

The Interpretation and Application of Fundamental Rights in Civil Cases in the Czech Republic

I. Introduction

The aim of this article is to determine and shed light on the specific features of application and interpretation of fundamental rights in the field of civil law in the Czech Republic. The article follows a methodology developed by Prof. Z. Tóth to examine decisions made by constitutional courts in Central Europe and works with an analysis of 10 selected rulings² of the Czech Constitutional Court (CCC).³ The article will scrutinise these decisions one by one, according to the areas to which they materially belong. A quantitative analysis of the individual interpretation methods will follow in the conclusion. The reason why I opted for this approach is that decisions in individual cases are relatively strongly influenced by two factors in terms of the methodology and values. The first is the specific panel of justices that is called on to hear a certain case and the second is the justice-rapporteur appointed to present it to this panel.

What is important from the perspective of this article is not the actual solution to each given matter, but rather the process by which the CCC arrived at the solution. The article will therefore focus primarily on the methods of interpretation and the arguments used in each case, and on significance the CCC attributed to these methods and arguments in the reasoning of its decisions.

II. Family law – same-sex couples

I chose two decisions from the field of family law. The first was case Pl. ÚS 7/15, where the Constitutional Court answered the question of whether it was constitutionally permissible for a registered (civil) partnership to form an obstacle to individual adoption of a child. The Civil Code (CC) lays down a general rule that children may be adopted by married couples. That being said, “another” person may also adopt a child under certain circumstances, even if he or she is single.⁴ This provision can be interpreted in that such other person may also be a “registered partner”. On the other hand, however, the Registered Partnership Act explicitly excludes this option.⁵ The legislator thus ultimately allowed for the adoption of a child by an unmarried individual, where his or her sexual orientation was completely irrelevant. At the same time, however, adoption was prohibited to a person who lived in a registered partnership complying with the law (*sic*). This meant, rather illogically,

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² Decision I.ÚS 199/11 of the Constitutional Court, Decision I. ÚS 2482/13 of the Constitutional Court, Decision II. ÚS 2224/14-1 of the Constitutional Court, Decision Pl. ÚS 7/15 of the Constitutional Court, Decision I. ÚS 1234/15-1 of the Constitutional Court, Decision I. ÚS 3226/16 of the Constitutional Court, Decision II. ÚS 3194/18 of the Constitutional Court, Decision II. ÚS 3212/18 of the Constitutional Court, Decision III. ÚS 4129/18 of the Constitutional Court, Decision II. ÚS 2778/19 of the Constitutional Court.

³ I chose these decisions based on their significance for legal practice, while the arbitrariness of my choices is offset by the fact that I selected those judicial decisions that captured the attention of the professional public and that significantly contributed to formation of the law and the legal environment in the Czech Republic.

⁴ § 801 CC.

⁵ § 13 Sec. 2 of the Registered Partnership Act.

that such a person could become a parent *de facto*, but not *de iure*. Indeed, if his or her relationship with the partner was legalised, this would prevent possible adoption.

This case deserves attention for several reasons. The CCC took into close account existing case law of the ECtHR and drew from this case law standards of non-discriminatory treatment in similar situations. In doing so, however, it admittedly neglected one aspect, specifically that ECtHR case law has only subsidiary nature in this area, and the Member States thus have room for their own discretion. This room was in no way delimited or analysed – no judicial dialogue took place in this regard. As a matter of fact, the CCC could have started where the ECtHR had left space for national law and national specifications.

It is also worth noting that the CCC carried out a comparative analysis in the part of the decision titled “Further relevant case law”. While this heading might imply that the court made a broader reflection on foreign case law, it in fact analysed only a single ruling of the Austrian Constitutional Court. And moreover, this decision was probably analysed and mentioned only because it supported the conclusions reached by CCC itself. The CCC deliberately omitted laws that did not fit well into its arguments.⁶ I admit that I may be overly influenced by the academic environment, but I still believe that in such a sensitive matter, the CCC should have properly dealt both with arguments supporting the conclusion which it clearly intended to reach and those that would imply the opposite.⁷ The comparative method of interpretation was thus used only partially and the arguments are not very apt. It is true on the other hand that this comparison was clearly supposed to serve as an *illustrative argument*.

