamental Rights: National Measures*. p. 355.

³⁹ EUROPEAN PARLIAMENT. Social security cover in other EU Member States. In: *European Parliament* [online]. 2016 [2017-04-13]. Available at: <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.10.4.html>.

⁴⁰ HARTLEY, T. C. *The Foundations of European Union Law*. Oxford: OUP, 2010, p. 155.

⁴¹ This digest is based on X. Groussot’s excellent summarising work, see GROUSSOT, X., PECH, L., PETURSSON, G. T. The Scope of Application of Fundamental Rights on Member States’ Action: In Search of Certainty in EU Adjudication. In: U. Neergaard – R. Nielsen (eds.). *European Legal Method*. Copenhagen: DJØF Publishing, 2012.

⁴² *Ibid.*

⁴³ Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] EU:C:1989:321.

⁴⁴ Case C-101/01 *Bodil Lindqvist* [2003] EU:C:2003:596.

⁴⁵ Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] EU:C:1991:254.

to an objective test: the benchmark of reference is not the aim of the national measure under review (that is, whether it is designed to implement EU law or not), but the area covered by the aggregate scope of EU legislation (that is, whether the measure falls therein).⁴⁶

As P. Eeckhout explains: “the discretion that states enjoy to choose the preferred means of implementation cannot include the power to violate fundamental rights.”⁴⁷ However, this would lead us to conclude that “member states must respect the general principles of Union law, including the norms on the protection of fundamental rights, whenever their acts concern or affect, even potentially, a matter touched upon by EU law.”⁴⁸ According to F. Fontanelli, such test would probably determine the application of the Charter to a disproportionate majority of state measures.

A minimal safeguard against the inadvertent encroachment of Union law on state measures was set in *Annibaldi*,⁴⁹ where the Court found that the national expropriation law concerned *was not* intended to implement a provision of Community law and it pursued objectives other than those covered by the common agricultural policy and, therefore, given the absence of specific Community rules on expropriation, applies to a situation which *does not* fall within the scope of Community law.

The CJEU continued in this vein both in its pre-Lisbon and in most of its post-Lisbon case law.⁵⁰ In *Iida* the Court examined “whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it.”⁵¹

This means that even if we find *some* link between the national and EU measure, there are other criteria (intention, objective, specific EU rules) which need to be met for EU fundamental rights to be applied. As noted earlier, this mechanism aims to keep EU law in its intended boundaries. As most of the social policies were retained by the Member States, social rights have had a harder time breaking through.

After the upheaval caused by *Åkerberg Fransson*⁵² and the reaction thereon by BVerfG,⁵³ the Court returned to the more restrictive doctrine used in *Annibaldi*. In *Siragusa*, the

⁴⁶ FONTANELLI, F. *National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu?* p. 235.

⁴⁷ EECKHOUT, P. The EU Charter of Fundamental Rights and the Federal Question. *Common Market Law Review*. 2002, Vol. 39, No. 945, p. 977. In addition to the *Wachauf* line of cases and the *ERT* line of cases, AG Maduro proposed a third category, where the Court may carry out the review of apparently serious and persistent breaches of fundamental rights, even though the respective State measure did not fall inside the scope of EU law (see C-380/05 *Centro Europa 7* [2008] ECR I-349).

⁴⁸ FONTANELLI, F. *National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu?* p. 236.

⁴⁹ C-309/96 *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] EU:C:1997:631.

⁵⁰ Such as cases C-333/09 *Noël v SCP Brouard Daude* 2009 ECR I-205 or C-535/08 *Pignataro* [2009] ECR I-50.

⁵¹ Case C-40/11 *Yoshikazu Iida v. Stadt Ulm* [2012] EU:C:2012:691, para 79.

⁵² Here the Court equates the scope of EU law with the implementation of EU law. ‘The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.’ C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] 2 CMLR 46, para 21.

⁵³ Judgment BVerfGE 133, 277 [2013] para 91.

Court ruled out the application of the Charter, because the respective EU act did not impose on MS any obligations.⁵⁴

The chain of cases mentioned above, from *Wachauf* to *Siragusa*, relates – in one way or another – to the question of the scope of EU law. The question was, is and for some time will be a matter of dispute. And though it cannot be resolved here, I need to count **Art. 51 (1)** as an important inherent (de)limitation on the Charter's application. The second very important provision is **Art. 53 (level of protection clause)**, which was subject to certain conceptual changes. At first, it was given a symbolic political meaning,⁵⁵ then, in post-Lisbon Europe, it was called the “*non-regression clause*”⁵⁶ or “*standstill clause*.”⁵⁷ According to Groussot and Olsson, the CJEU gave it a meaning which goes further; they speak of a “*pluralist-*”, “*discursive-*” or a “*co-existence clause*”, or more precisely, as “*a limited or conditioned best protection clause*.”⁵⁸ After *Melloni*,⁵⁹ some authors speak of “*more of a maximal rather than minimal standard of protection*,”⁶⁰ of a transformation from a minimal protection clause into a conflict of norms rule in the area of fundamental rights.⁶¹

