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Rule of Law Crisis:

The Erosion of the Principle of Non-Discrimination in EU Law

–

on the Protocol No. 30

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Abbreviations:

ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
PiS	Prawo i Sprawiedliwość
TEU	Treaty of the European Union
UK	United Kingdom

Rule of law Crisis: The erosion of the principle of non-discrimination in EU law – on the Protocol No. 30

I. Introduction

Freedom, democracy, equality and solidarity – the fundamental values of the European Union are the base for the European idea, the European lifestyle and the European success. They are implemented in Article 2 of the Treaty of the European Union[1]. Also if the values should be the unanimous opinion of all member states, the interpretations are quite wide.[2] With the passage of the European Charter of Fundamental Rights[3] in 2000 the basic rights became more detailed and finally binding to the member states with the implementation of Article 6 (1) TEU by the Treaty of Lisbon in 2007. Also if the European Charter of Fundamental Rights is only legally binding when the member states implement European Union law,[4] it was a big political step for the European Union.[5] Meanwhile the legal development was small as the European Union citizens already had a similar fundamental protection due to the judgements of the European Court of Justice.

Has the European Charter of Fundamental Rights still been a big step for the European non-discrimination law? It should have been so, if there would not had been one aspect which dimmed the euphoria showing in the same time the wide range of interpretations of European fundamental rights:[6] The United Kingdom and Poland stepped out the line of all the other European Member States.[7] In Protocol No. 30 they made clear not to apply the European Charter of Fundamental Rights. Later the Czech Republic wanted to join the Protocol No. 30, what finally did not happen as the Czech government relinquished the modification of the protocol in 2014.[8]

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[1] In the following referred to as TEU.
[2] Thiele, Europarecht, S. 48.
[3] In the following referred to as ECHR.
[4] Joshua Rozenberg, in: „Never mind human righs law, EU law is much more powerful“ Availabe from: http://www.theguardian.com/law/2013/oct/09/human-rights-eu-law-powerful .
[5] Thiele, Europearecht, S. 49.
[6] Ibidem.
[7] Protocol of the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0156:0157:EN:PDF.
[8] http://www.moz.de/artikel-ansicht/dg/0/1/1248517.

That leads to the question, whether the original idea of a development of the European non-discrimination law finally turned out to be an erosion of it, because of Protocol 30?

II. Political motivations behind Protocol Number 30

First of all it is necessary to focus on the political motivation behind the release of Protocol Number 30.

1. The British motivations

In the United Kingdom the political motivations behind the draft of protocol number 30 was mainly to protect the British social and labour rights on their status quo,[9] by avoiding any new obligations imposed by the European Union. This biggest fear was that the British courts could have suddenly been legally bound by the judgements of the European Court of Justice. It was expected because the Charter of Fundamental Rights would suddenly have become a legally binding instrument and not only a political declaration,[10] and further more because of the special importance of judgements in the British Common Law system.

Strictly speaking the British government expected a creation of new social and economic rights on the level of the European Union Law – a development the British government wanted to avoid.[11] Especially the UK labour right of strike, might have been affected by a British binding to the Charter. Not only for the Confederation of British Industry it was an important reason for announcing campaigns against the implementation. Also the government of Prime Minister Tony Blair from the social democratic Labour-Party was afraid of the new development. The government was afraid of British Citizens possibly going to the European Court of Justice in Luxembourg. They expected a loss of independence of the British courts and new bindings to the European Court of Justice judgements.[12]

How big the British fear of the upcoming development was, might show the fact that the government made clear, it would possibly not ratify the Treaty of Lisbon with the new legal implementation of the European Charter of Fundamental Rights through (the new) article 6 of the Treaty of the European Union. That is why protocol number 30 was finally negotiated to

[9] Andrea Kabelova, in: The Treaty of Lisbon and the Czech Republic. Availabe on: http://www.czech.cz/en/98331-the-treaty-of-lisbon-and-the-czech-republic from the 25.05.2010.
[10] „Q & A: Charter of Fundamental Rights“, bbc.co.uk. Available here: http://news.bbc.co.uk/2/hi/europe/6225580.stm.
[11] Ian Black, in: New Sticking Points for Blair in draft text. Availabe here: http://www.theguardian.com/uk/2003/may/28/politics.eu.
[12] Ibidem.

avoid the application of the Charter to British domestic law, as Benjamin Burrow, solicitor in the human rights department at Leigh Day, thinks.[13] Summarizing the protocol number 30 was, at least from a political point of view, supposed to be an 'opt out' of the new development to avoid the legal bind to European fundamental rights.[14] The British politicians also celebrated it as a big success for some time.

This success was mainly appreciated by the Eurosceptic movements in the UK, considering their point of view there could not be enough exceptions of European Law for the United Kingdom.[15] The UK government hoped to had found a middle way with Protocol No. 30: As the entire Lisbon Treaty would have been influencing the UK constitutional system which would have made a referendum (political) necessary as Prime Minister Tony Blair had promised such a referendum for the ratification process of the finally not issued Treaty of Constitution in 2005. This time Blair convinced his opponents that the Treaty would not affect the constitution thanks to the Protocol No. 30-'opt out'. In the same time Blair was able to sign the Treaty of Lisbon and accomplished his part towards the other member states. The strategy worked out: Eurosceptic media supported the idea of the opt-out directly. The Daily Mail, the Daily Express and the Sunday Express celebrated Blair's negotiation result of Protocol no. 30 as a big success.[16] 'EU chiefs have agreed to give Britain an opt-out on the Charter of Fundamental Rights which could bring in new laws which would destroy jobs'[17], wrote the News of the World.