As regards other individual methods of interpretation, the linguistic method was used with regard to sub-constitutional law and is therefore not relevant for the research in this article. On the other hand, the CCC knowingly, intentionally and openly gave up on defining the concept of “family”, as used in the Constitution. An apparent effort was also made in this decision to adopt an evolutive approach to various forms of cohabitation of couples, but without any detailed analysis of their substance and role in society. Instead, such an analysis was replaced by general and superficial platitudes concerning human dignity.⁸ They thus do not directly concern the matter as such. Ultimately, emphasis is laid on the actual development of society, and interpretation of the fundamental rights is adapted accordingly. In the end, the Constitutional Court ruled in favour of registered partners. In doing so, it relied on the right to human dignity, the right to private life and the right to non-discrimination, all protected by the Charter and the European Convention. The applicant invoked the prohibition of discrimination (pursuant to the Charter and the ECHR) and also the prohibition of discrimination on the grounds of sexual orientation (under the EU Charter). In fact, the argument referring to the EU Charter was excessive, as the case comprised no EU element. What is remarkable in this regard is that the proceedings were initiated by a court, and thus an institution which should be aware of this fact, and not by a private lawyer, where one might expect excessive arguments in view of his or her role and occupation.

The second decision concerned with family law pertained to a same-sex couple married in California, where one of the partners was a Czech citizen. Under the laws of California, both partners are deemed to be the parents of their child, which naturally had to be delivered by a surrogate mother because the partners were male. One of the partners is also the biological parent of the child, but it is deliberately kept secret which one. Czech common courts refused to recognise their parental status on grounds of *public policy* protected by the Private International Law Act.

⁶ See dissenting opinion of Justice Ludvík David.

⁷ The practical consequence of this omission, or more accurately simplification, were dissenting and concurring opinions presented in the case.

⁸ And moreover, using rather poor rhetoric. The CCC states, e.g.: “As stated convincingly by Jiří Baroš”. The word “convincingly” is redundant in the given context.

Although it could have been relatively easily determined which one of the partners was the child's parent, the CCC noted that this should not be unveiled and the partners' decision in this regard ought to be respected. The CCC further accentuated doctrinal interpretation of surrogacy. As regards other methods of interpretation, this decision was again strongly influenced by case law of the ECtHR. The Constitutional Court tends to use this case law in two ways – as an argumentation basis (where the conclusions of the ECtHR are adopted and serve as *decisive arguments*) and also to support the Court's own arguments (the CCC's conclusions are confirmed thereby and ECtHR case law is used *strengthening arguments*). Finally, the CCC refers to the authority of the *Committee on the Rights of the Child* and states that its interpretation⁹ is authoritative and thus binding (plays the role of the “*defining (sic) argument*”). This is so despite the fact that such an authority cannot be really inferred under public international law.

The focus of this article also warrants attention to the CCC's approach to the concept of “public policy”. This term needs to be defined if one is to specify correctly the scope of “best interests of the child”. Nonetheless, the CCC provided no interpretation of the above concept. It thus failed to explain why Czech public policy would not allow for surrogacy (with a view to protecting the best interests of the child). Instead, the CCC *de facto* adopted the Californian approach (while referring to the best interests of the child).¹⁰ As regards the rights invoked, the applicants relied on the rights to private and family life, non-discrimination and fair trial, and on the principle of the best interests of the child, while referring to the provisions of the Charter and the ECHR. The CCC substantiated its decision by the best interests of the child under the Convention on the Rights of the Child, and the right to a family life under the Charter.¹¹

III. Cases involving joint custody of children

The second group of decisions concerns the issue of parents' custody of children in case of breakdown of their marriage. The first important decision in this regard was delivered in case I. ÚS 2482/13. What is important in terms of methodology is that the CCC worked in this ruling not only with ECtHR case law (as usual), but also with its own case law, and they both served as *decisive arguments*. The approach to these two sources was homogeneous and uniform rules of procedure were thus formulated on their basis. Further, as a *strengthening argument*, the CCC referred to General comment No. 14 on the right of the child to have his or her best interests taken as primary consideration.

The decision had two levels: interpretation of constitutional rights and the impact of such interpretation on family law. Indeed, the relevant provision of the CC¹² governing the custody of children set out a list of possible solutions in this regard, but without explicitly

⁹ Contained in General comment No. 14 on the right of the child to have his or her best interests taken as primary consideration.