According to J. B. Liisberg, Art. 53 exists to clarify that the Charter does not substitute the national constitutional standards of fundamental rights protection, nor does it jeopardise their application when they provide for higher protection.⁶² Or as AG Bot argued extensively in *Melloni*:

“[t]he drafters of the Charter could not have been unaware of the existence of a plurality of sources of protection for fundamental rights binding the Member States [...] From that point of view, Article 53 of the Charter supplements the principles stated in Articles 51 and 52 thereof, by pointing out that, in a system in which the pluralism of sources of protection of fundamental rights prevails, the Charter is not intended to become the exclusive instrument for protecting those rights and, also, that it cannot have the effect, on its own, of adversely affecting or reducing the level of protection resulting from those different sources in their respective fields of application.”⁶³

⁵⁴ Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* [2014] EU:C:2014:126, para 25, see also C-265/13 *Emiliano Torralbo Marcos v Korota SA and Fondo de Garantía Salarial* [2014] EU:C:2014:187, para 40. For the analysis of both judgments, see EXNER, J. Aplikace Listiny základních práv EU na akty členských států. Jakým směrem kráčí Soudní dvůr? In: *Právní prostor* [online]. 18. 4. 2014 [2017-04-18]. Available at: <<http://www.pravniprostor.cz/clanky/mezinarodni-a-evropske-pravo/aplikace-listiny-zakladnich-prav-eu-na-akty-clenskych-statu-jakym-smerem-kraci-soudni-dvur>>.

⁵⁵ LIISBERG, J. B. Does The EU Charter Of Fundamental Rights Threaten The Supremacy Of Community Law? *Common Market Law Review*. 2001, Vol. 38, p. 1171.

⁵⁶ GROUSSOT, X., OLSSON, I. Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgments in Åkerberg and Melloni. *Lund Student EU Law Review*. 2013, Vol II.

⁵⁷ LENAERTS, K., de SMIJTER, E. A “Bill of Rights” for the European Union. *Common Market Law Review*. 2011, Vol. 38, p. 273. Although much of its significance was disputed by both Liisberg and Van de Heyning (see Xavier Groussot and Ingrid Olsson above).

⁵⁸ GROUSSOT, X., OLSSON, I. *Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgments in Åkerberg and Melloni*. p. 25–26.

⁵⁹ Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107.

⁶⁰ BENKO, R. Vplyv Charty základných práv EÚ na formovanie ústanoprávnej štruktúry EÚ na pozadí rozhodnutia Súdneho dvora vo věci Melloni. *Právnik*. 2015, Vol. 154, p. 667.

⁶¹ SARMIENTO, D. Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe. *Common Market Law Review*. 2013, Vol. 50, p. 1288.

⁶² LIISBERG, J. B. *Does The EU Charter Of Fundamental Rights Threaten The Supremacy Of Community Law?* p. 1193.

⁶³ Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107, para 131.

A lot of attention has been drawn by **Art. 52 (3)**, which stipulates that the scope of the Charter rights corresponding to the Convention rights shall be the same as those laid down by the said Convention. This provision does not apply to rights that find no counterpart in the Convention. In the case of most of the Charter's social rights and principles, the CJEU has the unfettered power to determine their meaning and scope.

Finally, the provision in **Art. 52 (5)** distinguishes between rights and principles. According to the Explanations it implies that

*“[p]rinciples may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities.”*⁶⁴

We may find a similar provision in the CFRE, prescribing that certain rights may be claimed only within the confines of the laws implementing these provisions.⁶⁵ However, while here the exact articles are enumerated and rigid limits of any implementation are established,⁶⁶ the Charter is very unclear on how to differentiate between the two categories and whether the existence of independently applicable subjective rights can be inferred in this context or not.⁶⁷

To illustrate the latter problem, let's take Art. 25 of the Charter and Art. 30 (1) of the CFRF – both guaranteeing respect for specific rights of the elderly and both contextualised as only indirectly applicable.⁶⁸ Should an act of the Parliament run contrary to “the essence and significance” of Art. 30 (1) of the CFRE, the Czech Constitutional Court would have to strike the legislation down upon the request of an applicant whose Art. 30 (1) right was violated. But what of the Art. 25 of the Charter, which does not determine an individual legal situation and which does not confer on individuals any other right than one considered in conjunction with implementing legislation?⁶⁹ If the authorities are called upon to transform the principle into a judicially cognisable reality while respecting its purposive nature as determined by the wording, then how can we tell when the authority crossed a line, or where the principle ends and the right begins?⁷⁰ More importantly, how can a Czech court tell when it is confronted with a case where one of the Charter's principles might have been violated and, should it err and dismiss the applicant with allegedly void claim, what is the reference for review of the court's decision? It follows for our purposes that at least some of the Charter's social rights cannot be expected to have any direct effect on the protection of rights in the Czech Republic by virtue of their operation.

⁶⁴ See Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), part dedicated to Art. 52 (5).