But the political and public atmosphere changed quickly as it was recognised that the 'opt out' might not be a real exception from the application of the Charter of Fundamental Rights in the United Kingdom, what was based on its legal analysis and later on judgements of the European Court of Justice as well.[18]

2. The Polish motivation

In Poland the initiative for a resistance against the implementation of the European Charter of Fundamental Rights in the Treaty of Lisbon came from the right-wing Polish government.

[13] Interview with Benjamin Burrows with Lexis from the 30st of April 2014. Available here: https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Human%20rights/The_Charter_and_its_applicability_in_UK_law.pdf.

[14] As what the the protocol number 30 turned out to be – see below.

[15] Catherine Barnard, in: *The ‚Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?* Source availabe on: https://www.researchgate.net/profile/Catherine_Barnard/publication/227221420_The_%27OptOut%27_for_the_UK_and_Poland_from_the_Charter_of_Fundamental_Rights_Triumph_of_Rhetoric_over_Reality/links/02e7e53c53ee9c5e35000000.pdf

[16] Ibidem.

[17] J.Lyons 'EU Traitor', *The News of the World,* 24 June 2007.

[18] Legal analyse oft he Protocol No. 30: See below.

The minority government of the parties, Liga Polskich Rodzin and Samoobrona, which was leaded by the Prime Ministers Kazimierz Marcinkiewicz (until July 2006) and Jarosław Kaczyński, who was in power until September of 2007. This government, with the strongest party Prawo i Sprawidliwość, which is an Eurosceptical and the catholic church supporting party,[19] wanted to protect family values against the European Charter of Fundamental rights: Because of Article 9 and 21 of the Charter the Prawo i Sprawiedliwość was afraid that the Charter could encourage the rights of sexual minorities and homosexual relationships.[20] This liberalisation of moral aspects – as it was seen by the opinion-leaders of PiS, the Kaczyński brothers – was not acceptable as they expected homosexual couples to enter adoption, institutionalisation and also state benefits.[21]

A second main reason has been the impact of the right of privacy, the European Charter of Fundamental Rights could have had. Here the Prawo i Sprawidlwość expected women rights to increase – especially in case of family-development and sexual health. As Poland had a quite strict abortion law, which made abortions due to social or personal reasons impossible in a legal way,[22] the PiS expected a huge impact on this by the European Charter of Fundamental Rights.[23] An additional aspect which was taken in consideration by the politicians was the fear that previous German expellees could claim damages payments for their lost territories in the west of Poland or that they could even claim back the territories themselves.[24] This last argument was mainly brought from Anna Fotyga, the former chief of Polish diplomacy. The commentaries are diverging here, whether this was a honest argument[25] or only the try to manipulate the public opinion with frightening populism.[26]

When the Treaty of Lisbon finally needed to be signed, a political change had happened in Poland: the former minority government of Prawo i Sprawiedliwość, Liga Polskich Rodzin and Samoobrona had resigned, the Polish Parliament Sejm had annulled itself. From now on the man in power was the new Prime Minister, Donald Tusk, a pro–European member of the liberal conservative party Platforma Obywatelska. This leaded to the obscure constellation that the treaty, which was negotiated by the previous Prawo i Sprawiedliwość government,

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[19] PiS and Church. Translation from German: *More than a few people in church groups want to see the PiS as a policial wing of the catholic church* https://g2w.eu/zeitschrift/leseprobe/1236-zeit-zum-umdenken-die-katholische-kirche-in-polen .

[20] http://www.statewatch.org/news/2008/jan/01eu-poland.htm.

[21] Ibidem.

[22] http://www.federa.org.pl/reproductive-rights-and-health/abortion-law.

[23] See footnote 10.

[24] Translated from German: 'The PiS name (…) property claims as a concrete argument for their fear and reasons'. Bujanowski, Simon, in: Vom 'schwierigen Partner' zum europäischen Gestalter, S.248. Available frpom: http://hss.ulb.uni-bonn.de/2014/3683/3683.pdf.

[25] Ibidem.

[26] http://www.statewatch.org/news/2008/jan/01eu-poland.html.

was attacked by the same political group now. Donald Tusk needed to find a compromise with this party, because the Treaty of Lisbon had to be supported by two third of the Polish members of parliament to be ratified. The outcome of this political interior negotiation process was finally protocol number 30.