¹⁰ This ruling also comprises some legally problematic arguments. The CCC notes that “[a]lthough the complainants' have a family life, the contested judgement means in fact that any legal relationship existing between the second and third complainants terminates once they get off the plane at Václav Havel Airport on their way to the Czech Republic.” This type of argument should not be used in court decisions. Primarily, it abuses the authority of a deceased person, and moreover, it is wrong in its very substance. The legal relationship existing under the laws of California does not terminate, but simply has no effects wherever Czech laws apply. See Telec, Ivo: Kritický pohled na nález Ústavního soudu: uznání kalifornského rodičovského statusu stejnopohlavního manžela In *Právní rozhledy*. 2017/19. p. 670-674.

¹¹ I should note in this regard that the CCC is bound in its review by the relief sought in the constitutional complaint, rather than by its legal justification; see rulings II. ÚS 3764/12, III. ÚS 1076/07, IV. ÚS 787/06 and others.

¹² Section 907 of the Civil Code.

giving their order of priority. What had to be considered, however, were the child's interests and the child's right to receive care from both parents and to have regular personal contact with them.

When interpreting the concept of "best interests of the child", the CCC came to the conclusion that "it is in the best interest of a child to be primarily in the custody of both parents and, if all the statutory conditions are met (...), entrusting children to joint custody should be a rule, rather than an exception". This approach could be described as revolutionary at the time.¹³ Literature focusing on the regulation of children's custody did not envisage any such priority¹⁴ and it cannot be inferred from the wording of the law either. At the same time, the CCC's approach meant *de facto* a breakthrough in judicial decision-making, which had previously more or less favoured mothers.

Some scholars expressed certain scepticism as to the actual impact of this decision in practice.¹⁵ Indeed, common courts are relatively free not to follow this decision of the CCC. They can, for example, place emphasis on differences in the facts of each specific case. But I, nevertheless, consider the decision significant as it demonstrates how constitutional law radiates into general law. In this particular case, an order of priorities was established although it was not explicitly laid down by the law.

In the case at hand, the applicant (the father) invoked his right to a fair trial, unpredictability of the court decision amounting to factual denial of justice, variance with the best interests of the child, and discrimination on the grounds of sex, while relying on the Charter, the ECHR and the Convention on the Rights of the Child. The CCC based its decision on the same sources, and merely accentuated the right to respect for family and private life, the parents' right to care for their children and their upbringing, and the best interests of the child.

In two subsequent decisions,¹⁶ which again concerned the same issue, the CCC again focused on the definition of the child's best interests. In doing so, it somewhat modified its conclusions and emphasised primarily the importance of the facts of each case for legal evaluation. It stated that each and every case was unique and one could thus hardly speak of any precedential effects of the CCC's judgement. I consider this very important as this feature is quite rare in the CCC's case law. The facts of previous cases usually form just a backdrop for its considerations. They are neither accentuated nor analysed in new decisions; what is important is the "headnote". The CCC's mode of operation thus differs generally in this regard from the way courts work in the Anglo-American legal system. The two cited rulings are therefore an exception to this rule.

In terms of methodology, emphasis was again laid here on references to the Court's earlier case law, and this method served as the *decisive argument*. One of the cited rulings also contains references to case law of the ECtHR, but not directly – they are made via the CCC's own prior decisions. This case law can thus be regarded as a mere *illustrative argument*. Account was also taken of General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, and of the statement issued by the Council for the Rights of the Child attached to the Government Council for Human Rights on 14 October 2014, both in the form of *strengthening arguments*.

¹³ Fidrmucová, Anna: Střídavá péče v rozhodovací praxi Ústavního soudu In Právní rozhledy. 2017/8, p. 277-283.

¹⁴ Hrušáková, Milana, Králíčková, Zdenička, Westphalová, Lenka et al.: Občanský zákoník II. Rodinné právo (§ 655-975). Komentář: C. H. Beck, Praha, 2014, p. 1019.

¹⁵ Questions marks regarding the presumption of joint custody of minor children – the influence of the ECtHR over case law of the Constitutional Court, Monika Forejtová, Jana Grygerová, Bulletin advokacie 1-2/2016

¹⁶ I. ÚS 1234/15-1 and II. ÚS 2224/14.

IV. Group of cases concerning contract law

Another group of cases concerns contract law and is significant for two reasons. First, these cases affect enforcement proceedings. Simply put, enforcement courts used to order the enforcement of decisions essentially automatically, based on a previous court decision or arbitral award, without going any deeper into the conditions that had led to the issue of the enforcement title. While the word “automatically” might sound derogatory, there is no reason for criticising this practice. If the courts had not proceeded in this way, they would have merely repeated and performed what should already have been resolved in the fact-finding proceedings.