⁶⁵ See Art. 41 (1) CFRE.

⁶⁶ See Art. 4 (4) CFRE commanding that the essence and significance of limited (or rather defined) rights and freedoms always be preserved.

⁶⁷ MAZÁK, J., JÁNOŠÍKOVÁ, M. *Prienik Charty základných práv Európskej únie do vnútroštátneho práva na príklade Slovenskej republiky*. pp. 71–78.

⁶⁸ See Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), part dedicated to Art. 52 (3).

⁶⁹ Case C 176/12 *Association de médiation sociale v Union locale des syndicats* [2014] EU:C:2014:2 (Judgment), para 49, and EU:C:2013:491 (AG's opinion), para 50.

⁷⁰ The Czech Constitutional Court answers this question by employing the rationality test.

III. EFFECTS OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU ON THE JUDICIAL PROTECTION OF ECONOMIC AND SOCIAL RIGHTS IN THE CZECH REPUBLIC

Now that the complexities of the Charter's binding force have been introduced in the context of social rights, I can shift my attention to the effects the binding Charter has or has not had on the judicial protection of economic and social rights in the Czech Republic.

Grounds for some initial predictions can be found in the statistics collected by the European Union Agency for Fundamental Rights ("FRA"). To begin with, the organisation reports that the Charter is not an explicit and regular element in judicial review, whereas national human rights instruments are systematically included.⁷¹ Between 2011 and 2015, the Member States referred to the Charter in roughly 188 references for preliminary rulings ("RPRs").⁷² FRA found that in 2015 national courts continued to refer to the Charter without a reasoned argument about why it applies in the specific circumstances of the case.⁷³

In the Czech Republic, the reasoning is hardly a problem, because in the last several years, not once has the country mentioned the Charter when referring cases to the CJEU, along with Croatia, Cyprus, Denmark, Lithuania, Malta and Sweden.⁷⁴ The data is quite surprising, because out of 42 Czech RPRs since December 2009, only 1 mentioned the Charter. This is especially strange with reference to the SAC, which is known as the kind of court that frequently uses EU law.⁷⁵ V. Stehlík speaks about the SAC's "timidity" and "certain distaste" towards the interpretation and application of the substantive provisions of the Charter, resulting in their "merely marginal application in its case law."⁷⁶

These findings are hardly conclusive, *inter alia* because they focused on RPRs while omitting the judgments and decisions where the courts resolved to use or not to use the Charter without the need to consult the CJEU. Nonetheless, they certainly do not lead one to expect considerable effects of the Charter on the application of social rights in the Czech Republic. Hence, the central question of this part is – quite simply – whether the Charter brought anything new into the area of protection of (non-cross-border) social rights in the Czech constitutional system. It can be transferred for research purposes into the hypotheses as follow:

⁷¹ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS. *Fundamental Rights Report 2016*. Luxembourg: Publications Office of the European Union, 2016, p. 52.

⁷² 27 in 2011, 41 in 2012, 41 in 2013, 43 in 2014 and 36 in 2015. See the Report on the Application of the EU Charter of Fundamental Rights (years 2011, 2012, 2013, 2014, 2015).

⁷³ European Union Agency for Fundamental Rights. *Fundamental Rights Report 2016*, p. 52.

⁷⁴ European Union Agency for Fundamental Rights (n 71) 41. This is not true anymore, because a few days after the publication of the report, one case was brought. It was an asylum case and the reference by the Czech Supreme Administrative Court concerned Art. 18 Charter.

⁷⁵ It also submitted one half of all of the Czech RPRs. The Supreme Court added 9, lower courts another 12, while the Constitutional Court retains 0.

⁷⁶ STEHLÍK, V. *Unijní právo před českými soudy*. Prague: Leges, 2014, pp. 71–77. Note that J. Mazák and M. Jánosíková reached the same conclusion when assessing the same topic in Slovakia, which obtained nationhood in 1993 with the same bill of rights. In particular, they assert that both the Constitutional Court (Ústavný súd) and Supreme Court (Najvyšší súd) seem either to consider the Charter to be 'a redundant legal instrument', or reject its application altogether – MAZÁK, J., JÁNOŠÍKOVÁ, M. *Prienik Charty základných práv Európskej únie do vnútroštátneho práva na príklade Slovenskej republiky*. pp. 15.

Null hypothesis (H0): The scope of protection (*der Schutzbereich*) of the social rights as guaranteed by the Czech Charter of Fundamental Rights and Freedoms and afforded by Czech courts prior to 1 December 2009 **has not changed** with the introduction of the Charter into EU primary law.

Alternative hypothesis (H1): The scope of protection (*der Schutzbereich*) of the social rights as guaranteed by the Czech Charter of Fundamental Rights and Freedoms and afforded by Czech courts prior to 1 December 2009 **has changed** with the introduction of the Charter into EU primary law.