From a political and fundamental point of view the final outcome of Protocol number 30 is far away from what it was supposed to be.[27] The final protocol says only that the national courts are not bound to the European Court of Justice, which means that the national courts are supposed to be independent. In fact and officially Poland did not doubt the fundamental rights and the Charter itself, but only the legal bounds of the Charter on the national law.[28] Furthermore Poland declared the Declarations number 61 and 62 of the Treaty of Lisbon. In Declaration number 61 the Polish government makes clear what its intention was by signing the protocol:

61. *DECLARATION BY POLAND ON THE CHARTER OF FUNDAMENTAL RIGHTS*

> *The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.*

And in Declaration 62 Poland names its special political and historical connection with labour and social rights due to the "Solidarność"-movement in the 1980s. That is, why Poland declared respect of the labour and social rights of the European Charter of Fundamental Rights, as it is underlined in Declaration 62:

62. DECLARATION BY THE REPUBLIC OF POLAND CONCERNING THE PROTOCOL ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS IN RELATION TO POLAND AND THE UNITED KINGDOM

> *The Republic of 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.*

[27] A analyse of Protocol No. 30 from a legal point of view will follow below.

[28] Wyrozumska, Anna (2007): The Charter of Fundamental Rights of the European Union in the Reform Treaty and the Polish Objetions demental Rights of the European U Treaty and the Polish Objections, in: The Poly Quarterly of International Affairs (4/2997) S. 11-40.

In the public the Polish participation in Protocol No. 30 was reflected differently. It was celebrated as a big success by the supporters of the PiS-party, because of the defence of Polish family and moral values. But it might be already implied by the fact that the final ratification of the protocol was an outcome of a negotiation compromise between PiS and the new government of Donald Tusk: There were also different political and societal opinions. For example professor Anna Wyrozumska assessed the Protocol as a negative sign in the challenge of strengthening fundamental rights.[29] Furthermore she analysed a logical gap between the Polish support of the European Union preparing itself to join the European Convention of Human Rights on the one hand side, but rejecting the legal bind of the Charter on the other hand.[30] Last but not least she emphasized that the participation of the Protocol No. 30 does not fit to the traditional Polish attitude of being part of a European Union as a community of shared values.[31]

3. The Czech Republic

Although the Czech parliament and the Chamber of Deputies of the Czech Parliament had already agreed to the Treaty of Lisbon, the Czech Republic was finally the last country, which had not ratified the Treaty in autumn 2009.[32] The reason: The Eurosceptic president Vaclav Klaus expected a lack of accordance of the Treaty with the Czech Constitution, as he officially argued. Despite the fact that the Treaty had passed both parliaments and the Czech Constitutional Court had declared the Treaty as compatible with the Czech Constitution twice, Klaus still refused to sign the Treaty.[33] That is why the Czech interim government of Prime Minister Jan Fischer decided to negotiate a late participation to the Protocol No. 30. In October 2009 the 'Protocol on the application of the charter of fundamental rights of the European Union to the Czech Republic'[34] was released. In article one it says:

> *Article 1*
> *Protocol No 30 on the application of the Charter of Fundamental Rights of the*

[29] *German source:* Simon Bujanowski, in: Vom ‚schwierigen Partner' zum europäischen Gestalter. Available on: http://hss.ulb.uni-bonn.de/2014/3683/3683.pdf.
[30] Ibidem.
[31] Ibidem.
[32] Andrea Kabelova, in: The Treaty of Lisbon and the Czech Republic. Availabe on: http://www.czech.cz/en/98331-the-treaty-of-lisbon-and-the-czech-republic from the 25.05.2010
[33] Tomas Dumbrovsky, in: „Constitutional Change through Euro crisis law: 'Czech Republic' ". Available on: http://eurocrisislaw.eui.eu/czech-republic/#_ftnref2_493.
[34] Available on: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf.

European Union to Poland and to the United Kingdom shall apply to the Czech Republic.

The idea was that the Czech Republic would join the Protocol No. 30 within the Treaty of the Croatian Accession. But when the Czech government drafted a new version of Protocol No. 30, the European Parliament adopted a resolution to not include the Czech Republic anymore, because of new judgements by the European Court of Justice, which had not applied the British 'opt out' of the European Charter of Fundamental Rights. Finally Czech government incumbent at this time decided in 2014 to not focus on the realisation of the previous aim of joining the Protocol No. 30. An erosion of the non-discrimination principle was finally impossible in case of the Czech Republic.[35]

4. Interim conclusion

Summarizing the political motivations behind the negotiation of Protocol No. 30 it turns out that the 'opt out' neither in the United Kingdom, nor in Poland, or in the Czech Republic had been the result of unanimous demands in each country. It seems to be less discussed in the United Kingdom, but especially in Poland and the Czech Republic the Protocol is a result of certain political players, which just had been in power in the appropriate moment. The change of the political leadership in Poland and Czech Republic – and with it the change in development of the interior and exterior negotiation process – proves that.

Still there was an aim behind the negotiation of this protocol, which was to avoid the strong application of the European Charter of Fundamental Rights to the domestic law. The reasons for that diverged in all three countries. But nowhere this reason was to protect existing Fundamental Rights. So has there been a erosion of the European non-discrimination principle from a political point of view?