In practice, the CCC’s rulings caused that even enforcement courts must now review the conditions of the fact-finding proceedings and, under certain circumstances, refuse to order enforcement of an already enforceable decision. This is so in cases where the terms and conditions stipulated by the contract that underlies the dispute are unconstitutional.

This brings me to the second reason why this group of cases is important: they set constitutional limits for *terms and conditions of contracts*. A certain rate of default interest, certain penalties or a combination of some contractual arrangements might be contrary to the Charter. *This is so where the whole contract is either manifestly unfair or contrary to good morals*. It is clear that such boundaries are somewhat vague in private law; nonetheless, it can be satisfactorily inferred from case law which arrangements are no longer admissible.¹⁷

These decisions of the CCC found little sympathy among the professional public, as they introduce an element of instability into an otherwise balanced system.¹⁸ It cannot be denied, however, that they turned around the fate of people in individual cases and resolved their personal problems.¹⁹ At the same time, they show how fundamental rights radiate into simple law, both substantive and procedural, and also demonstrate the horizontal effects of fundamental rights in private-law relationships.

The CCC’s methodological approach to this subject is also interesting from the perspective of this study. It is apparent that ruling I. ÚS 199/11 was rendered by a different panel of justices, which did not include justices Šimáčková and Šimíček.²⁰ Indeed, the decision is conservative in that it is based solely on *legal professional dogmatic interpretation*; this method is used as the *decisive argument*, and the decision relies on a single previous decision of the CCC²¹ and in no way reflects either the ECHR or ECtHR case

¹⁷ Given the subsidiarity of proceedings on constitutional complaints, this is not even required of the CCC by the law.

¹⁸ See for example Svoboda, Karel: Návrh na zastavení exekuce jako mimořádný opravný prostředek proti exekučnímu titulu. *Soudní rozhledy*, 2019/7-8, p. 221 and Hobl, Jaroslav: Posouzení úvěruschopnosti spotřebitele a dopady na exekuční řízení In *Obchodní právo*, 2020/5, p. 29, Šrámek, Dušan: Kolegium předsedů krajských soudů kritizuje nález ÚS ohledně nepřiměřenosti exekucí, In *Česká justice* <https://www.ceska-justice.cz/> (2019/6/13).

¹⁹ It must be stressed, however, that the people concerned usually caused these problems themselves – by signing contracts they had not read or which they did not understand, by violating the terms of their contract, and also by not addressing their problems in time, i.e. at the fact-finding instance, and starting to act only when the matters got really urgent. The “wake-up call” was typically when the enforcement officer attached their property. These conclusions naturally cannot be generalised, as there are a number of cases where such people were left with no choice despite all caution.

²⁰ These justices often work with ECtHR case law and are open to external influences. They also belong among those justices who often make unorthodox rulings, at variance with established conventions.

²¹ This was an earlier ruling in which the CCC provided common courts with a guideline for interpretation of simple law. It stated that it “would not tolerate an excessively formalistic approach on the part of public authorities and especially common courts, providing a sophisticated reasoning for a manifest injustice” and that “in this respect, a common court is actually not absolutely bound by the literal wording of the law, but rather may and must deviate from it where this is required by the purpose of the law, the history of its adoption, systemic relationships or one of the principles that are based on legislation conforming to the Constitution as a

law. That both would be symptomatic of these two justices. As a matter of fact, the applicant himself invoked only the national right to a fair trial under Art. 36 (1) and Art. 38 (2) of the Charter, and the CCC also assessed the case in this sense.

It is precisely from the methodological point of view that this decision contrasts with a more recent decision in II. ÚS 3194/18 (in which justices Šimáčková and Šimíček were involved). This later decision is based primarily on existing case law of the CCC, which is thoroughly analysed and forms an axis of the decision. Interpretation based on the court's own previous decisions is used as a *defining argument*, together with *legal professional dogmatic interpretation*. At the same time, the decision reflects the external framework formed by the Additional Protocol to the ECHR and case law of the ECtHR with regard to the principle of legitimate expectations. What is noteworthy in this regard is that quotes from the ECtHR case law remain concealed from a layperson. The reasoning of a decision refers to a list of court rulings, including decisions of the CCC and of the ECtHR without any distinction.

As regards the rights invoked, the applicant referred to the protection of ownership and the right to a fair trial under the Charter, and the CCC granted the right to judicial protection and protection of property under the same provisions.

