Is Charter of the Fundamental Rights of the EU Taking Social Rights Seriously?

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Summary: The paper discusses the issue of a new position of the social rights brought by the adoption of a legally binding Charter of Fundamental Rights of the EU. The author examines whether formal turnover and incorporation of social rights into a single catalogue means also a revolution in the level of protection of these rights (which are traditionally associated with a cautious approach by both the national states and the international community). Author answers this question with a certain degree of scepticism. He points to the significant limitations which the Charter connects with social rights – namely the incompleteness of the catalogue, references to national law, an understanding of social rights as the principle of limited justiciability, and finally he discusses the special impact of the Protocol (No. 30) on the application of the Charter of Fundamental rights of the European Union to Poland and the United Kingdom on the social rights.

Keywords: Charter of the Fundamental Rights of the EU, Chapter IV. Solidarity, Protection of Social Rights, Formal Revolution, Material Doubts.

1. Introduction

Granting the legally binding force to the Charter of Fundamental Rights of the European Union (Charter) via adoption of Treaty of Lisbon[1] brought significant changes within the EU legal system as whole. Thanks to the Charter, the project of European integration entered a new stage and got a new image.

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[1] The central provision is article 6 TEU which defines the three cornerstones of the protection of fundamental rights at the supranational level – Charter of fundamental rights of the EU, European Convention for the Protection of Human Rights and Fundamental Freedoms (potentially) and fundamental rights as general principles of law. These three pillars seems to provide Union within the most complex system of the promotion of fundamental rights which shall work as the one body of tools with three different heads – like Cerberus guarding the mythic underworld.

Breakthrough importance of adopting a legally binding catalogue of fundamental rights has several aspects:

- It can be viewed from the perspective of constitutional dogmatic where adoption of own internal catalogue of rights and freedoms completes the constitutional system of the Union. Next to the more or less established formal/procedural constitutional rules (relations of the Union and the Member States, the internal rules of separation of powers between a several Union institutions, quasi-federal rules on the application of Union law in the national practice, etc.) it brought clear material constitutional rules defining the relationship between individual and public authorities into the to the supranational constitutional system.[2]
- Moreover, this step can be evaluated from the perspective of some constitutional symbolism where the existence of the human rights catalogue serves as important legitimizing tool[3] vis-á-vis ever-expanding and deepening powers of the European Union or Member States acting on behalf of Union.[4]
- Finally, the legally binding Charter serves as an important revolutionary novelty in terms of theory and history of human rights. The Charter by its wide content revolutionizes the classic approach to human rights which used to be recognized by the separate documents in line with the theory of several human rights generations. The Charter abandons this traditional approach at least formally and recognizes civil and political rights as well as economic, social and cultural rights as part of one general human rights record.

Economic, social and cultural rights (hereinafter simply titled by the general term social rights) are traditionally assigned to the so-called second generation

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[2] Contours of material constitutionality of the European Union are defined primarily by the syss tem of protection of fundamental rights. The question of the role and place of fundamental rights within the European Communities and the European Union has undergone major developments during the history of integration (see ŠIŠKOVÁ, N. Actual Issues of the Creation of Constitutionalism in the Field of Human Rights at the EU Level and its Prospects. In ŠIŠKOVÁ, N. *The Process of Constitutionalisation of the EU and Related Issues*. Groningen: Europa Law Publishing, 2008, p. 7–13.) But it is non-disputable that only by adoption of the binding catalogue it reached the level of complexity and clarity.

[3] NEACSU E. D. The Draft of the EU Charter of Fundamental Rights: A Step in the Process of Legitimizing EU as a Political Entity, and Economic-Social Rights as Fundamental Human Rights. *Columbia Journal of European Law*, 2001, no.1, p. 141–146.