Beside the aspect that an erosion requires a standard to be set, which is later decreased – because this would not fit into the here described situation as the entire implementation of the Charter into the Treaty of the European Union would have been simply a progress – we come to the conclusion, that the Protocol No. 30 was signed to avoid an increase of the Fundamental Rights. As the reason for that had not been to improve fundamental rights, the political motivation here is equable with an erosion of European non-discrimination principles. Especially considering the general political atmosphere of the European Union: solidarity is something else.

[35] See Footnote 27.

III. The purpose of the Protocol no. 30

The purpose of the Protocol No. 30 was understood differently in the United Kingdom and in Poland, however its wording reflects only the goals of the first county, which was to prevent any new rights being created, particularly economic and social rights.[36] As Poland had no influence on the text, because of its late accession to the Protocol, two Declarations of the Republic of Poland annexed to the final act of the Intergovernmental Conference, which adopted the Treaty, served as clarification of the Protocol. The first one[37] was meant to prevent the institutions of the European Union from any interference in the sphere of public morality, family law, abortion and rights of homosexuals. The second one[38] was to negate the exceptions concerning the social and labour rights made by the Protocol. From the political declarations it was clear that the Polish authorities saw the document as an exemption from the Charter in certain areas. This view was confirmed in a legal opinion of the Legislative Council of the House of Commons, which will be considered later on. In the United Kingdom the Charter, despite initial intentions of its creators, was ultimately presented by the British Government as an 'opt-out' 'from both the charter and judicial and home affairs.'[39]

Such presentation of the Protocol in the media has caused a state of confusion about the applicability of the Charter of Fundamental Rights in the United Kingdom and Poland. The lawyers in both countries debated the legal force of the Protocol. The main question in relation to the Protocol was, whether it provides a limited 'opt-out' from the Charter in favour of contracting parties, or whether it simply serves to clarify the effect of the Charter in those Member States. To answer this question it is necessary to analyse the text of the Protocol in relation to the Charter of Fundamental Rights of the European Union and the EU Treaties.

In the beginning of our considerations it must be noted that since the ratification of the Treaty of Lisbon the Charter is a part of the legal order of the European Union and that its legal value is equal to the Treaties.[40] Ever since the judgement in *Stander*[41], it had been established that

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36 European Scrutiny Committee, The application of the EU Charter of Fundamental Rights in the UK: a state of confusion; available from http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/979/979.pdf.

37 Declaration (no. 61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union.

38 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.

39 Tony Blair in a statement to the House on 25th June 2007 as quoted in the report of European Scrutiny Committee.

40 Treaty on European Union, Article 6(1).

fundamental rights apply as general principles of EU law, protected by the European Court of Justice. However, there was no clear catalogue of fundamental rights, which the institutions of the European Union were to respect. The purpose of the Charter was to address this issue, as it was confirmed in the Cologne European Council Conclusions.[42] A vast majority of the rights and principles collected in the Charter was already confirmed by the Court in its rulings. Remaining ones had been accepted in international law binding all Member States. It is clear from the Preamble of the Charter that its purpose was never to create new rights, but only to reaffirm those already existing.[43] What is more, the Treaty of the European Union in Article 6 prohibits the Charter from being used to „extend in any way the competences of the EU as defined in the Treaties." It also requires the Charter to be interpreted „in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions." Those provisions are designed to render impossible expansive interpretation of the rights, freedoms and principles enshrined in the Charter. This restrictive interpretation is further expressed in Article 51(2) of the Charter:

> *The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

Given all this limitations, it may be hard to see the point of imposing any further constrains on the applicability of the Charter. However, the government of the United Kingdom, later joined by the Republic of Poland, have decided to take additional precautions from European Union overreach and Protocol No. 30 was drafted. It consisted of the Preamble and three articles. In the Preamble we read that the goal of the Protocol was to „clarify certain aspects of the application of the Charter", especially „in relation to the laws and administrative action of Poland and of the United Kingdom". Also, the Contracting Parties strived to clear up the issue of the Charter's 'justiciability within Poland and within the United Kingdom.'[44]

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41 Judgement of the Court in case 29/69 Stauder, ECLI:EU:C:1969:57.

42 Annex IV of the Cologne European Council Conclusions, 3 and 4 June 1999; available from http://www.europarl.europa.eu/summits/kol2_en.htm#an4.

43 Preamble of the Charter of Fundamental Rights; Recital 5.

44 See a detailed analysis of normative content of the Protocol below.

IV. The legal meaning of the Protocol No. 30

The Article 1(1) of the Protocol reads as follows:

> *The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*

As it was already mentioned, both the Treaty on European Union and The Charter disallows any interpretation of the Charter that could constitute an extension of the competences of the Union. The quoted Article serves only to reaffirm this prohibition. In no way, it does limit existing competence of the courts of Poland or the United Kingdom to examine the conformity of the national law with the fundamental right as general principles of EU law. As to the competence of the European Court of Justice, ever since *Stauder* the Court has possessed the ability to identify new fundamental rights, which are binding for the Member States as general principles of European Union law. The Article 1(1) does not negate a possibility of introducing new justiciable rights, provided they are derived from sources of EU law other than the Charter of Fundamental Rights. In conclusion, the Article 1(1) does not change whatsoever the legal situation of Contracting Parties as compared to other Member States. This view is generally shared by jurists in the United Kingdom, notably the European Scrutiny Committee,[45] despite dissenting comments from the Government. However, this provision was interpreted differently in Poland. The Polish Legislative Council in its opinion[46] claimed that by virtue of the Article 1(1) the applicability of the Charter is restricted in Poland, as it undermines the competences of national courts to submit preliminary questions regarding the application of the Charter. This view was seconded by Adam Bodnar, then from Helsinki Foundation of Human Rights, who stated that Article 1(1) prevents Polish citizens from invoking the Charter both in Polish courts and in the European Court of Justice.[47] This state of legal uncertainty resulted in a preliminary question to the European Court of Justice being formulated by the Court of Appeal of England and Wales in the case

