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Penetration of the Charter of Fundamental Rights of the European Union into the Constitutional Order of the Czech Republic – Basic Scenarios

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Summary: This paper deals with the question, whether, how and to what extent the Charter of Fundamental Rights of the EU could enter the scene of constitutional review before the Czech Constitutional Court. In connection to Czech Republic, this question must react on the special constitutional category – Czech constitutional order, which includes also international agreements on human rights which are binding for the Czech Republic. The paper analyses the question, whether EU Charter can be understood as such international commitment or not and what are the options of its application by the Czech Constitutional Court and also how we can define its relation to the constitutional order. Paper distinguishes 3 scenarios: 1) inclusion of the EU Charter into the constitutional order of the Czech Republic; 2) refusal of formal inclusion of the EU Charter into the constitutional order of the Czech Republic; and 3) understanding of the EU Charter as association of constitutional order, capable to be used within the constitutional order even without the formal inclusion into the set of Czech constitutional rules.

Keywords: EU Charter, constitutional order, constitutional review, Czech Republic.

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1. Introduction

Charter of the Fundamental Rights of the European Union (hereafter "EU Charter") represents one of the most important milestones in the development of EU law. Since 2000, when it was created, it has become one of the main themes of doctrinal discourses. Over the past almost 20 years, the academia and legal doctrine created an enormous amount of studies, texts, books and articles devoted to this document, dealing with the plethora of issues (e.g nature and content of the EU Charter; the impact of the EU Charter at the EU legal system as such; strengthening the democratic legitimacy and the rule of law in the EU; interpretation of so-called horizontal provisions = articles 51-54 of the EU Charter; the impact of the EU Charter within specific areas of protection of fundamental rights and the impact of the EU Charter in the framework of national practice etc.). The vast majority of these academic texts deals with horizontal topics, or they offer the comments on selected case law. Such general (of in other words constitutional) issues related to the EU Charter certainly deserve academic attention, especially given the fact that the EU Charter is to certain extend still an "unexplored territory".[1]

In the following text, we will address issues related to the penetration of the EU Charter into national practice and its implications for the system of protection of fundamental rights. More specifically, this text offers an insight into the question of how the position of the EU Charter can be defined and understood within the constitutional system of the Czech Republic. Our research is based on the claim of robust potential of the EU Charter to impact the national judicial practice. EU Charter brought the kind of new federal impetus[2] into the EU legal system in two layers. Firstly, it opened the discussions about more 'bounding' tendencies within the integration project[3] as it binds also the Member States

[1] For the overview of the most significant doctrinal contributions see HAMUĽÁK, O. Analysing the Fundamental Rights Messiah – Review Article on the Edited Book SVOBODOVÁ, M., SCHEU H. CH., GRINC, J. (eds.) *EU Charter of Fundamental Rights: 10 year in the practice - evaluation and prospective views*. In Czech yearbook of Public and Private International Law, 2020, vol. 11., pp. 515–519.

[2] Not immune from the critics. See DI FABIO, U. A European Charter: Towards a Constitution for the Union. *Columbia Journal of European Law*, 2001, vol. 7, pp. 159–172.

[3] EECKHOUT, P. The EU Charter of Fundamental Rights and the Federal Question. *Common Market Law Review*, 2002, vol. 39, pp. 945–994; KNOOK, A. The Court, the Charter, and the vertical division of powers in the European Union. *Common Market Law Review*, 2005, vol. 4l, pp. 367–398; HAMUĽÁK, O. *National Sovereignty in the European Union – View from the Czech Perspective*. Springer, 2016; SPAVENTA, E. Federalisation versus Centralisation: tensions in fundamental rights discourse in the EU. In CURRIE, S., DOUGAN, M. *50 years of the European Treaties: Looking backwards Thinking Forward*, Hart publishing, 2009, p. 343.

(article 51 para 1 of the EU Charter).[4] Thanks to this diagonal[5] binding force, it can be enforced against the Member states in infringement proceedings before the Court of Justice (articles 258-260 TFEU)[6] and secondly it widely penetrates into the national practice as the instrument of the human rights review before the judicial authorities of the Member States. The scope, limits and interpretation of particular EU Charter provisions must follow the unified rules and national bodies must take due account of the authority of the case law of the Court of Justice. Having two variables in a mind = 1st – decentralized applicability of the EU Charter and 2nd – general applicability of the EU law before all national law-enforcing authorities, we are facing the need to debate and research on the impact of the EU Charter on national constitutional law and activities of national constitutional courts. EU law establishes an overall obligation to apply/reflect the EU rules before all national courts in all of their procedural activities and does not distinguish between situations whether the application authority is part of system of general judiciary or whether it is a special constitutional court.[7] This notion was recently (albeit indirectly) approved by the CJEU in "hard" constitutional cases like Melloni[8] and Taricco[9]. Additionally, we must give a due respect to the principles limiting national procedural autonomy, namely the principle of effectiveness and equal treatment. According to these principles, entitlements under EU law must be protected to the same extent and with the same quality as similar entitlements under national law.[10] In addition, Members States must adhere to the principle of effective judicial protection under article 19 para. 1 TEU and principle of sincere cooperation (article 4 para. 3). As approved by the CJEU in its recent *ASJP* judgement, the Member States are „[...] obliged [...] to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law [... and] to establish a system of legal remedies