[4] Lenaerts and Cambien speak about increasing of the output democracy of the EU in this ree gards. Charter legitimizes EU with the same value as increased role of principle of representation and parliamentarism in the EU (the input democracy). See LENAERTS, K.; CAMBIEN, N. The Democratic Legitimacy of the EU after the Treaty of Lisbon. In WOUTERS J. (eds.). *European Constitutionalism beyond Lisbon*. Antverps: Intersentia, 2009, p. 185–207.

of human rights. They are significantly different to the widely accepted first generation rights – the civil and political rights. The difference between the first and the second generation lies mainly in the fact that former sum of rights and freedoms is accepted as self-determined and self-executive in politically, legal and also economic sense. Later the category of human rights is deeply understood as conditional in all aspects. From the political point of view the social rights are dependent on the willingness of political representation for their active systemic provision, they require an active role of law and autonomously (so without the active role of politics) they can hardly lead to the protection of individuals. They are strictly conditional also in economic sense, because many social rights are subject to the economic power, possibilities and supplies of the States. Finally social rights are interlocked with the existence of precise implementing regulation following the general non-applicable constitutional or international norm. Only existence of these ordinary laws which concretize the general norms makes the social rights living legal instruments. Different character and social rights is connected also with some formal diversity, both at the level of classical international law and constitutional law of the states. In the first case, social rights tend to be catalogued in autonomous legal documents separately to the first generation rights[5]. In the second case, the comparison within the constitutional catalogues appear significant differences in access to social rights, where these rights are neglected in some constitutional text; or treated as secondary (conditional) rights; or rarely assimilated with the first generation rights.

Having in mind the abovementioned differentiated traditional approach to the social rights, we must accept that the Charter of Fundamental Rights of the EU by putting all rights together to the one document provides the distinctive formal turnover. Charter of Fundamental Rights of the EU is certainly an ambitious project, an effort to (at least documentary) universal approach to human rights. But the project which gathers in one place the rights of all generations and types, have a priori raised doubts and some resistance, especially on the part of Member States. Therefore the main question is, whether such a formal (documentary) turnover can also be associated with any change in a material view on the rights of the second generation and whether it – in terms of protection – equalized the social rights with the core part of the human rights system? In this paper I will deal with the question whether the Charter brought a systematic fundamental change in the approach to the social

[5] See example of European Social Charter next to the European Convention for the Protection of Human Rights and Fundamental Freedoms or International Covenant on Economic, Social and Cultural Rights next to the International Covenant on Civil and Political Rights.

rights (elevating the level of their protection) or whether inclusion of the social rights into the Charter has only some symbolic value. I must admit that I answer this question rather negatively and sceptically. The form of anchoring social rights in the Charter has some critical points that undermine the hypothesis of universal access to fundamental rights. My rather critical opinion is based on the following assumptions, which I see as main factors decreasing the quality of protection of social rights in the framework of the Charter of Fundamental Rights:

- The first reason is a certain incompleteness. Inclusion of social rights into the Charter was not precise enough and overlooked some categories of these rights as they are recognized in other international instruments. Moreover, there are some doubts about possible reduction in standards of protection of social rights in Europe identified in the European Social Charter and its revised form via application and interpretation of the Charter in future.
- Next problem is wide use of so called national conditionality clauses in connection with most of the rights contained in Title IV of the Charter which brings the question whether any supranational approach to these rights is even possible.
- An important factor is also potential schematic understanding of the Title IV of the Charter as chapter containing mainly (only) the principles within the meaning of art. 52 para. 5, i.e. only unenforceable, secondary provisions unable to offer directly applicable individual rights.
- The last problem is connected with the adoption of the Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, which specifically affects the rights contained in Title IV (Solidarity) of the Charter.

2. Incomplete and "unstable" catalogue of social rights

Looking closely at the Title IV of the Charter we may found that it contains only some social rights and cannot be considered as exhaustive catalogue comparable to the European Social Charter of 1961, and its revised version of the 1996. The rights contained in the Title IV can be systematically divided into two general groups:

- the rights related to employment (thus mostly the workers' rights)
- and rights related to social responsibility, broadly construed.[6]

[6] See O'NEILL A. Social Rights in the Charter: Employment and Social Security. [online] Available at: http://www.era-comm.eu/charter_of_fundamental_rights/library.html

The first group of rights includes workers' right to information and consultation within the undertaking (art. 27 of the Charter), the right to collective bargaining and action (art. 28 of the Charter), the right to protection in the event of unjustified dismissal (art. 30 of the Charter), the right to fair and just working conditions (art. 31 of the Charter), the prohibition of child labour and protection of young people at work (art. 32 of the Charter), the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave (art. 33 para. 2 of the Charter). The second category contents the provision about special status of the family in society and its protection (art. 33 para. 1 of the Charter), the right to social security and social assistance (art. 34 of the Charter), the right to health care (art. 35 of the Charter), access to services of general economic interest (art. 36 of the Charter), environmental protection (art. 37 of the Charter) and consumer protection (art. 38 of the Charter). Mixed nature on the border between the two groups has a right of access to placement services (art. 29 of the Charter).