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45 See: House of Commons European Scrutiny Committee, The application of the EU Charter of Fundamental Rights in the UK: a state of confusion; available from http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/979/979.pdf.

46 See: Opinion of 17 march 2008 on the legal effects of the Charter of Fundamental Rights; available from http://radalegislacyjna.gov.pl/dokumenty/opinia-z-17-marca-2008-r-w-sprawie-skutkow-prawnych-karty-praw-podstawowych.

47 See: http://wiadomosci.gazeta.pl/wiadomosci/1,114873,10289183,Karta_Praw_Podstawowych_nie_musi_byc_ratyfikowana_.html .

C□411/10 N.S. v. Secretary of State for the Home Department[48]. In their consideration of the case, both the Advocate General and the Tribunal made comments on the legal meaning of Protocol No. 30.

The interpretation of the Article 1(1) shared by English legal doctrine was corroborated by the Opinion of Advocate General Trstenjak.[49] The Advocate General went further stating that 'the question whether Protocol No. 30 is to be regarded as a general opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland can be easily answered in the negative.'[50] She also argued that the fundamental validity of the Charter of Fundamental Rights in the Polish and the English legal orders is confirmed in the recitals in the Preamble to the protocol[51] – for example, the third recital states that 'Article 6 TUE requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article.'

The preliminary ruling of the European Court of Justice followed the opinion of the Advocate Genereal in *NS*. The referred question was whether the applicability of the Charter in the United Kingdom is 'qualified in any respect'[52] by the provisions of the Protocol. In the answer the Court reaffirmed the position of the Advocate General Trstenjak, stating that 'the Protocol (..) does not call into question the applicability of the Charter in the United Kingdom or in Poland'[53], what is confirmed by the literal interoperation of the text. The Court proceeded with the interpretation of Article 1(1) of the Protocol. Its purpose is to explain 'Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.'[54]

Unfortunately, the analysis of the Court did not cover the remaining Articles of the Protocol, which fell outside of the scope of the preliminary question referred in *NS* case. In order to fully understand the impact of the Protocol No. 30 on the application of the Charter in Poland

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48 Further reffered as *'NS'*.

49 Opinion in the case C□411/10 N.S. v. Secretary of State for the Home Department; ECLI:EU:C:2011:611.

50 Ibid., paragraph 167.

51 Ibid., paragraph 170.

52 Judgment of the Court in the case C□411/10 N.S. v. Secretary of State for the Home Department, paragraph 50; ECLI:EU:C:2011:865.

53 Ibid., paragraph 119.

54 Idid. parahraph 120.

and in the UK, its remaining Articles must be considered. As it is read in Article 1(2) of the Protocol:

> *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 above quoted Article states that its existence is 'for the avoidance of doubt', what suggests it is not meant to create any special rules with regard to the UK or Poland, but to clarify already existing provisions of the Charter. The Article 1(1) of the Protocol seems to correspond to the Article 52(5) of the Charter, which 'clarifies the distinction between 'rights' and 'principles' set out in the Charter.'[55] Notably, Title IV, to which the scope of the Article 1(2) of the Protocol is limited, consists both of social fundamental rights and principles, however the distinction between them is difficult to draw. The principles are not standalone rights that is in order to be justiciable, they need to be implemented either at EU or Member State level, whereas the rights are self-executive. As the explanations fail to adequately separate rights from principles, the Protocol seems to be admitted as an interpretative tool, though a quite blunt one. And as far as 'nothing in Title IV of the Charter creates justiciable rights applicable', all the 'solidarity' rights are to be qualified as principles – they only create justiciable rights when implemented in national legislation. This interpretation is seconded by Advocate General Trstenjak, in her opinion in *NS* case, where she notes that 'Article 1(2) (…) appears to rule out new EU rights and entitlements being derived from Articles 27 to 38 of the Charter of Fundamental Rights, on which those entitled could rely against the United Kingdom or against Poland.'[56]

However, it must be emphasized that the Article 1(2) does not invalidate any pre-existing fundamental rights, which continue to have effect in Poland and the UK. The legal force of the Article 1(2) is mitigated by the existence of the framework of fundamental rights, confirmed both in the case law of ECJ and in Article 6(3) of the TUE. The Protocol does not grant the Contracting Parties any exemption from EU fundamental rights law. Professor Douglas-Scott suggests in the written evidence[57] for The European Scrutiny Committee of the

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55 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02).