[4] See further HAMUĽÁK, O., MAZÁK J. The Charter of Fundamental Rights of the European Union vis-à-vis the Member States – Scope of its Application in the View of the CJEU. *Czech Yearbook of Public & Private International Law*, 2017, vol. 8, pp. 161–172.

[5] See further NAGY, C. I. The diagonality problem of EU rule of law and human rights: Proposal for an Incorporation à l'européenne. *German Law Journal*, 2020, vol. 21, no. 5, pp. 884–903.

[6] See further DE SCHUTTER, O. *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*. Open Society European Policy Institute, 2017.

[7] See BOBEK, M. Learning to talk: Preliminary rulings, the courts of the new Member States and the Court of Justice. *Common Market Law Review*, 2008, vol. 45, no. 6, pp. 1611–1643. See also KUSTRA-ROGATKA, A. The Kelsenian Model of Constitutional Review in Times of European Integration – Reconsidering the Basic Features. *International and Comparative Law Review*, 2019, vol. 19, no. 1, pp. 7–37.

[8] C-399/11 *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.

[9] C-105/14 *Taricco and Others*, ECLI:EU:C:2015:555.

[10] STEHLÍK, V. *Aplikace národních procesních předpisů v kontextu práva Evropské unie* [The Application of national procedural rules in the context of EU law], Prague: Leges. 2012.

and procedures ensuring effective judicial review in those fields."[11] This duty is understood as integral part of the rule of law protection within the EU and reflects the common values on which EU is founded. All of these arguments led us to conclusion of wide pertinence of EU Charter in proceedings before the national constitutional courts as the systemic part of law-enforcing system within the EU.

2. Preliminary note – International Human Rights Treaties as constitutional *lex specialis*

Before we can deal with the position of the EU Charter within the Czech constitutional law, it is necessary to explain evenly the specific question of the constitutional status of international treaties on human rights.

Until the so-called "Euro" amendment of the Constitution of the Czech Republic came into force in 2002[12], international human rights treaties enjoyed a special constitutional status. According to the then wording of article 10 of the Constitution, they took precedence over the ordinary law and the Constitutional Court (hereafter "CCC") held specific powers to assess the compatibility of Czech ordinary laws with these international documents. However, the "Euro" amendment in 2002 formally removed this double-track nature of human rights and other presidential international treaties and deprived the CCC of its privileged position by introducing a decentralised model of compliance. According to new wording of article 10 of the Constitution, all presidential international treaties "form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply." Thanks to this incorporative norm, the human rights treaties became applicable before the ordinary courts and it´s should be their role to review the compatibility of statutes with them. This novelty brought a big turn in approach to fulfilment of international human rights obligations in order to achieve faster and more efficient courts´ decisions.[13] However, Constitutional court in the widely discussed[14] decision Pl. ÚS 36/01

[11] See C-64/16 *Associação Sindical dos Juízes Portugueses*, ECLI: EU:C:2018:117, para 34.

[12] Constitutional act no. 395/2001 Coll.

[13] See BARTOŇ, M. Novela Ústavy č. 395/2001Sb. (tzv. euronovela Ústavy). *EMP*, 2002, vol. 9, no. 1/2, pp. 30–32.

[14] Critically see KÜHN, Z., KYSELA, J. Je Ústavou vždy to, co Ústavní soud řekne, že Ústava je? Časopis pro právní vědu a praxi, 2002, vol. 10, no. 3, pp. 199–2014; or FILIP, J. Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem, *Právní zpravodaj*, 2002, vol. 3, no. 11, P) pp. 12–15. In favour of CCC decision see MALENOVSKÝ, J. Euronovela Ústavy: „Ústavní inženýrství" ústavodárce nebo Ústavního soudu či obou? In KYSELA, J. (ed). *Deset let Ústavy České republiky – východiska, stav, perspektivy.* Prague: Eurolex Bohemia, 2003. pp. 173–189 nebo HOLLÄNDER, P. Dotváření Ústavy judikaturou Ústavního soudu.