H0 will be rejected if the analysed case law does not support it. In this case, the **H1** is accepted in its place. If the data are consistent with **H0**, then **H0** is not rejected (i. e. it is accepted). Rejection or acceptance of one of the hypotheses amounts to the assertion that the scope of protection of the social rights has or has not changed. Note that the conclusion will not be ultimate due to a relatively short period of time (from 2009 to 2017), conditioning by types of action brought to the courts and, last but not least, the ever changing nature of law, society and judicial decision-making. It is reasonable to presume, however, that the analysed case law will be indicative of either **H0** or **H1**.

The following 4 factors can indicate either changing or unchanged intensity of the protection:

increase in the number of protected individuals – e.g. the right to higher protection of health at work is awarded not only to women, children and physically disabled (Art. 29 (1) of the CFRF), but also to the elderly;

increase in the number of protected interests – e.g. citizens enjoy the right to adequate material security not only in old age, during periods of work incapacity and in the case of the loss of their provider (Art. 30(1) of the CFRF), but also in case of the loss of their job as a repercussion of the state's irresponsible policy;

increase in content of a right – e.g. employees are entitled remuneration for their work, which is fair (Art. 28 of the CFRF) both in national and European comparison;

decrease in the scope of limitation clauses – e.g. the activities of trade unions cannot be limited by law in order to protect public order anymore.⁷⁷

When selecting the cases, I had a limited number of options. I could have (a) relied on the secondary sources as a means to quickly identify the cases which had higher impact in the area of social rights than others. Such method would be hardly comprehensive and my contribution to our legal knowledge very insignificant. On the other hand, I could have (b) opened all high court final judgments and look for any mention of social rights. Such method would be very comprehensive, but also incredibly time-consuming, hardly inviting a careful reading of each potentially relevant judgment. I could have also (c) searched for cases that were tagged in databases as related to social and economic policies. While

⁷⁷ Note that due to Art. 53 Charter (level of protection clause) I only considered an increase and not a decrease in the first three factors and, reversely, only a decrease in the fourth factor. Because while the CJEU did not hesitate to support the principle of primacy to the detriment of national constitutional rights and freedoms (see *Melloni*), it is hardly imaginable that the Court would hinder national protection because of less-protective wording of the Charter. As noted above, Art. 53 Charter is actually interpreted as not only the 'minimal standard clause', but even as the 'best protection clause'.

it may be true that social policy cases may be expected to contain claims of social and economic rights guaranteed by the Charter (e.g. a nurse complaining about the violation of working time rules) not unlike to economic policy cases (e.g. a person complaining about a new tax policy that violates her social rights), it definitely does not go the other way around; not every change in the protection of social and economic rights needs to occur in the area of social and economic policies (see a case below where a new rule concerning the qualification of medical personnel infringed applicant's freedom to choose an occupation).

In the end, I decided to (d) rely on the conventional method of full-text searching in court databases. I chose the name of the most important legal document as the best keyword. It goes without saying that whenever a judge applies the Charter, its name has to appear in one of its modifications in the text of the judgment. I was looking for Czech keywords equivalent to 'the Charter' ('Listina'), 'the Charter of Fundamental Rights of the European Union' ('Listina základních práv Evropské Unie'), and 'the Charter of Fundamental rights of the EU' ('Listina základních práv EU'), as well as their declinations and combinations. If the output was too large, I further reduced the scope by removing obviously irrelevant subjects (criminal procedure, damages in civil law etc.) from the search.

I acknowledge the possibility that some cases might have escaped my attention. If so, they must have escaped the attention of other researchers, too, because I did not find any other examples in the relevant literature. As far as RPRs go, most of them are continuously tracked by the SAC on its website, which made my work a little easier.⁷⁸

Case law

After I defined social and economic rights, distinguished cross-border and non-cross-border social rights, endeavoured to explain the self-limiting features of the Charter, briefly summarised the practice of the Charter's application in the Czech Republic and introduced the means and ends of my research, I can finally dedicate the remaining pages to the effects of the Charter on the judicial protection of social and economic rights in the Czech Republic. I ask the reader to bear in mind that changes of social and economic *rights* in the Czech Republic need not be caused only by *rights* provided by the Charter, but also by its non-justiciable *principles*.

When researching the case law,⁷⁹ I first needed to separate social-right cases from the rest. Most of the judgments in which the Charter was applied, but were irrelevant for my paper, concerned the right to international protection (Art. 18) and the right to fair trial (Art. 47). The selection of social-right cases comprised mostly of entitlements to social security (Art. 34) and the freedom to conduct a business (Art. 16), while e.g. claims concerning the right to health care (Art. 35) or the right to conclude collective agreements (Art. 28) rarely occurred.

⁷⁸ The information can be found at: <http://www.nssoud.cz/Predbezne-otazky-podane-NSS/art/533?menu=254> and at <http://www.nssoud.cz/Predbezne-otazky-podane-ostatnimi-soudy/art/534?menu=255> (both in Czech).

⁷⁹ I conducted the research in early 2017.

In cases where the Charter-argument was raised, the courts repeatedly rejected its application, because the applicants allegedly failed to establish the link to EU law.