56 Opinion in the case C□411/10 N.S. v. Secretary of State for the Home Department, paragraph 173; ECLI:EU:C:2011:611.

57 Written evidence from Sionaidh Douglas-Scott, Professor of European and Human Rights Law, University of Oxford, available from: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-scrutiny-committee/the-application-of-the-eu-charter-of-fundamental-rights-in-the-uk/written/4921.pdf.

House of Commons that 'even were all of Title IV itself to be unenforceable in the UK, the UK would be still bound by EU fundamental rights law in these areas.'[58] In this regard, the Declaration No. 62, where the Republic of Poland states that 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',[59] should be taken into account. This Declaration confirms the persistence of fundamental rights as the general principles of European Union law. It also points out to the reaffirmatory character of the Charter. As it is stated in Article 2:

> *To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.*

From the literal interpretation is follows that the scope of the Article 2 is limited to the provisions of the Charter referring to 'national laws and practices.' Protocol by no means constitutes any further limitation on the applicability of the Charter, but rather restates what should already be obvious from the references to the Article 52(6) of the Charter, which says that 'full account shall be taken of national laws and practices as specified in this Charter.' Where reference is made to national laws and practices, it is for the Member State to identify the standard of protection. In Article 2 the Protocol simply reminds that some issues are reserved for the competence of the Member States.

Having considered all the provisions of the Charter it is clear that the impact of the Protocol No. 30 on the application of the Charter of Fundamental Rights in both Poland and the UK is minimal. The Articles of the Protocol mostly restate what was already expressed in the Charter. Only the Article 1(2) had proven to restrain application of Title IV of the Charter, albeit to a limited extent. 'Solidarity' rights collected in the Charter are already guaranteed in various international agreements, most notably European Social Charter and some of those rights are recognized of the fundamental rights of the European Union. The Protocol should be considered to be an interpretative device, not an exemption from the obligation to comply with the provisions of the Charter, as the European Court of Justice confirmed it in *NS*.

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[58] Ibid., paragraph 3.3.

[59] 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.

V. The Field of Application of the Charter of Fundamental Rights

As it was already mentioned, the legal status of the Charter is equal to the EU Treaties. Since the Protocol No. 30 does not constitute an opt-out for Poland and the United Kingdom, the Charter is effective in all Member States of the European Union. Thus, the field of application of the Charter should be considered. As it stems from the wording of the Article 51(1) the Charter is only applicable 'when implementing the Union law.' From the explanations it follows that the requirement to respect fundamental rights 'is binding on the Member States when they act in the scope of Union law.'[60] The interpretation of 'acting within the scope of EU law' clause was considered by the Court in the ruling *Fransson*.[61] As we read in the judgement 'the Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations.'[62] The Tribunal also states that, when European Union law governs national action, the Charter invariably becomes applicable. However, in a situation where Member State action is only partially determined by EU law 'national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.'[63] In the light of the *Fransson* ruling, in order to qualify the action of a Member State as falling 'within the scope of EU law' it sufficed to show that said action was ultimately governed by EU law.. This broad interpretation of Article 51(1) of the Charter of Fundamental Rights was restricted by *Siragusa* test, where additional criteria were introduced – one of them being a subjective intention of the Member State to implement a provision of EU law.

In *Siragusa*[64] the Court provided a more restrictive interpretation of the connection with EU law required to invoke the Charter. The Court proposed a test, which could serve as benchmark to establish in a given situation, whether Member States are 'implementing European Union law' for the purposes of Article 51 of the Charter. The following criteria were identified by the Court:

(1) Whether national legislation is 'intended to implement a provision of EU law';

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60 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02).
61 Judgement of the Court in the case C□617/10 Fransson; ECLI:EU:C:2013:105.
62 Ibid., pragraph 19.
63 Ibid., paragraph 29.
64 The Judgement of the Court in the case C-206/13 Siragusa; ECLI:EU:C:2014:126.

(2) 'The nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law;
(3) Whether there are specific rules of EU law on the matter or capable of affecting it.[65] '
The Court has found that fundamental EU rights could not be applied in relation to national legislation if no obligation is imposed by European Union law on a Member State in a subject area of said legislation. While it may be argued that this new benchmark has limited the scope of application of the Charter in relation to national rules, potentially at the expense of the protection of rights enshrined in the Charter, the new test provides a much needed clarification of the meaning of Article 51(1).

Summarizing, it must be remembered that protection of fundamental rights is the primary responsibility of the domestic legal systems imposed by European Union law. All organs of Member States while exercising public powers are bound by the Charter, provided they act within the scope of EU law. Protection of fundamental rights enshrined in the Charter is the primary responsibility of the national courts and tribunals, in which the citizens are entitled, invoke the provisions of the Charter In case of doubts as to the interpretation of fundamental rights national courts, are obliged to refer a preliminary question to the European Court of Justice, which is the supreme interpretative authority when EU law is concerned, including the Charter. As to the Protocol No. 30, it may be interpreted as an exemption from observance of potential new fundamental fights derived from Title IV of the Charter, however as long as there is no authority of the Court on Article 1(2) of the Protocol there is no certainty about this interpretation. It should be noted that in the light of *Fransson* and *Melloni*[66] the standard of protection of fundamental rights resulting from the Protocol cannot be interpreted in a way that would compromise 'the primacy, unity and effectiveness of EU law.'[67] Contrary to the Opinion of the Legislative Council of Poland[68] the Protocol does not disable invoking the Charter's provisions by individuals before the courts in the United Kingdom and Poland, nor it undermines the competences of national courts to submit preliminary questions regarding the application of the Charter, as it is confirmed in *NS*. The courts in both Member States are obliged under EU law to ensure compliance with the provisions of the Charter. They are also bound to exact observance of the fundamental rights derived from other sources of European