("Bankruptcy Trustee" case) opposed the above-mentioned conceptual change and stated that the special status of international human rights treaties within the Czech legal system should be maintained. Within the framework of the obiter dictum, CCC created a construction according to which even after the "Euro" amendment to the Constitution there was no restriction in its powers, because international human rights treaties, despite the removal of explicit reference from the Constitution text, will continue to serve as a reference criterion for the review of constitutionality of ordinary laws as an immanent part of the constitutional order of the Czech Republic: "The constitutional basis of a general incorporative norm, and thereby the overcoming of the dualistic concept of the relationship between international and domestic law, can not be interpreted in terms of removing the reference point of ratified and promulgated international agreements on human rights and fundamental freedoms for the evaluation of domestic law by the CCC with derogative results. The scope of the constitutional order concept can not be interpreted only with regard to article 112 para. 1 of the Constitution, but must be interpreted in view of article 1 para. 2 of the Constitution and must include ratified and promulgated international agreements on human rights and fundamental freedoms. For these reasons article 95 para. 2 of the Constitution must be interpreted to the effect that a general court has an obligation to present to the CCC for interpretation a matter in which it concludes that a law which is to be used in resolving the matter is in conflict with a ratified and promulgated international agreement on human rights and fundamental freedoms."[15]

The CCC thus gave a broad interpretation of the concept of constitutional order. By this it overcame the existing opinion on the exclusivity and closed character of this constitutional notion.[16] Indirectly, CCC created the conditions for a later debate on the possibility of extending the constitutional order also by the text of EU Charter (or extension to EU law in general).[17] The relevance of this question is appropriate, in particular for the following reasons:

a) EU Charter could be understood as international treaty on human rights. Following the entry into force of the Lisbon Treaty in 2009, EU Charter has acquired the same legal status as the Treaties. Although EU Charter itself has not been directly adopted as an international treaty, there are several

In KYSELA, J. (ed). *Deset let Ústavy České republiky – východiska, stav, perspektivy.* Prague: Eurolex Bohemia, 2003, pp. 122–139.

[15] https://www.usoud.cz/en/decisions/2002-06-25-pl-us-36-01-bankruptcy-trustee

[16] MLSNA, P. Komentář čl. 10 Ústavy. In RYCHETSKÝ, P. a kol. *Ústava České republiky. Ústavní zákon o bezpečnosti České republiky. Komentář*. Prague: Wolters Kluwer, 2015, pp. 110–112.

[17] BOBEK, M., KÜHN, Z. What about that "Incoming Tide"? The Application of the EU Law in the Czech Republic. In LAZOWSKI, A. (Ed). *The Application of EU Law in the New Member States – Brave New World*. Hague: TMC Asser Press, 2010, pp. 325–356.

arguments in favour of conclusion, that materially it is an international treaty[18] as it is a result of agreement among the Member States negotiating and adopting the Lisbon Treaty.[19]

b) EU Charter forms the part of EU law, which enjoys the special status within the Czech legal (and constitutional) order formally but also materially. As for the former, we could state, that EU law is endowed with a certain exclusive, stronger status in comparison to other international rules binding the Czech Republic.[20] This view is based on the systemic argument, as the Constitution itself distinguishes the so-called integration treaties under Article 10a of the Constitution on the one hand and other "presidential" international treaties on the other (treaties under article 10 or 49 of the Constitution). In addition, it can be based on the fact of autonomous nature of EU law and its dominance in application, which are a basic prerequisite for the functioning of the EU legal system and which has been widely accepted by the CCC in its previous case-law.[21]

3. What about the EU Charter?

When seeking an answer to the question whether the EU Charter forms a part of the constitutional order of the Czech Republic or not, respectively, what role this document should play in the decision-making process of the CCC, there emerge several scenarios/variants of solutions, which I will introduce below. The key premise, or better said starting point for this evaluation is the question, how should EU Charter itself be comprehended from the perspective of Czech law and its developments? Do we tend to see it as an international document serving

[18] KÜHN, Z. Listina základních práv EU a český ústavní pořádek. In KLÍMA, K., JIRÁSEK, J. (eds.) *Pocta Jánu Gronskému*. Pilsen: Aleš Čeněk, 2008, pp. 112–120.

[19] See further KUSTRA-ROGATKA, A., HAMUĽÁK, O. Keeping the Safe Distance – Chapters from Randomized (Non) Application of the EU Charter of Fundamental Rights before Polish Constitutional Tribunal. *Baltic Journal of European Studies*, 2019, vol. 9, no. 4, pp. 72–107.