It is true that Title IV anchors some traditional social rights of workers (which form the so-called "hard core" of the European Social Charter). And Charter itself gives floor to the social rights also elsewhere (e.g. art. 12 para. 1 containing the right of everyone to associate in the trade unions to protect their interests; art. 15 governs the right of free choice of profession and the right to work, or, for example, art. 25 and art. 26 concerning the rights of older persons and persons with disabilities). On the other hand, it is true that the text of the Charter lacks some other social rights such as the right to a fair wage and a minimum income, the right of workers to participate in the creation of working conditions and working environment, etc.[7] In my view this selective approach to the social rights brings the first manifestation of a precautionary attitude to the codification of these rights at the supranational level. I consider this selective approach and the omission of certain social rights not only as disputable and risky but also as slightly superfluous. It is because the creators of the Charter in fact introduced the complex sum of other limiting "measures" related to the social rights. I will discuss later on for example the national conditionality clauses or understanding of social rights merely as principles. These limiting instruments might have been use also in connection with, for example, omitted right to a fair wage. If one can accept the limitations via interpretation or application of some restrictive measures, he can hardly accept the absolute omission of come classical social rights. Even limited acceptation is far better than ignorance of some right.

[7] See GIJZEN, M. The Charter: A Milestone for Social Protection in Europe? *Maastricht Journal of European and Comparative Law*, 2001, no. 1, p. 40–41.

Other negative aspect I want to point on in this part of my paper is certain instability in the wide European level of protection of social rights which was brought by the adoption of the Charter. By this instability I understand open question whether a future application or interpretation of social rights in the Charter can lead to a reduction in level of protection of such rights compared to the standards set by the European Social Charter, the Revised European Social Charter and case-law of the European Committee of Social Rights? On one hand it is clear that the Charter builds on these documents and explanations relating to the Charter refer to them as an important source of inspiration. But on the other hand, no provision of the Charter defines clearly the relationship of the Charter and the social charters adopted on the level of Council of Europe. If we look at the European Convention on Human Rights, which represents another important source of inspiration for the Charter, it is expressly perceived as a minimum standard of protection that cannot be reduced by applying the Charter (see art. 52 para. 3 of the Charter). With regard to the social charters of the Council of Europe, however, the principle of non-regressive interpretation is not present in the text of Charter. How can we understand this silence about relation between EU Charter and social charters? If one tends to the positivistic interpretation, the conclusion therefore could be that the EU Charter defines its own autonomous access to social rights, which is not linked to standards settled by the social charters of the Council of Europe and thus creates space for possible regressive understanding of a particular individual right[8]. I disagree with this hypothesis. Using the postulate *inclusio unius est exclusio alterius* would be the improper simplification in this case. No direct reference to the social charters in comparison with express reference to the Convention cannot be interpreted as ignorance of the level of protection of social rights within the system of Council of Europe. On the contrary, the social charters (at least their "hard core" rights) should operate as a minimum standard, which may not be reduced by the application and interpretation of the EU Charter. I construct my conclusion on set of systemic arguments:

- The preamble of the Charter proclaims that the Union Catalogue is only a reaffirmation of rights already contained in other documents.
- Art. 53 of the Charter prohibits the restriction of the level of protection of the rights recognized by "international law and by international agreements to which the Union or all the Member States are party."
- Respect for fundamental social rights set out in the European Social Charter is expressly stated in art. 151 TFEU, which represents the initial "programming" provisions of Title X – Social policy.

[8] Ibid p. 40.

In addition we may use some teleological and historical arguments in favour of principle of on regression of the standards of protection of social rights:

- The intent of the authors of the legally binding EU Charter was to endorse further development of human rights within the Union, what logically comprises the respect for already reached level of protection of any right.
- The Charter in general is based on a universalist approach to human rights and according to its preamble its goal is not only preserve but strengthen the protection of fundamental rights in Europe.
- Finally, the application and interpretation of the Charter cannot be seen implemented in isolation from developments of human rights protection within the Communities and the Union. Social rights have been politically declared (by adoption of Community Charter of Fundamental Social Rights of Workers back in 1989) as well as enshrined in the Court's case-law (with express references to social charters of the Council of Europe as a source of inspiration, see for example case C-438/05 Viking Line).