65 Ibid., paragraph 25.
66 Judgement of the Court in the case C□399/11 Melloni; ECLI:EU:C:2013:107.
67 Ibid., paragraph 50.
68 Opinion of 17 march 2008 on the legal effects of the Charter of Fundamental Rights, Title III; available from http://radalegislacyjna.gov.pl/dokumenty/opinia-z-17-marca-2008-r-w-sprawie-skutkow-prawnych-karty-praw-podstawowych.

Union law. In consequence, every limitation to the protection of European Union citizens provided by the Charter imposed on the citizens by national authorities in areas falling into the scope of EU law should be regarded as unlawful discrimination forbidden by the Article 18 of the Treaty on the Functioning of European Union. All in all, the effect of the Protocol No. 30 on the application of the Charter in the UK and Poland is non-existent, as long as new fundamental rights are not being derived from 'solidarity' provisions of the Charter. In such an event, the normative content of the Article 1(2) will come under the scrutiny of the European Court of Justice, as to whether it does not hinder uniform application needed to ensure legal certainty and coherence across the European Union.

VI. The failure of the Protocol No. 12 of the European Convention on Human Rights (ECHR)

In European Law, the European Court of Justice (ECJ) often uses the European Convention on Human Rights (ECHR) in its law cases. All the EU Members signed the ECHR and the ECJ uses the convention when it has to identify the scope of the protection given by the EU Law about Human Rights. Even the Charter of Fundamental Rights refers to the ECHR to describe the fundamental rights of all the EU citizens. Moreover, the Lisbon Treaty prepares the accession of EU to the ECHR and the Protocol No. 14 of the ECHR has been modified to allow EU to join the Convention. Even if the ECJ underlines seven incompatibilities to join the Convention[69], it may happen in the next years.

So we can see that ECHR is really important in European Union Law. ECHR and EU Law on Human Rights are related and referred to each other. Through this part, we will see that the Protocol No. 30 is a good way to take a look at the erosion of the principle of non-discrimination, but it's not the only proof of that erosion. The failure of the Protocol No. 12 of the European Convention on Human Rights is also something that underlines the attitude of European states, which are causing an erosion of non-discrimination in European Union Law.

[69] See: http://actu.dalloz-etudiant.fr/a-la-une/article/le-non-de-la-cjue-a-ladhesion-de-lunion-europeenne-a-la-convention-europeenne-de-sauvegar/h/0e696e5d1d36d28adb9d51eb15342f58.html.

The Protocol No. 12 of the ECHR was adopted in 2000. It spreads the scope of the principle of non-discrimination provided in Article 14 of the Convention.[70] The Article 1 of the Protocol says:

> *The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
> *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*[71]

So the purpose of this protocol is to increase the protection on Human Rights and non-discrimination given by the Convention. Yet, 38 countries out of 47 signed the treaty. Even less – only 19 – ratified it so far.[72] It may be seen as an erosion of the principle of non-discrimination because this protocol focuses on this principle and its protection. But nine countries totally refused to be engage in this protocol and 19 others just signed it in 2000 and do not want to ratify it. The nine countries contesting the Protocol are:

> *Bulgaria, Denmark, France, Lithuania, Monaco, Poland, Sweden, Switzerland, and United-Kingdom*

Recently, a French deputy M Aymeri de Montesquiou asked a question in the Senate in France to the French Minister of Foreign Affairs about the possible signature and ratification of the Protocol No. 12. The French Minister answered that it's impossible at this time because France does not want that the new law cases brought by the Protocol prevent the European Court of Human Rights to do its work[73]. It's true that the European Court of Human Rights is overworked at this time and it is a common argument for not signing this protocol. Moreover, France was recently convicted for various discrimination issues. For example we can talk about the case *E.B v. France*[74], where the France refused the right to adopt a child to a homosexual women due to her sexual orientation. The Court judged that France made

[70] Article 14 of the ECHR « Prohibition of discrimination ».
[71] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, available on the website of the Council of Europe.
[72] Chart of signatures and ratifications of treaty 177 (Protocol No.12).
[73] In French: https://www.senat.fr/questions/base/2001/qSEQ010734441.html.
[74] E.B v. France: http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20E%20B%20%20v%20France6.pdf.

discrimination between the homosexual women and a heteronormative individual. In this case, the right to adopt a child was related to the Article 8 of the ECHR due to the legislation of France regarding the adoption. But with the Protocol No. 12, it could be easier to judge this kind of case owing to the terms "any right set forth by law" used in the Protocol No. 12.