[20] MUCHA, J. The Presentation of Czech Experiences. In MAVČIČ, A. (ed). *The Position of Constitutional Courts Following Integration into the European Union.* Ljubljana: Ustavno sodišče Republike Slovenije, 2004, p. 166. Available at: http://www.us-rs.si/media/zbornik.pdf

[21] HAMUĽÁK, O. The Unbearable Lightness of Being Guardian of the Constitution (Revolt and Revolution Dilemma in the Approach of Czech Constitutional Court Vis-à-Vis EU and Supranational Legal Order). *European studies – The Review of European Law, Economics and* Politics. 2014, vol. 1, pp. 103–112. HAMUĽÁK, O. New Fighter in the Ring: The Relationship between European Union Law and Constitutional Law of Member States from the Perspective of the Czech Constitutional Court. *Journal of Eurasian Law*, 2011, vol. 3, no. 2, pp. 279–303. HAMUĽÁK, O. Double "Yes" to Lisbon Treaty – Double Yes to the Pooled Sovereignty Concept. Few Remarks on Two Decisions of the Czech Constitutional Court. *University of Warmia and Mazury Law Review*, 2010, vol. 2, no. 1, pp. 39–59.

to protect human rights, i.e. a new international human right agreement binding the Czech Republic? Or do we consider it to be ordinary source of EU law which is supposed to have the same status in our legal order as other EU law norms? Or we should prefer to approach the EU Charter as special legal source with original features and impact, distinguishing it from both previously mentioned options?

3.1. Charter as international human rights obligation – inclusion into the constitutional order

This scenario could be based on the assumption, that EU Charter certainly represents an international document on the protection of human rights?[22] Although Charter itself has not been directly adopted as an international treaty, it cannot be denied such status at least from a material point of view. This assumption is based on several arguments. Firstly, the Charter has been negotiated and signed as an international treaty (more precisely as part of an international treaty) in connection with the creation of the Treaty establishing a Constitution for Europe, and in the same form it was symbolically re-proclaimed on 12th December 2007. Secondly, the negotiation of the Lisbon Treaty implied also the negotiation of the Charter, as evidenced by the adoption of Protocol 30 and a number of declarations annexed to the Lisbon Treaty, which deal with the Charter.[23] Thirdly, the wording and the formulation of the reference in article 6 para. 1 TEU implies the above-mentioned shifts towards material understanding of the status of Charter. The formula used in 13 language versions of contemporary art. 6 para1 of the TEU introduces the legally binding force of Charter by using the phrase "same legal value as the Treaties"[24] The same legal value means not only placing the Charter

[22] The fact that the CFR has not been signed, promulgated and ratified as a separate document cannot, in my view, deny the contractual nature. The CFR is a fully-fledged part of the Lisbon Treaty system, which has undergone the negotiation, promulgation and ratification process. The form of the make a "commitment" out of the CFR was certainly not traditional. However, the result is a new, international human rights catalogue, which is binding for the Member States (and hence the Czech Republic).

[23] Declaration (no. 1) concerning the Charter of Fundamental Rights of the European Union; Declaration (no. 53) by the Czech Republic on the Charter of Fundamental Rights of the European Union; Declaration (no. 61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union; Declaration (no. 62) by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom.

[24] ES – valor jurídico; DA – juridiske værdi; DE – sind rechtlich gleichrangig; EL κύρος (validity but also prestige); EN – legal value; FR – valeur juridique; IT – valore giuridico; MT – valur legali; NL – juridische waarde; PT – valor jurídico; RO – valoare juridică; FI – oikeudellinen arvo; SV – rättsliga värde.

in a certain level within the pyramid of the sources of EU law (i.e. primary law), but also the same legal status with all its consequences, i.e. the understanding of the Charter as a (materially) binding international agreement.

Could its non-inclusion into the constitutional order be regarded as an inadmissible "restriction of the already achieved procedural level of protection of fundamental rights and freedoms," as argued by the CCC in the Bankruptcy Trustee case?

It can certainly be argued that the EU Charter was not a legally binding source before the adoption of the Lisbon Treaty and has never been (could not be) directly applied by the CCC and therefore not incorporating it into the framework of the constitutional order does not cause a reduction of the "procedural level of protection". This problem is closely related to the way how we understand the implications of the Bankruptcy Trustee decision itself. Does the argumentation of the CCC affect only the promulgated and ratified international treaties on human rights that had been binding for the Czech Republic before the Euro-amendment of the Constitution? Or is it an open category covering all other treaties on human rights concluded in the future? Arguments of the CCC, including the application of article 1 para. 2 of the Constitution suggests that this decision is not only a petrifying case, but it is also applicable pro futuro and thus also with possible impacts on the EU Charter. If we accept that, apart from being a source of EU law, the EU Charter also brings new international human rights obligations, we could justify its inclusion in the constitutional order of the Czech Republic. But such a conclusion opens a space for many doubts and brings the relevant risks. In the context of doctrinal debates, there prevails the opinion that the direct extension of the constitutional order by the EU Charter would not be appropriate.[25] The main reason is to maintain the autonomous nature of this Czech constitutional category.[26] If the EU Charter was incorporated into the constitutional order, this part of the constitutional order would be subject to the interpretation power of the Court of Justice of the EU. Apart from the distortion of the independent nature of the constitutional order and the possibility of significantly weakening the specific position of the constitutional justice,[27] this could also bring significant