According to E. Andreevska there are 3 situations in which it is clear the Charter applies. First, when a Member State exercises legislative, judicial or administrative activity when fulfilling obligations under EU law. Then, when a Member State exercises discretion that is vested in it by virtue of EU law. And, finally, when national measures are linked to the distribution of EU funds under shared management.⁸⁰

I think this lucid typology may serve as a template for the analysis of Czech judicial practice. It is convenient to start with the last category, because – even though it is the smallest in the number of cases – it offers an interesting insight into the whole mechanism.

The case of *Blanka Soukupová v Ministerstvo zemědělství*⁸¹ involved a pensioner, who previously worked in agriculture. In May 2004, she reached the age at which she became entitled to an old-age pension, pursuant to Czech Law on pension insurance. In October 2006 she filed, with the State Agricultural Intervention Fund, an application for registration under the support scheme for early retirement from farming, which was initiated by an EU Regulation to support workers in early retirement from farming. Her application was refused on the ground that, at the time at which that application was made, Mrs Soukupová had reached the age entitling her to an old-age pension. ‘The age required for entitlement to a retirement pension’, however, was not something that the EU legislation intended, claimed Mrs Soukupová, when it referred to ‘normal retirement age’. Age required for entitlement to a retirement pension was, in fact, determined differently for men and women and it also varied for women according to the number of children they raised. Mrs Soukupová found this discriminatory based on sex.⁸² Uncertain how to interpret the EU Regulation, SAC submitted a RPR to the CJEU.

The Luxembourg Court found that Member States may, in fact, rely on the difference in treatment that the Directive authorises them to retain when defining retirement age in the field of social security. But this is not the case with the relevant *Regulation*.

‘The European Union legislature cannot be regarded, on the basis of that reference to a concept which has not been harmonised, as having empowered Member States, in the implementation of that regulation, to adopt measures which would infringe the general principles of European Union law and fundamental rights.’

[...] *‘Consequently, in implementing Regulation No 1257/1999, the Member States are required, pursuant to Article 51(1) of the Charter of Fundamental Rights of the European Union, to respect the principles of equal treatment and non-discrimination, enshrined in Articles 20, 21(1) and 23 of that charter’* (§ 26).

And so, in its final judgment, the SAC concluded that the condition of higher retirement age applicable to men must be applied equally to women – this is *‘the only interpretation*

⁸⁰ ANDREEVSKA, E. The Applicability of the EU Charter of Fundamental Rights: National Measures. *Challenges of the Knowledge Society*. 2015, No. 5.

⁸¹ *Blanka Soukupová v Ministerstvo zemědělství*, judgment of 12 April 2001, 8 As 8/2010 – 94.

⁸² In technical legal terms, the case involved her right not to be discriminated (Arts. 20, 21 and 23 of the Charter) rather than her social rights. I decided to include the case anyway because it directly informed the pension-claim of Mrs Soukupová. The next cases will concern the social and economic rights more narrowly.

of ‘the age required for entitlement to a retirement pension’, which is in compliance with EU law’ (§ 31).

The case of *Blanka Soukupová v Ministerstvo zemědělství* – besides containing almost ironic discrimination of women resulting from their societal support elsewhere⁸³ – is an example of application of the Charter because of the link to European (Agricultural) policy. Now the question remains, whether Mrs Soukupová would or would not enjoy the same protection under Czech constitutional law.

In its first decision,⁸⁴ prior to the RPR, the SAC reminded the applicant that legislation stipulating different retirement age for men and women with respect to number of raised children was previously found constitutional by the Constitutional Court.⁸⁵ The Czech system was additionally upheld by the ECtHR, who found that the discrimination is based on a legitimate aim.⁸⁶ The SAC then expressed certain doubts, whether the same discrimination is legitimate in the area of funding agricultural activities (or the termination thereof). We know, now, that the CJEU shared its concerns as it repeated the opinion of AG Jääskinen, who pointed out that the support for farmers was designed to ensure the viability of agricultural holdings, and not a social security benefit.⁸⁷ Now, this is interesting, because a social policy measure (providing a pension) is used to achieve a goal of the Common Agricultural Policy. Does it mean that the level of protection afforded to beneficiaries of social policies do not apply? Both the Court and the AG think so.⁸⁸

If we assume that the Constitutional Court accepted this interpretation of EU law, it would mean that Mrs Soukupová would not be able to successfully invoke her right to social benefits in the old age as her right is ensured through national social security system. However, could she successfully invoke her freedom to choose an occupation in conjunction with right to non-discrimination? The answer ultimately depends on the Court’s opinion of whether freedom to choose an occupation encompasses the right of applicant to terminate her occupation under the same (and not worse) conditions as everyone else. The Court did not decide such issue, so we may only speculate. Therefore, it cannot be said with certainty whether Mrs Soukupová would obtain equal protection before the Constitutional Court and whether the protection afforded to social rights was effectively intensified with this case.