> *Protocol 12 prohibits discrimination in relation to 'enjoyment of any right set forth by law' and is thus greater in scope than Article 14, which relates only to the rights guaranteed by the ECHR*.[75]

This may frighten France and other countries. The European Court of Human Rights would be able to control national administrations and other courts to guarantee Human Rights and especially in this case freedom from any form of discrimination to all citizens and countries which signed the Protocol No. 12.

Poland and United Kingdom are two other countries, which did not sign and ratified the Protocol No.12 yet. That is another proof that in European countries we can see kind of unwillingness to treat certain groups of people equal. This might also be assessed as an erosion of the principle of non-discrimination, as this principle is supposed to support exactly the opposite. The governments and administrations are not very happy about the principle and its consequence of a non-discrimination and equal treatment, which might be the main reason to avoid the obligation to apply the principle by not ratifying the Convention.

The United Kingdom government is more clear than the French government on the question of signing and ratification. The UK position is to point out that the Protocol would result in a flood of new cases for the European Court of Human Rights, which is the same as the French position. But that is not the only issue for the United Kingdom: Even though the government explains that they agree with the purpose of the protocol, UK will not sign or ratify this treaty before some explanations will be made and some new cases will reach the court (only one case refers to protocol 12 so far)[76]. The government considers that there are "unacceptable uncertainties":

[75] Handbook on European non-discrimination law, Page 63.
[76] Sejdić and Finci v. Bosnia and Herzegovina (27996/06 and 34836/06).

The potential application of the Protocol is too wide, since it covers any difference in treatment, applies to all "rights set forth by law" in both statute and common law and could therefore lead to an "explosion of litigation";
"Rights set forth by law" may extend to obligations under other international human rights instruments to which the UK is a party;
It is unclear, pending decisions by the ECtHR, whether the protocol permits a defence of objective and reasonable justification of a difference in treatment, as applies under Article 14 ECHR.[77]

Summarizing we clearly see that there is an issue about the scope of application of the Protocol No. 12. UK administration is disturbed by the main purpose of the Protocol, which is to increase the protection of non-discrimination in Europe. The government of the United Kingdom shows that it will create a global right to not be discriminated, without reference to a particular detailed text. Moreover, they put as an issue the fact that the European Court of Human Rights could judge UK not only on the basis of the ECHR, but also other Human Rights treaties.

So we can see that this Protocol No. 12 of the ECHR was not a real success or possibly even a failure as many of the countries engage in the Council of Europe do not want to give more power to the European Court of Human Rights to judge discrimination-cases. The Convention was supposed to end discriminations, but instead an erosion of the principle of non-discrimination occurred, because of the attitude of European countries towards this Protocol.

VII. Conclusion:

The principle of non-discrimination was created in 1957 and has been developed since this time. Initially it was designed for an economic purpose of fair competition, but it has been further developed during the 90's and in the current century. Yet, in this paper, we saw that it is not so easy to say that this principle is now fundamental for all EU countries. The Protocol No. 30 shows that there is a kind of an erosion of this principle, especially for United Kingdom and Poland, but not only.

[77] Report of the UK Parliament : http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9906.html.

What is it about this erosion? Is it just an erosion of the principle of non-discrimination or is it more than that? Through this paper, we saw that it is not really an erosion of the law itself, but rather an erosion of European principles fuelled by political and social aspects of our modern society. However, the erosion that we can see in the Protocol No. 30 or in the Protocol No. 12 is not just an erosion of the principle of non-discrimination; it is also – and from a historical, political and corporative point of view that might be even worse – an erosion of the idea of the European Union, the idea of Europe. It is the idea to share common values, fundamental rights and stay together to keep freedom, peace and attached with that also wealth of our societies. We wanted to share those rights and values with all the European citizens. That this idea and ideology has been crumbling in the most recent past is not only obvious if you focus on the non-discrimination principle as we did. It becomes more evidently if you extend your range of view: The "Brexit", the growing Euro- and Europe- / EU-scepticism in many EU member states, or the disregard to the idea of rule of law displayed by Polish or Hungarian governments.

Nonetheless, the principle of non-discrimination is still guaranteed in European Union Law and in the European Convention on Human Rights. Even the European Social Charter of the Council of Europe is a proof that many men in Europe want to improve the human rights and prevent any discrimination in all countries. Even though we can see the erosion in several situations by virtue of the Charter of Fundamental Rights, ECHR, European Social Charter, and the framework of general principles of European Union Law we have a guarantee of non-discrimination. We have to work on a strategy to create a new dynamic in European Union to stop Euroscepticism and to reform the institutions. It is necessary in order to stop not only the erosion of fundamental principles of the EU, but also an erosion of the idea of an united Europe.

Daniel Faucher[78], a French Geographer, once said: "Europe is too big to be united, and too small to be divided. That is its dual destiny." It is the challenge and the assignment of each European to keep this existing unity of Europe alive. And this will not work if we stop respecting and honouring our common values. Values like the principle of non-discrimination.

[78] History of Daniel Faucher: http://w3.msh.univ-tlse2.fr/bipt/VOIR/faucher/accueil.html.