3. Social rights and national conditionality

Another expression of the sensitive and reserved access of the lawmakers to the social rights may be seen in the inclusion of so called national conditionality clauses in respect of many rights contained in Title IV of the Charter. According to these clauses the pure recognition or practical application of some fundamental right is conditional and must be in compliance with national laws or even national practice. These clauses are present also in some other parts of Charter[9] but in connection with social rights they occurrence is most common. The national conditionality appears in the provisions related to the right of workers to information and consultation within the undertaking (art. 27 of the Charter), the right to collective bargaining and action (art. 28 of the Charter), the right to protection in the event of unjustified dismissal (art. 30 of the Charter) the right to social security and social assistance (art. 34 of the Charter), the right to health care (art. 35 of the Charter) and the right of access to services of general economic interest (art. 36 of the Charter).

The importance of conditionality clauses is emphasized also within the final 'horizontal' provisions of the Charter, which in art. 52 para. 6 lay down the duty to give full account to the national laws and practices as specified in the Charter. The main question, however, is how we shall conceive the meaning

[9] E.g. art. 9 (Right to marry and right to found a family), art. 10 para 2 (Right to conscientious objection) or art. 14 para 3 (Freedom to found educational establishments).

of these references to national laws and national practices, what importance do they have for practice of law enforcement? Explanations which accompany the Charter do not provide for any detailed guidance in respect of art. 52 para. 6. They contain only succinct suggestion according to which such clauses present a manifestation of the application of the spirit of subsidiarity. Link to subsidiarity in relation to the obligation to respect the national laws and practice is in my view a bit confusing.

First of all I understand the principle of subsidiarity as some 'legislative' rule setting when and who may, in certain areas, have the right to legislate. In this regard it gives the impression that the rights associated with a national conditionality clause have only a programmatic nature and cannot be enforced directly, but only on the basis of existing implementing legislation. This would mean the inclination to the classical understanding of social rights and thus move apart from the universal concept of the Charter[10].

Secondly, the principle of subsidiarity primarily determines the relations between Member States and the Union within the framework of the separation of powers, which act as a limit (mainly legislative) to the action of the Union. Subsidiarity is simply a boundary between Member States and Union action. Subsidiarity does not preclude all Union's action. It only limits the scope of Union's action by obligation to respect the legislative capacity of Member States. Therefore if we accept that application and interpretation of certain rights which are connected with the national conditionality is determined by national law, it is not quite clear where the space for autonomous legislative activity of the Union lays. The reference to the subsidiarity is superfluous also from another point of view. In fact in most of areas, where reference to national law and practice occurs, the Union has only limited or no legislative power at all.[11]

It is clear that inserting a reference to national law was intended to modify the effects of the Charter in relation to the sensitive problematic types of fundamental rights. Giuseppe Martinico puts these clauses into the relation with art. 4 TEU (which among other things protects the national identity of the Member States[12]) and understands then as another instrument which shall protect

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[10] For the critics of this vertical subsidiarity see KENNER, J. New Frontiers in EU Labour Law: From Flexicurity to Flex-Security. In DOUGAN M., CURRIE S. (eds.). *50 Years of the European Treaties Looking Back and Thinking Forward*. Oxford: Hart Publishing, 2009, p. 290

[11] See PEERS, S. Commentary on the Article 52 (6) of the EU Charter. In PEERS, S., HERVEY, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 1513.

[12] See further ARNAIZ, A. S., LLIVINA, C. A. (eds.). *National Constitutional Identity and European Integration*. Cambridge: Intersentia, 2013.

national prerogatives of Member States, restrict the interpretative activity of the Court of Justice and limit "federal" (i.e. from the center) incorporation of certain rights to the Union constitutional structure[13]. Personally, I find references to national law and practice as unfortunate part of the system of the Charter. Once again, they interfere with the universal concept of the Charter and raise doubts about its supranational potential. Even though I may understand the motives of Member States I disagree with the chosen method. Since the Charter opens the space for differentiate approach by using the general derogation clause (art. 52 para. 1 of the Charter) case by case (at application level) it seems needless to include the general limiting clause for all situations (at normative level).