[25] See in particular the discussion papers by Z. KÜHN, J. KOMÁREK, P. BŘÍZA, D. KOSAŘ and others on the blog Jiné právo (Another Law) dated 30 November 2007 entitled: Bude Listina základních práv EU součástí ústavního pořádku ČR? (Is the Charter of Fundamental Rights of the EU Going to be Part of the Constitutional Order of the Czech Republic?) and a rich discussion to it. Available at: http://jinepravo.blogspot.cz/2007/11/bude-listina-zkladnch-prv-eu-soust.html.

[26] See KÜHN, Z. Listina základních práv EU a český ústavní pořádek. In KLÍMA, K., JIRÁSEK, J. (eds.) *Pocta Jánu Gronskému.* Plzeň: Aleš Čeněk, 2008.

[27] In relation to this see also KOMÁREK, J. Why National Constitutional Courts Should Not Embrace EU Fundamental Rights. *Law Society and Economy Working Paper Series* WPS 23-2014 December 2014. Available at: https://www.lse.ac.uk/collections/law/wps/WPS2014-23_Komarek.pdf

practical complications, because where the EU Charter materially overlaps with the Czech Charter of Fundamental Rights and Freedoms, different views on the interpretation of a specific human right by the Court of Justice (interpreting the EU Charter) and the CCC (interpreting the Czech Charter) might occur. The incorporation of the EU Charter of Fundamental Rights into the constitutional order could also be considered contrary to the requirements of EU law. With respect to the concentrated form of constitutional control in the Czech Republic, the issue of contradiction between the Czech norms and the EU Charter (as a part of the constitutional order) would have to be obligatory submitted by the general courts to the CCC as a monopoly "watchdog" of contradictions between ordinary law and norms of constitutional order.[28] However, this would conflict the requirement for effective and urgent application of the EU law, which is one of the basic principles of EU law application.[29]

3.2. The EU Charter as an "ordinary" EU law – exclusion from the constitutional order

The second possible scenario is based on the looking for parallels between position of EU Charter and effects of EU law in general within the Czech legal system. Indeed, the CCC has paid considerable attention to the question of whether EU law can serve as a reference criterion for assessing the constitutionality of national laws, which is directly linked to the problem of the possible extension of the constitutional order by EU norms.[30]

From the outset, the CCC has taken a reserved stance on the existence of its power to assess the conflict between EU law and ordinary national law. As soon as in the decision no. Pl. ÚS 19/04,[31] it rejected its jurisdiction and left the resolution of possible conflicts between EU and national law to the ordinary courts. It reiterated its negative attitude even in other decisions. The decision in the matter of the so-called Drug Decree, Pl. ÚS 36/05[32] was a key

[28] Similarly, see the opinion of Z. Kühn in the discussion on its post on the *blog Jiné právo* (Another Law) dated 30 November 2007 entitled: Bude Listina základních práv EU součástí ústavního pořádku ČR? (Is the Charter of Fundamental Rights of the EU Going to be Part of the Constitutional Order of the Czech Republic?). Available at: http://jinepravo.blogspot.cz/2007/11/bude-listina-zkladnch-prv-eu-soust.html

[29] Judgment of the Court of Justice C-106/77 *Simmenthal*, ECLI:EU:C:1978:49; C-188/10 a C-189/10 *Melki a Abdeli*, ECLI:EU:C:2010:363.

[30] I comment on this issue more in detail, for example, here HAMUĽÁK, O. Flexibilita ústavního pořádku, právo Evropské unie a marginalia k Listině základních práv Evropské unie. In ML-SNA, P. Ústava ČR – vznik, vývoj a perspektivy. Prague: Leges, 2011, pp. 288–308.

[31] CCC decision Pl. ÚS 19/04 *Povaha tzv. zlatých akcií*, ECLI:CZ:US:2006: Pl.US.19.04.

[32] CCC decision Pl. ÚS 36/05 *Léková vyhláška*, ECLI:CZ:US:2007:Pl.US.36.05.1.

one.[33] In its decision, CCC responded negatively to the question of the possible use of EU law as a reference framework for the review of Czech laws. This view was based on separate functions of the constitutional and European judiciary. CCC does not perceive itself as a court called to deal with questions of conformity of national law with EU law. In the system of a decentralized European judiciary, this matter appertains to ordinary courts and the Court of Justice. CCC in its case law accepts the so-called Simmenthal principle[34] and stresses the obligation of general courts to resolve the conformity issues of national and Union norms separately without the inherence of the constitutional judiciary.[35]

By taking a negative approach to the issue of the possible extension of the mass of benchmarks of constitutionality by EU law, the CCC shows that it respects the triangular construction of the European judiciary consisting of the Court of Justice, general national courts and constitutional courts of the Member States, in which these parts have their specific tasks.[36]

Therefore, if we consider the EU Charter from a purely technical point of view as another ordinary part of EU law, we must conclude that this document does not form part of the constitutional order taking into account the binding case law of the CCC.