A third recent case concerning the same topic²² was again heard by a different panel and this is again clearly discernible from the style of reasoning. The Court's interpretation starts with a relatively extensive explanation of precedential effects of the CCC's decisions. This begs the question why the CCC did so in this case, because if this introduction was supposed to legitimise the subsequent conclusions, which the panel was not convinced about, the case could have been presented to the plenum and the assessment changed. However, I consider it more likely that the rationale behind this discourse was an attempt to emphasise²³ the inevitability of the solution in this matter (a prior decision has been made in this sense, and it is therefore imperative to follow suit). The actual solution was based on dogmatic interpretation of simple law provided by the two Czech supreme courts, and also by the CJ EU. In addition, the Court also worked with the explanatory memorandum accompanying the given statute. As regards the regulation on which the CCC based its considerations, the foundations were formed by good morals and their protection, and the Court also emphasised the potential factual consequences of an individual being unable to repay a loan for society as a whole.²⁴ Dogmatic interpretation was used as the *decisive argument* and further arguments merely strengthened the conclusions reached by the CCC.

In this third decision, the applicant invoked the right to judicial protection, including the principle of equality of the parties to the proceedings under the Charter, the right to a fair trial under the ECHR and the right to the protection of property under the Charter and the Additional Protocol to the ECHR. The CCC found violation of the right to judicial protection under the Charter.

logical whole" see decision II. ÚS 1648/10.

²² III. ÚS 4129/18.

²³ With reference to its own earlier case law and to literature.

²⁴ The CCC noted that "common courts (...) should guide loan providers (even by means of potential discontinuation of an enforcement procedure on application of the obliged party) to thoroughly examine whether or not the (future) debtor will clearly have difficulties repaying the loan. This, according to the Constitutional Court, is not an especially strict or even disproportionate requirement: the question of whether it is realistic to expect a certain debt to be repaid is a basic principle that should be taken into account by the courts regardless of whether or not it is explicitly enshrined in a statute."

V. Group of cases concerning consumer protection

The last group of selected decisions is formed by those which relate to consumer protection. Consumer protection is not explicitly regulated at the constitutional level in Czech law. It is, however, enshrined in the EU Charter.

Decision II. ÚS 2778/19 concerned a dispute between a consumer who had failed to inspect goods properly upon their delivery and later found that they were defective. The seller did not acknowledge his claim because it was late; the consumer therefore withdrew from the contract. The “catch” and whole substance of the dispute was that the contract based on which the goods were supplied was concluded over the internet, and the seller violated the law by not informing the consumer fully about his consumer rights.

In this ruling, the CCC noted primarily that “consumer protection is one of the manifestations of the principle of weaker party protection, which forms a part of the constitutional principle of equality pursuant to Art. 1 of the Charter, in its material concept”, but then essentially failed to follow up on this declaration and in no way worked with the mentioned provision and, in turn, this principle. Instead, attention was paid to delimiting the reference framework in which the CCC would judge the case. The CCC noted that “[t]he Charter of the European Union has a special position among the sources of European Union law with regard to the Constitutional Court’s work, as the Court has denoted the Charter in its case law as part of the reference framework for review (...), a criterion for review, or emphasised the need to consider the case at hand also from the viewpoint of the EU Charter”. These conclusions imply the possibility of direct application of the EU Charter and the same is indicated in other parts of the cited decision. However, in the summary of its conclusions, the CCC refers only to the duty to interpret and apply national EU law in a manner conforming to EU law, where breach of this duty is considered a violation of the right to fair trial under the Czech Charter and, in turn, also the Constitution. In other words, the possibility of direct application of the EU Charter is practically equated to Euro-conforming interpretation, i.e. application of national law. Subsequently, the duty to reflect the relevant EU standard is inferred not directly, on the basis of this standard (as part of the reference framework), but indirectly through a national standard.

The bottom line is that Article 38 of the EU Charter states very simply that “Union policies shall ensure a high level of consumer protection”. It is thus clear from the wording of that provision that it cannot have direct effect in the Member States because it is too general in nature and does not formulate any specific duty or right of an individual. It is therefore not eligible for direct application (within the reference framework) and can only be reflected within Euro-conforming interpretation.