Notwithstanding the abovementioned criticism we must accept that national conditionality clauses form a part of the Charter and therefore we must look for their proper interpretation. The question is whether national law and practice shall limit some particular right in absolute meaning and derogate the effects of the Charter in the context of the specific Member State in respect with that right? I disagree with this rigid interpretation and incline to the relative understanding of the national conditionality as proposed by Steve Peers in the recent commentary to the Charter. Peers accepts only the relative effect of the references to national law, which although they may limit the scope of protection of certain rights, they shall not lead to their total elimination.[14] This conclusion is based on the practice of the Court of Justice that, in cases where Member States have a right to limit the exercise of certain individual rights steaming from EU law (e.g. free movement rights) takes a restrictive approach and rejects the absolute derogation which would touch upon the very nature of such rights.

4. Rights versus (social) principles in the Charter

One of the most discussed questions in relation to the adoption of the legally binding supranational catalogue of fundamental rights is a certain dichotomy which appeared in the content of the Charter. The Charter introduces two categories of provisions (and two levels of protection thereof) as it distinguishes between rights and freedoms on one hand and principles on the other. The dual

[13] See MARTINICO, G. *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*. New York: Routledge, 2012, p. 95–96.

[14] See PEERS, S. Commentary on the Article 52 (6) of the EU Charter. In PEERS, S., HERVEY, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 1514.

nature of the provisions of the Charter is underlined in the text of its Preamble and also in provision determining the addresses of the duty to protect the fundamental rights (EU and Member States) who have a duty to respect the rights and observe the principles. But the main provision which determines the dual approach to the content of the Charter is "horizontal" art. 52 para. 5. This provision raises the biggest controversy and opens wide discussions. According to it "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality." Explanations to the Charter in respect of this provision states that "Principles 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."

The text of art. 52 para. 5 of the Charter and its explanation give a clear message, saying that parts of the Charter which includes the principles have a significantly weaker position in comparison to those including rights and freedoms. Judicial enforcement of principles is significantly limited. Most scholars tend to the opinion according to which the principles do not provide individuals with the subjective claims enforceable directly in the proceedings before the courts.[15] The provisions containing the principles serve as programming stipulations and content of the principle, therefore they have only political importance – the principles are mere aspirations conditioned by the express will of the legislator: "the public authorities, and in particular the legislature, are called upon to promote and transform the 'principle' into a judicially cognisable reality, while at all times respecting the objective framework (the subject-matter) and its purposive nature (the results) as determined by the wording of

[15] See e.g. LADENBURGER, C. Institutional Report. In LAFFRANQUE, J. (ed.). *The Protection of Fundamental Rights Post Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*. Reports of the XXV FIDE Congress. Tallinn: Tartu University Press, 2012, p. 183; BESSELINK, L. General Report. In LAFFRANQUE, J. (ed.). *The Protection of Fundamental Rights Post Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*. Reports of the XXV FIDE Congress. Tallinn: Tartu University Press, 2012, p. 109–110; or PRECHAL, S. Commentary on the Article 52(5). In PEERS, S., HERVEY, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 1505.

the Charter establishing the 'principle'".[16] Principles represent the conditional rights. Once embodied in the text of implementing measure, they get the concrete shape and only then they can be relied on by the individuals before the courts. There are also some opposite voices claiming the indivisibility of human rights.[17] Dichotomy established by the Charter clearly interferes with this universalistic approach. Even though it is sympathetic, the radical universal view on human rights seems to me a bit idealistic and contrary to the contemporary state of things. Hypothesis according to which all rights are equal is not valid merely because not all rights are the same. Even European Convention distinguishes between the irrevocable rights (like prohibition of torture, prohibition of slavery etc.) and those which may be derogated in special circumstances. Also material comparison between some rights confirms the distinctions where for example respect to right to life is without any doubts clearly self-executive and directly enforceable and for example right to fair trial or freedom of association always call for at least simple legal framework to be actively exercised.

I am prepared to accept that there are "stronger" and "weaker" rights. What I hesitate to accept is the exact provision (art. 52 para 5) portraying this fact. First of all it gives rise to wide debates about meaning, scope and content of that provision. One of the most discussed problems is determining which part of the Charter falls to the "weaker" category described above? Explanations related to the Charter give just a few demonstrative examples of provisions containing the principles (e.g. articles 25, 26 and 37). The situation is even complicated once we deal with the information according to which, in some cases, a provision of the Charter may contain both elements of a right and of a principle (e.g. Articles 23, 33, 34). The exact enumeration of the Charter provisions containing principles is missing. In this regard Charter brings a certain amount of uncertainty. But it is not necessary to perceive this openness negatively. It seems to me that open texture of the Explanations is balancing the rigid formulation of the Charter here. It is clear that list of principles as well as definition of their impact and relevance shall be brought by the future case-law. Court of Justice has therefore a wide space for individual approach in determining which provisions contain rights and which only programing stipulations. So even tough the uncertainty is a bit problematic it shall not be perceived completely in negative. On the other hand what must be mentioned