On the other hand, the CCC does not reject EU law completely and it notes that in interpreting the Czech constitutional order – formally used as a benchmark for the constitutionality review of ordinary laws – it will follow requirements of EU norms and take into account the case law of the Court of Justice. It does not understand EU law as a formal part of the constitutional order, however, on the other hand, in the words of Michal Bobek and Zdeněk Kühn, it treats it as a binding constitutional argument while assessing the constitutionality of ordinary national law.[37]

When coming to this conclusion, we may return to the question of the EU Charter. Even in that case it is not possible to rule out such an indirect effect in the form

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[33] The importance of the question of the possible incorporation of norms of EU law into the framework of the constitutional order is also underlined by the fact that when seeking the answer, the Judge-Rapporteur (Jiří Nykodým) even requested the expert opinion of the relevant departments (mainly the department of constitutional law) of Czech faculties of law.

[34] Judgment of the Court of Justice C-106/77 *Simmenthal*, ECLI:EU:C:1978:49.

[35] CCC, in addition to the aforementioned decisions, also repeats its rejection of its power to assess compliance between national law and European Union law in decisions II. ÚS 1217/08, ECLI:CZ:US:2008:2.US.1217.08.1 or Pl. ÚS 12/08, ECLI:CZ:US:2008:Pl.US.12.08.1.

[36] Similarly, see BOBEK, M. Learning to Talk: Preliminary Rulings, the Courts of the New Member States and Court of Justice. *Common Market Law Review*, 2008, vol. 45, no. 6, p. 1629.

[37] See BOBEK, M., KÜHN, Z. What about that "Incoming Tide"? The Application of the EU Law in the Czech Republic. In LAZOWSKI, A. (Ed). *The Application of EU Law in the New Member States – Brave New World*. Hague: TMC Asser Press, 2010.

of an interpretative model while interpreting the Czech law, including the norms of the constitutional order. It is indisputable that the EU Charter forms a part of EU law and that is why the national courts are obliged to take account of its content when interpreting national law. It is clear that the CCC itself has begun to use the EU Charter as an inspirational source or a certain supporting argument in its case law.[38] It thus confirms its "positive" relationship to the indirect effect of EU law norms, which plays a key role in its approach to EU law in general.[39] Such an indirect application of the EU Charter is twofold. Firstly, the EU Charter may be used as an additional supportive argument to conclude that certain national sources of law or action by public authorities does comply with the standards of constitutional order or not (in particular with the Charter of Fundamental Rights and Freedoms) – this is a quasi-indirect effect when the EU Charter (and reference to it) does not affect the outcome of decision-making of the CCC in substantive way. Secondly, there may be cases where the EU Charter will be used as an interpretative guide by the CCC in connection with interpretation of the Czech constitutional norms, i.e. as a source the existence of which will influence the outcome of the proceedings. This is the real indirect effect of the EU Charter when its existence and use by the CCC determines the outcome of the proceedings.

3.3. The EU Charter as a "special" EU law – association of constitutional order

Contrary to the above conclusion, however, another alternative approach can be considered in relation to the EU Charter. The question is whether the EU Charter cannot be understood by the CCC differently as a specific part of EU law which is not covered by the general approach to this legal system? Assuming that the EU Charter is a source that national courts shall use, in conjunction with the understanding of the CCC as an authority that (like all other law enforcement bodies) is obliged to apply EU law[40], there is space for the direct application of

[38] See for example cases: II.ÚS 164/15 *Zákaz konání shromáždění z důvodu zvláštní ochrany zájmu dětí*, ECLI:CZ:US:2015:2.US.164.15.1; III. ÚS 1956/13 *Právo podezřelého na nahlížení do policejního spisu a přiměřenost nařízení a provedení domovní prohlídky*, ECLI:CZ:US:2014:3.US.1956.13.1; Pl. ÚS 12/14 *K protiústavnosti výluky soudního přezkumu u pozastavení výplaty části dotace*, ECLI:CZ:US:2015:Pl.US.12.14.2. For further analyses see SVOBODOVÁ, M. Působnost Listiny základních práv EU v kontextu judikatury Ústavního Soudu ČR. *Acta Universitatis Carolinae – Iuridica*, 2018, vol. 64, no. 4, pp. 53–63.

[39] For details see HAMUĽÁK, O., KERIKMÄE, T. Indirect Effect of EU Law under Constitutional Scrutiny – the Overview of Approach of Czech Constitutional Court. *International and Comparative Law Review,* 2016, Vol. 16, No. 1, pp. 69–82.