A non-cross-border social right was at stake in *J. Z. v Ministerstvo práce a sociálních věcí*.⁸⁹ The applicant, Mr J. Z., complained that being a freelancer, his housing allowance is calculated less favourably than the housing allowance of workers under a contract of

⁸³ The separate retirement age for men and women has, in the end, always been meant as an affirmative action to acknowledge women’s role in family. To use the words used by the SAC, ‘the favouring became unfavourable’ (*‘zvýhodnění se stalo znevýhodněním’*).

⁸⁴ Judgment of 12 April 2001, 8 As 8/2010 – 94.

⁸⁵ Judgment of 16 October 2007, Pl. ÚS 53/04.

⁸⁶ *Augustin Andrle v Czech Republic* App no 6268/08 (ECHR, 17 February 2011), paras 31–32.

⁸⁷ C-401/11 *Blanka Soukupová v Ministerstvo Zemědělství* [2013] EU:C:2013:223 (Judgment), para 25, and EU:C:2012:658 (AG opinion), paras 32, 33, 47.

⁸⁸ C-401/11 *Blanka Soukupová v Ministerstvo Zemědělství* [2013] EU:C:2013:223 (Judgment), para 48, and EU:C:2012:658 (AG opinion), para 26.

⁸⁹ *J. Z. v Ministerstvo práce a sociálních věcí*, judgment of 11 August 2016, 5 Ads 181/2014, cf. a similar judgment of 27 September 2016, 1 Ads 94/2016.

employment, which he deemed contrary to the Constitution, the Charter and the European Social Charter.

In its negative judgment, the SAC pointed at Art. 51 (1) and Art. 6 (1) TEU. Conscious of the CJEU's case law, the SAC cited *Siragusa* and its requirement of sufficient link between national and EU law. While admitting that the matter in the present case concerned housing allowance, which falls under the scope of *Regulation on the coordination of social security systems*,⁹⁰ it nevertheless emphasised that the *Regulation* does not aim at stipulating the material requirements on provision of respective allowance and, therefore, to this extent the Member States do not implement the EU law.⁹¹

Similarly, there was no room for anti-discrimination legislation as freelancer-employee distinction does not fall under one of the forbidden grounds of discrimination. *‘However, even if the Charter (hypothetically) applied, its relevant provisions (Art. 21 in conjunction with Art. 34) would need to be interpreted (...) as not establishing the right to absolute equality in access to social benefits and looked upon in accordance with Art. 52 (5) Charter (i.e. taking into account the difference between rights and principles guaranteed by the Charter)...’*⁹² Having read this excerpt one would be excused to assert that about any invocation of Art. 21 (entitlement to social benefits) in conjunction with Art. 34 (right to equality) is destined to fail, because the contents of these articles are determined by legislators.

Even more illustrative is the case *M. B. v ČSSZ*.⁹³ It tells the story of a native-born German, who acquired Czechoslovakian citizenship in 1958 at 30 years old, but later reapplied for his German citizenship and stayed in Germany for the rest of his life. After obtaining Czechoslovakian citizenship, Mr M. B. was called up to perform military service, which he refused for religious reasons. He was accused of military crimes and imprisoned. After the Velvet Revolution, it was decided to compensate victims of the Communist regime, who were unjustly imprisoned. Pursuant to a law from 1992, pensioners, who worked in Czechoslovakia (such as M. B.), were entitled to bonuses to their pensions. However, when a decree by the Government was issued in 2004 to implement these provisions, it included the condition of Czech citizenship. After his application was denied, Mr M. B. filed a judicial protection claiming that he is a European citizen and as such, he is protected from discrimination based on nationality by Art. 21 Charter.

In *M. B. v ČSSZ*, the SAC rejected his complaint, because the Charter did not apply. It found that the issue of financial compensations for the victims of Communist regimes does not fall into the scope of EU law and the principle of non-discrimination cannot apply.⁹⁴ In addition, the Court examined whether the bonus can be seen as a social security benefit as its Czech name suggests. Despite the principle of extensive interpretation of the ‘rehabilitation acts’ (promoted by the Constitutional Court) in favour of the compensated

⁹⁰ Regulation (EC) No 883/2004 of the European Parliament and of the Council, on the coordination of social security systems [2004] OJ L 166.

⁹¹ Here the Court mentions the *Dano* case, where the CJEU clearly stated that the Charter did not apply, because when Member States put conditions on benefits and their extent, they are not implementing EU law.

⁹² See pages 8 and 9 of the judgment.

⁹³ *M. B. v ČSSZ*, judgment of 16 June 2010, 6 Ads 155/2009 – 42.

⁹⁴ Page 3 of the judgment.

victims, the SAC continued that the compensation cannot be interpreted as a social security benefit and, as a result, corresponding EU Regulations (and the Charter) do not apply.⁹⁵ Finally, the SAC pointed out that this conclusion is consistent with the case law of the ECtHR, which (unlike the UN Human Rights Committee) affirms that Czech restitutory legislation complies with the international requirements on non-discrimination based on nationality.