[16] Para 50, Opinion of Advocate General Cruz Villalón delivered on 18 July 2013, Case C-176/12 Association de médiation sociale, Association de médiation sociale (C-176/12) ECLI:EU:C:2014:2

[17] For some examples see LACIAKOVÁ V., MICHALIČKOVÁ, J. Rights and Principles – Is There a Need to Distinguish Them in the Charter of Fundamental Rights of the European Union? *Contemporary Readings in Law and Social Justice*. 2013, no. 2, p. 235–243.

as negative is a kind of hypocrisy which is present here. The approach towards principles seems to me only half way done. In connection to these principles which are mentioned as examples in the Explanations one must accept their weaker nature. In respect of them the Charter introduces the static and fixed scenario and excludes (or strongly complicates) any further flexible interpretation and development of principles to the at least partially directly enforceable rights. In connection to all other potential principles, we must wait for the reaction of the judicial practice and therefore we may only speculate about the margin of their possible direct applicability.

The abovementioned openness and uncertainty have a big negative impact in the field of social rights. The general approach is that the principles as some special category of human rights rules must be associated mostly with the Title IV of the Charter "Solidarity". I am not prepared to accept this generalization for some specific reasons:

- First of all this schematic understanding does not have any base in the text of preamble, Explanations or "travaux préparatoires" of the Charter. It is interesting enough that first draft of the Charter (2000) did not include a special provision (like todays art. 52 para 5) speaking about the "no-applicability" of principles. Charter just prescribes the duty to observe the principles (art. 51 para 1) by the Union and (in limited scope) by the Member States. The notion of principles was never clearly bound by the solidarity rights.
- Secondly, Title IV clearly includes some provisions which confer clear and directly enforceable claims to individuals. One of the traditionally accepted is the right of collective bargaining and action (art. 28 of the Charter), which was accepted as the enforceable right on the EU level even before Treaty of Lisbon. Another example of the clearly enforceable rights is the cogent prohibition of child labour (art. 32 of the Charter).
- Thirdly, such a generalized view completely denies the universalistic ethos of the Charter and codification of all generation of human rights in one catalogue. Here I must repeat that I did not perceive all types of human rights as equal and same. But although I'll accept social rights as mostly conditioned, in does not mean that whole category must be locked in the rigid class of non-applicable political aspirations.

5. Protocol No. 30 and social rights

One of the most discussed and emotionally portrayed questions related to the Charter was adoption of the Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the

United Kingdom. This protocol reflects serious political sensitiveness of the adoption of the supranational human rights catalogue. It clearly expresses some doubts raised in the UK and Poland. And it opened the wide debates and academic reflections discussing its legal impact, scope, interpretation and relation to the Charter. The existence of special source of primary law dealing with the question of application of the Charter in two Member States naturally evokes the specific mode of approach to the supranational catalogue in these countries. Thera are plenty of commentaries and reflections to this protocol. Most of the commentaries refer to the fact that Protocol No. 30 does not make any exception or opt-out in connection to the application of the Charter in the countries concerned, and that it is primarily interpretative and explanatory tool.[18] According to the major view, this protocol does not introduce any particular special status of the Charter but only confirms the following facts:

- that the Charter does not extend the competencies of the Union;
- that the application of the Charter must be fully in line with the principle of subsidiarity;
- that application of the Charter in connection with the Member States actions is not universal but on the contrary limited to the cases when Member States are implementing EU law (see art. 51 para 1 of the Charter);
- that in the case of the references to the national law of practice included in the particular provisions of the Charter, these national laws and practices must be taken into full account whenever some particular provision is to be applied vis-á-vis some Member States.