[40] See BOBEK, M.: Learning to talk: Preliminary rulings, the courts of the new Member States and the Court of Justice. *Common Market Law Review*, 2008, vol. 45, no. 6, pp. 1611–1643. For

the EU Charter as a source of constitutional review of Czech norms or decisions of Czech public authorities. In such a case, EU Charter would no longer act merely as a "stand-by" interpretation guide, but it would become part of the benchmarks used in the constitutional review, thus in practice producing the same effects as the norms of the constitutional order of the Czech Republic even without the explicit inclusion of the EU Charter into this special constitutional framework. The simple proposal here is, that CCC should use the EU Charter if the case falls within the scope of EU law in a same way as norms of constitutional order, but without claiming the monopoly for the review (as in the case of using the norms of constitutional order) and degrading the roles of general courts. The CCC has already indicated this role of the EU Charter in some of its decisions[41] and lifted it into the practice of constitutional review. By following this scenario, we shall avoid the main risks connected with the inclusion of the EU Charter into constitutional order, concretely the risk of universal applicability of the EU Charter even outside the scope of article 51 para. 1 and deprivation of the autonomous character of the Czech constitutional order. Contrary to that risk, by using the EU Charter within the constitutional review not as a part of constitutional order, but as an associated source of protected rights, we will reach acceptable and euro-consistent results. Here the EU Charter should be used only when the case falls within the framework of "application" of EU law. Such a conclusion is also supported by the current approach of the CCC, which, in connection with the possible use of the EU Charter, carries out the test by article 51 para. 1. For example, in cases I. ÚS 1904/14[42] and II. ÚS 1135/14[43] it pointed out that the issue of expropriation of land for the purpose of transport construction does not fall within the scope of EU law and thus the issue is not covered by the EU Charter.[44]

special Czech insights see: SEHNÁLEK, D.; STEHLÍK, V. European "Judicial Monologue" of the Czech Constitutional Court – a Critical Review of its approach to the Preliminary Ruling Procedure. *International and Comparative Law Review*, 2019, vol. 19, no. 2, pp. 181–199.

41 See e.g. decisions III. ÚS 2782/14 *Střet letounu s ptákem*, ECLI:CZ:US:2014:3.US.2782.14.1; or Pl. ÚS 14/14 Ústavnost pětiprocentní uzavírací klauzule pro volby do Evropského parlamentu, ECLI:CZ:US:2015:Pl.US.14.14.1.

42 CCC decision I. ÚS 1904/14 *K otázce spravedlivé náhrady za vyvlastněný majetek*, ECLI:CZ:US:2015:1.US.1904.14.1.

43 CCC decision II. ÚS 1135/14 *Spravedlivá a přiměřená náhrada za majetek vyvlastněný ve veřejném zájmu*, ECLI:CZ:US:2015:2.US.1135.14.1.

44 Under the same limited regime, the Austrian Constitutional Court also incorporated the CFR into constitutional review in its debated decisions U 466/11-18 and U 1836/11-13 as of 14 March 2012. For commentary on the Judgement, see e.g. KLAUSHOFER, R. a PALMSTORFER, R. Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law, *European Public Law*, 2013, vol. 19, no. 1, pp. 1–11.

4. Conclusion

It is worth noting here that we are currently in a situation where the definitive answer to the question of the relationship (inclusion) of the EU Charter and the constitutional order of the Czech Republic does not exist yet. There is neither a clear final position of the CCC (similar to the one pronounced in the "Bankruptcy Trustee" case in connection with international treaties on human rights), nor settled case law offering some indirect signs of the approach of the CCC to the question of (non-)incorporation of the EU Charter into the constitutional order. However, increasing relevance of the EU Charter[45] makes it very likely that the catalogue of fundamental rights of the EU will not be left aside and it will be reflected in the work of the CCC in growing way. To sum up, the Charter ensures the unified application and unique interpretation of Union fundamental rights law but does not totally unify the level of human rights' protection within the Member States. The correct understanding of the notion of "implementation of EU law" according to article 51 para. 1 of the EU Charter and the systemic use of this formula in harmonised way, are the prerequisites for any further development and potential impact of the EU Charter on national (not only) constitutional human rights enforcement. On the other hand, because Member States (from procedural point of view) are free to apply their internal procedures and instruments for human rights review, we must count with the appearance of diversity and differences in approach of particular national authorities.[46] Differences have already appeared in the very understanding of article 51 para 1 and the extent of applicability of the Charter.[47] It is also clear that neither the EU Charter, nor the general norms of EU law require

[45] The increasing relevance of the CFR is pointed out by the increasing number of significant judgments of the Court of Justice based on this catalogue (case C-293/12 Digital Rights Ireland, ECLI:EU:C:2014:238; C-131/12 Google Spain, ECLI:EU:C:2014:317; C-236/09 Test-Achats, ECLI:EU:C:2011:100), as well as the increasing number of questions referred to the Court of Justice by national courts for interpretation of the CFR, see the Annual Report of the Commission on the application of the CFR (available at: http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm).