The CCC then quite carefully analysed the EU regulation of consumer protection in secondary law and also the CJEU’s case law interpreting this regulation. In conclusion, it stated that the common court had “*failed to take into account the requirements following from consumer protection under Article 38 of the EU Charter and the legal regulation adopted to ensure this protection in the case of distance contracts, (...) and thus violated the complainant’s right to judicial protection under Art. 36 (1) of the Charter (NB: the Czech Charter). It also breached the constitutional principle of protecting the consumer as the weaker party in the sense of case law of the Constitutional Court (...), whereby it also violated the complainant’s right to judicial protection under Art. 36 (1) of the Charter.*”

This approach is quite remarkable. It is generally considered that constitutional law radiates into simple law and affects its contents. Here it was exactly the opposite. In the CCC’s decision, secondary law “radiated” into Art. 38 of the EU Charter, as it *de facto* defined the contents of this provision, and then, within Euro-conforming interpretation, determined the contents of the Czech Constitution and Charter. But in view of the general

nature of Article 38 of the EU Charter, this “excursion” into said provision was unnecessary. The Czech Charter was ultimately interpreted according to EU directives and the reference to Article 38 of the EU Charter merely concealed the absurdity of this approach. It means that the CCC *de facto* became another court instance in the application of simple law and reviewed a decision rendered by common courts on its merits, all this in a situation where the relevant directives could not be applied directly in view of the horizontal nature of the relationship between the parties to the dispute.

In terms of methodology, this decision is based primarily on the *legal professional dogmatic interpretation* method, which is used as the decisive argument. At the same time, it is partially disguised as interpretation based on previous case law of the CCC and of the CJEU, which are supposed to legitimise the CCC’s decision in this matter, but which are, in fact, redundant in terms of the core of the given case.

As regards arguments invoking fundamental rights, the complainant referred to the right to a fair trial under the Charter and the ECHR, the right to protection of property under the Charter and the Additional Protocol to the Convention and, at the same time, also the principle of *pacta sunt servanda* following from Art. 1 (1) of the Constitution of the Czech Republic (the “Constitution”), and further to violation of those provisions of the Constitution which require the courts to ensure protection of rights and emphasise that the courts are bound by statutory law and international treaties. The CCC made its decision primarily on the basis of the right to judicial protection in connection with those provisions of the Constitution which are aimed to ensure respect for external obligations of the Czech Republic.

In sharp contrast to the case described above is a different ruling which was, paradoxically, issued by the same panel. The dispute concerned a situation where hotel management required Russian guests to sign a declaration condemning the occupation of Crimea, or else they would not be allowed to stay at the hotel. In terms of methodology, this decision is exceptional and differs from earlier rulings. This owes to the fact that the case involved primarily a political – rather than legal – matter. Therefore, the CCC worked with general concepts in the reasoning, and referred not only to professional literature, but also to philosophical works and belles-lettres. Unlike the previous decision, which – in terms of style – resembles a document typical of Moot court competitions, in this case, the reasoning has the nature of a professional essay. At the same time, the legal conclusions are supported by political arguments based on the UN General Assembly resolution titled “Territorial integrity of Ukraine”, EU’s and Czech foreign policies and historical experience of the Czech Republic. As regards methodology, the decision is based more or less exclusively on *legal professional dogmatic interpretation* – this method serves as the *decisive argument*, while everything else, including references to professional literature and other non-legal documents, is used only as a *strengthening argument*, or even an *illustrative argument*.

Quite surprisingly, however, the decision completely neglects the rights of the customer, who often has the position of consumer. Honestly, who would sign a declaration abroad to condemn their own country? What is important, however, is the legal regulation; indeed, it might seem unexpected in the light of prior rulings that the decision contains no mention whatsoever of consumer protection, whether at the level of the Charter or at the level of secondary law. There would be more than enough space to broach this subject.

VI. Conclusion

In summary, the Court does not visibly deviate from its general practice when hearing cases from the domain of private law.²⁵ The contents of individual decisions and the method of interpretation, as well as the arguments used are thus more influenced by the composition of each specific panel and by the justice-rapporteur. There is also no discernible general rule defining which cases will end up before the Constitutional Court. The ball is in the applicants' court – the Constitutional Court cannot pick cases at will, like some of its foreign counterparts. It is clear at the same time that the Constitutional Court deals with society-wide impacts and is therefore willing, even if only exceptionally, to also accept disputes in “trivial cases”.²⁶ What serves as a filter in practice is compulsory representation by a lawyer. Lawyers themselves can be divided into two groups: while the first ones approach their cases realistically, lawyers in the second group are well-known figures as they tend to try and push the limits as far as possible. As a matter of fact, they succeed from time to time. Indeed, the Constitutional Court certainly cannot be described as a predictable institution. The outcome often depends primarily on the panel or even the justice-rapporteur to whom the case is assigned. The problem can thus be viewed from a different angle. Rather than asking in what area of law cases will most probably reach the CCC, it makes more sense to ask which justice or panel is likely to make a decision in favour of the common man. This role, which used to be played by justice Eliška Wagnerová, has now been taken over by justice Kateřina Šimáčková.²⁷