Such a view is based mostly on the wording of the preamble to the Protocol No. 30 (see para. 8 and 9) and teleological interpretations. I do not have any objection to this approach to the Protocol No. 30. But what I perceive as problematic and challenging is general use of this neutralizing understanding. For sure it can be accepted in connection with the art. 1 para 1 and art. 2 of the Protocol which have a general scope and general meaning.[19] But what can be seen as problematic and still open is application of the "no opt-out"

[18] See e.g. BARNARD, C. The EU Charter of Fundamental Rights: Happy 10th Birthday? *European Union Studies Association Review*, 2011, no. 1; or FORNI, F. Free movement of "Needy" Citizens After the Binding Charter. Solidarity for All? In DI FEDERICO, G. *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument.* New York: Springer, 2011, p. 139–140.

[19] Finally this was confirmed by the Court of Justice in its decision in case C-411/10 N.S. and others. Here the Court confirmed that Protocol no. 30 does not represent any exemption or opt-out of the application of the Charter in UK. This opinion of the Court was raised in the case related to the art. 4 of the Charter (prohibition of inhuman or degrading treatment) so in connection to the classical right belonging to the 1st generation of human rights.

interpretation in connection with the art. 1 para 2 of the Protocol No. 30, the provision which relates directly to the social rights. This provision states that: "In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law." The language and complicated design of this provision causes the greatest debate and doubts. Debates turn around the question whether that provision must be construed as declaratory or as constitutive?[20] In the first case, it would not mean any exception for the United Kingdom and Poland, but it would only illuminate (with the meaning and impact for all Member States) that Title IV of the Charter does not include any judicially enforceable individual right but only the principles in the meaning of art. 52 para 5 of the Charter. Conclusion according to which title Solidarity includes only principles was refused in previous chapter of my paper. Also here I am not prepared to accept such a schematic view. Therefore I tend to the second interpretation of the art. 1 para 2 of the Protocol (the constitutive one) according to which Protocol No. 30 may serve as an opt-out in relation to the social rights. And by using of this interpretation we get to the negative result saying that Charter in respect of (in maximum)[21] two Member states and in the field of social rights is not capable to produce legal effects autonomously. In fact – from the perspective of enforceability of social rights – we are facing the "lose-lose" situation here. I prefer the second "lose" variation just because of its smaller negative impacts. It's clear that opt-out scenario would mean total non-enforceability of rights included in the chapter IV only for addressees of the Protocol No. 30. In contrast to that, the interpretative understanding of art. 1 para 2 would touch all Member States what I am not prepared to accept.

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[20] See LADENBURGER, C. Institutional Report. In LAFFRANQUE, J. (ed.). *The Protection of Fundamental Rights Post Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*. Reports of the XXV FIDE Congress. Tallinn: Tartu University Press, 2012, p. 180.

[21] It is because in fact this option means opt-out only in connection with single Member State – the United Kingdom, whereas Poland in its own law recognizes social rights to an even greater extent than provided for in Title IV. In this respect see also 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 annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007: "Poland declares that, having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union."

6. Conclusion

In the introduction of this paper I put the question whether the formal turnover and the inclusion of social rights into a single catalogue of fundamental rights within the EU (next to the traditionally well-established rights of first generation) can be understood as a revolution in the level of protection of these rights and shift in their material understanding. I answered this question with certain amount of scepticism and offered a critical view on the real substantial change in this regard. But I have to confess that my conclusions were reached mainly by a static analysis of the structure of the Charter and the place of social rights in its system. From this textual point of view, it seems to me that the Charter has brought the one step forward and two steps back. The future certainly will be different. I realize that once the actual text of the Charter will get into the practice of the Court of Justice, we will get more colourful and maybe more positive picture. I am aware of the fact that the Charter is a living instrument of protection of rights in the same sense as other human rights catalogues. The fact that social rights have been associated with the most vivid resistance of the authors of the Charter is certainly not a surprise. It is after all that these rights are traditionally accompanied with the cautious approach of the states and the international community. On the other hand I do not think that it was necessary to create such a large amount of protective nets against this category of human rights. This enormous caution undermines the unity of the Charter, is in the opposition to the universalistic tendencies and eventually also lightens the revolutionary significance of this catalogue. Fortunately the law does not enter into real life through books but through action, thus opening space for a restrictive view of all the limits of social rights, which I discussed in my paper. Nick Bernard writes: "Lack of binding effect does not necessarily mean lack of legal effect."[22]

[22] BERNARD, N. A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU. In: HERVEY, T.; KENNER, J. (eds.). *Economic and Social Rights under the Charter of Fundamental Rights of the European Union*, Oxford: Hart Publishing, 2003, p. 247–268.