[46] See in particular BURGORGUE-LARSEN, L. (ed.): *The EU Charter of Fundamental Rights seized by the national judges*, Paris: Pedone, 2017. For some national reports see MAZÁK, J., JÁNOŠIKOVÁ, M. et al. *The Charter of Fundamental Rights of the European Union in Proceedings Before Courts of the Slovak Republic*. Košice: Pavol Jozef Šafárik University, 2016; HAMUĽÁK, O. Listina základních práv Evropské unie jako okolí ústavního pořádku České republiky. *Acta Iuridica Olomucensia*, 2015, vol. 10, no. 3, pp. 7–30 or SVOBODOVA, M. Působnost Listiny základních práv EU v kontextu judikatury Ústavního soudu ČR. *Acta Universitatis Carolinae –Iuridica*, 2018, vol. 64, no. 4, pp. 53–63.

[47] See e.g. FRA: *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*. European Union Agency for Fundamental Rights, 2018. Available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf

the protection/application of EU rules on human rights in the form of a special constitutional review. At the same time, they do not exclude such constitutional protection either (provided that it does not unnecessarily delay or complicate the effective enforcement of Union requirements).[48] Therefore, it is primarily up to the CCC itself in what way it will approach this issue. On the other hand, the EU Charter is one of the sources of EU law and all the characteristics of EU law apply to it, which must also be respected by the CCC (which, moreover, has confirmed this in its rich case law)[49] and is therefore not possible to ignore the EU Charter in its work. The approach of the CCC to the EU Charter appears to be positive. Already in the first Lisbon judgment, the CCC unequivocally admitted that the EU Charter could serve both as an interpretative guide and as an applicable source of individual rights.[50] Such a view of the EU Charter is being confirmed by the appearing case law of the CCC[51], which clearly shows that the EU Charter does not stand aside from its interest. Developing reflection and use of the EU Charter by the CCC has a potential to raise interesting constitutional issues. The most doctrinally attractive one, i.e. whether the EU Charter will be included into the constitutional order, as well as other international treaties on human rights, has not been (re)solved by the CCC yet. Personally, I do not consider the inclusion of the EU Charter into the constitutional order to be particularly suitable especially because of the risk of mixing interpretative authorities within one system (CJEU vs. CCC) At the same time, however, I do not see it as a problem when the CCC actively uses the EU Charter in the context of the constitutional review. In such a case, the EU Charter will be equated with the norms of constitutional order (the source of constitutional review and the reason for the derogation of the norms of ordinary law). Here, the EU Charter brings a change in the approach of the CCC to the issue of the general constitutional relevance of EU law. In general, the CCC unequivocally refuses to use the norms of EU law as a direct source of constitutional review, but on the contrary, it uses it widely as a source of euro-consistent interpretation of the norms of the constitutional order. This phenomenon, described elsewhere as a problem of quantitative resistance and qualitative revolution,[52] might be not only developed, by also to certain extent overcame by the active use of the EU Charter.

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[48] Generally, see C-188/10 a C-189/10 Melki a Abdeli, ECLI:EU:C:2010:363.

[49] For more details, see HAMUĽÁK, O. *Právo Evropské unie v judikatuře Ústavního soudu České republiky.* Praha: Leges, 2010. 256 p.

[50] See CCC decision Pl. ÚS 19/08 *Lisabonská smlouva I*, ECLI:CZ:US:2008:Pl.US.19.08.1.

[51] See SVOBODOVA, M. Působnost Listiny základních práv EU v kontextu judikatury Ústavního soudu ČR. *Acta Universitatis Carolinae –Iuridica*, 2018, vol. 64, no. 4, pp. 53–63.

[52] STEHLÍK, V., HAMUĽÁK, O., JIRÁSEK, J. BONČKOVÁ, H., PETR, M. *Unijní právo před českými soudy*. Praha: Leges, 2014, 304 p.

The presence of the EU Charter in the decision-making activities of the CCC irritates the scholars so that they repeat the Hamlet dilemma. Without an explicit reply from the CCC, we may endlessly ask whether or not the EU Charter should be included into the constitutional order. However, there remains the fact that the EU Charter simply exists! And it is finding its role in the case law of the CCC. It could confirm the constitutional norms (as "supporting argument"), it may shift their traditional interpretation (as matrix for "euro-consistent interpretation"), or supplements them (as "the source of constitutional review outside the constitutional order").

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