It further follows from the overview of selected decisions that complainants tend to invoke a wide range of rights enshrined in both the Charter and the ECHR. On the other hand, the Constitutional Court is not bound by such pleas. A consensus is regularly reached in this regard and, not surprisingly, the Constitutional Court then tends to rely on a certain, genuinely significant right affected in the case.

No rule or principle can be found in private matters that would distinguish such cases from decisions in the sphere of public law. What is apparent, however, is little regard for the comparative method of interpretation. While the CCC reflects foreign laws and case law very well in matters concerning directly constitutional law, in matters of private law, the potential of this method remains untapped, except for rare cases which, moreover, have limited impact. It further follows from case law that constitutional law radiates into simple law. This is true primarily of “indirect influencing” of the contents of national law. Its effect is nevertheless rather limited.²⁸ The consumer decision analysed above represents an exception in this regard, as in contrast, it was simple law that define – and thus also “created” – a constitutional standard of consumer protection in this case. As regards the horizontal effect of human rights, the professional public in the Czech Republic is not fully consistent in evaluation of its scope. Nonetheless, there is a consensus that the CCC has been significantly inspired by German doctrine and that indirect influence forms a part of its case law. As a matter of fact, this approach was also followed by the legislature, who enshrined it in the Civil Code.²⁹

²⁵ See Kühn, Zdeněk: Budování horizontálního konstitucionalismu: tři středoevropské strategie. In Tichý, Luboš (ed.) *Základní lidská práva v jednotlivých právních odvětvích*. Univerzita Karlova v Praze, Praha, 2006. pp. 93-104.

²⁶ Claims for a pecuniary performance not exceeding CZK 10,000 – see III. ÚS 4497/12.

²⁷ Eliška Wagnerová was well known for her willingness to rule in favour of the complainant statistically significantly more than any other judge. Chmel, Jan: Zpravodajové a senáty: Vliv složení senátu na rozhodování Ústavního soudu České republiky o ústavních stížnostech In *Časopis pro právní vědu a praxi*, 2017/4, p. 739-758.

²⁸ Tichý Luboš: Podmínky používání základních práv v soukromém právu. In Tichý, Luboš (ed.) *Základní lidská práva v jednotlivých právních odvětvích*. Univerzita Karlova v Praze, Praha, 2006. p. 66:72.

²⁹ According to the Code, each provision of private law can only be understood in accordance with the Charter of

Among the methods of interpretation used by the CCC, a minor role is apparently played by *interpretation based on ordinary meaning*. Doctrinal interpretation tends to be used as a supporting argument. A key role is played, however, by the policy formed by the CCC itself, although it usually remains hidden behind dogmatic interpretation. It is common for the CCC to take well into account its own earlier case law, which forms the *modus operandi* of interpretation and decision-making by the CCC. Case law of the ECtHR is also largely reflected, depending on the individual panel. Decisions of the ECtHR and the ECHR as such have an exceptional position in the Czech legal order and their contents form a unity with the Czech Charter and decisions of the CCC. An auxiliary role is played by literature and not once did the Constitutional Court commit an argumentative flaw by quoting an article or book written by a justice of the CCC.

On the other hand, the method of logical interpretation was never used in the group of decisions under scrutiny; *domestic systemic arguments* were important especially in terms of ensuring that the Charter was interpreted in conformity with EU law. Teleological and historical interpretation methods were also used in the background. In contrast, *non-legal arguments*, based on (international) politics, current social reality and good morals, played a visible role in the CCC's decisions.

It is thus typical of the CCC that it highly reflects case law of the ECtHR, but this case law is treated similarly as the CCC's own prior decisions. The CCC is thus characteristic for little consideration of the *margin of appreciation*. What the ECtHR says in its rulings is a canon. The CCC is aware of its own subsidiary role, although it emphasises this role only in exceptional cases, rather than this being a regular part of its decisions.