Although it includes the cross-border element, the case of *M. B. v ČSSZ* is an example of *non*-cross-border social rights, whose putative holder failed to establish the link between Czech and EU measure. Would Mr M. B.'s position be better if he relied on his cross-border rights and invoked the *Compensation to Crime Victims Directive*? After all, his request was rejected only because he asked for the compensation as a victim who is simultaneously a citizen of another Member State. Should he succeed, the link would be established and the Charter applicable. Note that neither CFRF, nor the Convention or the European Social Charter offer protection in such circumstances.

In a series of judgments in 2015, the SAC ruled out the applicability of Art. 16 Charter in the case of a refusal to give permission to operate gambling machines by the appellant company SYNOT TIP, a.s., because *Directive 2006/123/EC*, on services in the internal market, could not be (directly) applied.⁹⁶

In their article cited above, Peeters and Verschueren⁹⁷ argued that some groups of taxpayers enjoy advantages with a clear social goal. Sometimes these tax advantages may result in negative taxes and, consequently, Member States conduct their social policy partly through tax measures. Using an analogy, one could assert that giving or refusing to give administrative fee exception to certain individuals may represent indirect form of social policy. In *STOP černým skládkám, o. s. v Ministerstvo dopravy*, a group of environmental activists wanted to challenge the Ministry of Transport at court and asked to be exempted from court fee. After the lower court refused, they invoked their Art. 47 Charter right before the SAC. The SAC, however, ruled that a refusal to grant court fee exemption is not a matter governed by EU law and the Charter does not apply.

In *V. K. v Ministerstvo zdravotnictví*,⁹⁸ a legal question was brought before the SAC concerning the interpretation of an interim provision in *the Medical Profession Qualifications Act*. Since the bill was a reaction to the accession of the Czech Republic into the EU, the legislature included an interim provision stating, *inter alia*, that those, who received a certificate by the Czech Medical Chamber and exercised the medical profession in 5 out of the last 6 years, *must be considered qualified* for certain practices. The Chamber then decided that those, who wish to qualify under this provision, must present their certificates by 17 April 2004, i. e. 15 days after the law became binding. Ms. V. K., however, only received her certificate on 15 May 2004, one month after the deadline, and her request to recognise her qualification was denied by the Ministry of Health *ratione tempore*. She lodged a complaint which made its way to the Great Senate of the SAC (*Rozšířený senát NSS*).

⁹⁵ Page 4 of the judgment.

⁹⁶ See 6 As 285/2014-32, 24 February 2015, paras 40-41.

⁹⁷ Bruno Peeters and Herwig Verschueren (n 22) 263.

⁹⁸ Judgment of 1 April 2014, 3 Ads 37/2012.

The SAC found that the provision is indeed ambivalent and there are two possible interpretations thereof: the first one in favour of the applicant, supported by principles of legal certainty and *in dubio mitius*, and the second interpretation observing the purposes of the *Directive 53/16/EEC*⁹⁹ and other State obligations stemming from the EU law (principle of loyal cooperation in Art. 4 (3) TEU). The Court expressly admitted that interpretation not in favour of the applicant *infringes* her freedom to choose an occupation under Art. 15 Charter and Art. 26 CFRF.

‘Such argumentation would, nevertheless, only be in place provided that the respective legal regulation effectively negated or substantially limited the possibility to exercise one’s occupation in discriminatory or otherwise unacceptable manner. However, the analysed provisions merely legitimately tightened the conditions for acquiring specialised qualification and simultaneously stipulated interim period allowing fulfilment of tightened requirements. They cannot be considered, even if interpreted more strictly, in violation of respective human-right provisions. Further, the interpretation consistent with EU law protects relatively specific rights advanced by the Union, i. e. freedom of establishment and free movement of services in medicine.’¹⁰⁰

Even though the applicant asked for the certificate on 5 March 2004, just as the period of *vacatio legis* began, the SAC dismissed her case, because the certificate was not issued before the said deadline.

Here I think the reasoning of the Court is problematic, at the very least. Firstly, the topic clearly falls under the scope of EU law. In spite of that, the Court fails to take it into account. If the legal norm actually *‘infringes her freedom to choose an occupation under Art. 15 Charter and Art. 26 CFRF’*, it is clear that a proportionality test under Art. 52 (1) Charter must follow. And if not that, the Court is obliged to submit a request for preliminary reference to the CJEU. And if not that, the Court must explain why it proceeded differently. This is further supported by the SAC’s suggestion that the applicant may seek compensation from the side of the Czech Medical Chamber, which failed to issue her certificate in time. I think this implies that not only her freedom to choose an occupation, but the right to fair trial (Art. 47 Charter) might have been violated. In addition, it is not clear how the interpretation consistent with EU law protects EU freedoms in the present case.

In my opinion, the case of *V.K. v Ministerstvo zdravotnictví* concerned a Member State, which failed to meet its duty to respect the freedom to choose an occupation of individuals under Art. 15 (1) Charter, a non-cross-border social right, acting within the scope of EU law. In a way, it represented an opportunity to secure the fundamental right of an individual where the EU law triggers systemic changes of medical qualifications in Member States, i. e. by way of supervising limitations posed on this right. The Great Senate could have used the very straightforward interpretation *in dubio mitius* adopted in a similar case 2 years before.¹⁰¹ However, the SAC, on 1 April, did not embrace this opportunity and

⁹⁹ Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications.

¹⁰⁰ See para 73 of the judgment. As translated by the author.

¹⁰¹ Judgment of 25 July 2012, 3 Ads 8/2012.

made a decision ‘consistent with EU law’ and, yet, ‘infringing right guaranteed by the Charter’ without employing anything related to the proportionality test.

It is well-known that the Czech Constitutional Court is no less a fan of the primacy of EU law than its German counterpart.¹⁰² Absence of the Charter references in its case law, let alone the one related to socio-economic rights, comes as no surprise. If any room is given to the Charter, it is next to the Czech CFRF as a supportive argument.¹⁰³ The Charter’s principles – such as consumer protection – can also play their auxiliary role,¹⁰⁴ whereas in other instances their justiciability is rejected after invocation by an applicant.¹⁰⁵

It remains to be noted that I was not able to find any important reference to the Charter in the case law of the Czech Supreme Court. It comes as no surprise, because most of the matters the Court has to deal with (contracts, damages, insolvency, criminal procedure etc.), is not widely regulated by EU law.¹⁰⁶

IV. CONCLUSION

The incorporation of the Charter into the primary law of the EU leads one to expect intensified protection of fundamental rights in EU Member States. On the other hand, many scholars have been pointing to considerable legal limitations posed on the Charter’s application. In the first two sections I attempted to summarise the most important limitations stemming both from the Charter, as well as from the particularities of the Czech legal system and the judiciary. I chose social and economic rights as the group of rights with the largest potential for enhancement in the Czech Republic.

Part III showed that the constraint imposed by Art. 51 (1) of the Charter remains the biggest obstacle for the realisation of social and economic rights in the Czech Republic as the courts frequently ruled out the Charter’s applicability mostly because the State did not implement EU law.¹⁰⁷ On some occasions they did use the Charter, but only as a supportive argument without actual meaning for the decision.¹⁰⁸ Unfortunately, instances, in which a court does admit the Charter is applicable, but fails to legitimise an actual infringement of human rights, also occur.¹⁰⁹

Indeed, social and economic rights represent a relatively new generation of rights with a great potential for expansion, be it by virtue of increase in the number of protected individuals, protected interests, in contents of rights or even by virtue of decrease in the scope of limitation clauses. What my analysis uncovered, however, is that no matter how stronger the protection of social and economic rights is on the normative EU level, these

¹⁰² It has never submitted a single RPR to the CJEU.

¹⁰³ For instance, interest of a child is protected, in the first place, by the CFRE, then there is the Convention and last (and least?) is the Charter (judgment of 8 April 2015, I. ÚS 1775/14).

¹⁰⁴ Judgment of 25 October 2016, I. ÚS 3308/16.

¹⁰⁵ Judgment of 10 April 2014, III. ÚS 3725/13.

¹⁰⁶ In the few exceptions, the Court just retorts that the issue is clearly not covered by EU law (e. g. judgment of 9 December 2015, 22 Cdo 4884/2015).

¹⁰⁷ *J. Z. v Ministerstvo práce a sociálních věcí* (n 86) or *M. B. v ČSSZ* (n 90).

¹⁰⁸ Judgment of 8 April 2015, I. ÚS 1775/14, judgment of 25 October 2016, I. ÚS 3308/16.

¹⁰⁹ *V. K. v Ministerstvo zdravotnictví* (n 95).

changes are not reflected in the case law of Czech courts. The courts simply do not find a sufficient link between the Charter and national legislation that purportedly violated rights of individuals.

Because the case law of Czech courts does support my null hypothesis and – *vice versa* – does not offer any convincing reasons to reject it, I conclude that

the scope of protection (*der Schutzbereich*) of social rights as guaranteed by the Czech Charter of Fundamental Rights and Freedoms and afforded by Czech courts prior to 1 December 2009 **has not changed** with the introduction of the Charter into EU primary law.

Note that it does not mean that the scope has not changed theoretically.¹¹⁰ As I explained in introductory remarks, this analysis is aimed at showing how the law changed *as applied* by the courts, i. e. how it changed effectively. The truth is, this finding does not imply whether the inertia is to be attributed to the general character of the Charter's social and economic rights on the one hand, or to the legal culture in the Czech Republic on the other. The answer can be found only after comparing my conclusion with those of my colleagues in the other EU Member States.

¹¹⁰ For instance, jurisprudence may argue that if M.B. had indeed used a different line of argumentation, he might have won the case. Or, alternatively, that the Court should have found the EU law applicable (even though it was not summoned by the plaintiff) and used the Charter.