



## FREEDOM OF MOVEMENT OR A HOLIDAY IN ZANZIBAR: THE RIGHT TO LEAVE AND RETURN TO THE HOMELAND

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**Abstract.** The Charter of Fundamental Rights and Freedoms, as a key part of the constitutional system of the Czech Republic, was adopted thirty years ago. This happened in a fundamentally different society. Over the past thirty years, Czech society has undergone significant changes. From a society of scarcity, it has become a much richer society as a whole, accustomed to a high standard of consumption and possessing higher expectations. Czech society has also changed in the sense that it has gone from being a collectivist society to one based on strong individualism. This can be well illustrated by the example of Article 14 of the Charter of Fundamental Rights and Freedoms, which guarantees freedom of movement and, among other things, the freedom to travel beyond the borders of the state and to return to its territory. At the time of the creation of the Charter of Fundamental Rights and Freedoms, in 1990–1991, this right was perceived primarily as the right to leave the territory of the state and return without the need for the consent of the ruling regime, i.e., regardless of the political attitude of the state towards the individual and vice versa. Naturally, this right also included an element of possible economic emigration. During the COVID-19 pandemic, it became apparent that freedom of movement was perceived, not by the whole of society but by a not-insignificant part of it, as an unrestricted right, including the right to go on holiday and to return, regardless of the health consequences. This is one of the proofs of a change in Czech society's view not only of itself but also of the content of the Charter of Fundamental Rights and Freedoms.

**Keywords:** freedom of movement; Charter of Fundamental Rights and Freedoms; limitability.

### Introduction

This year's annual conference held on the Constitution Day was dedicated to the rule of law and current challenges and problems in its implementation in practice. This is an extremely topical subject for two reasons. The first reason is obvious. The fight against it entails many measures that also imply interference with the rule of law, in addition to interference with the fundamental rights and freedoms of the individual. The second reason is linked to this first reason, but goes beyond it, even though it apparently concerns only the countries of Central and Eastern Europe. It lies in the fact that this year marks three decades since the restoration of democracy, human rights, and the rule of law in this region. Thirty years is a long time to be able to observe the transformation of society. The societies of the countries of Central and Eastern Europe have changed considerably over that period (Klima, 2005, p. 5).<sup>2</sup> As this is a slow change, it is not the subject of significant or everyday discussions (Filip, 2010, p. 315; Kudrna, 2021, p. 57),<sup>3</sup> although such assessments have begun to appear in the public space in the last few years (Suchanek & Jiraskova, 2009, p. 7).

Importantly, the transformation of society's view of itself also has an impact on society's view of its basic constitutional documents and the principles on which they are based – and which they are supposed to guarantee

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<sup>2</sup> Let us compare the impact of this long period with the observation of Prof. Karel Klíma from the Faculty of Law in Pilsen, who points to a significant social shift already during the year and a half that separated the preparation of the Charter of Fundamental Rights and Freedoms and the Constitution of the Czech Republic.

<sup>3</sup> Prof. Jan Filip from Masaryk University in Brno, and judge of the Czech Constitutional Court, specifically mentions the traditional lack of interest in the anniversary of the Charter of Fundamental Rights and Freedoms.

and ensure (Paine, 1999, p. 9).<sup>4</sup> As society and its needs change, so too does its view of what codified texts mean (Pavliček, 2011, p. 464).

As far as the rule of law is concerned – but also other fundamental rights and freedoms – this is the result of liberal political and social thinking in our legal space over recent decades. The purpose of fundamental rights and the rule of law is to guarantee individual freedom to the extent that this is at most possible without compromising the functioning of society (Barber, 2018, pp. 2–6; Garlicki, 2000, p. 32; Winczorek, 2000, p. 110; Holländer, 2009, pp. 262, 265).

However, these rights and freedoms, including the rule of law, are perceived differently by a society that has just liberated itself from totalitarianism and is beginning its journey towards individualism and prosperity, and differently again by a society that is already individualistic and prosperous. In the first case, the rule of law is a promise and a goal of this journey; in the second case it is a demand and an expectation. In the first case, society is still essentially restrained; in the second case, its members often actively seek further ways to expand the space of their individual freedom and to break free from social constraints. In both cases, the same legal document and the same legal principles are applied, but in different conditions.

The aforementioned global COVID-19 pandemic marks a return to previous decades in a societal sense. The space for individualism and its expansion has been reduced, because the fight against COVID-19 means fighting to protect public health, which also entails limiting the rights and freedoms of individuals (Barber, 2018, pp. 6–9).<sup>5</sup> This pandemic has shown just how much our societies have changed, and how individualized they are. It has also shown how, in the fight against the COVID-19 pandemic, some solutions which would not have surprised anyone thirty years ago – but which, in today’s society, are perceived by a significant proportion as undemocratic, even totalitarian – are being returned to.

This paper attempts to show this fundamental shift through some concrete examples from the Czech Republic.

## 1. Historical context

The Charter of Fundamental Rights and Freedoms (hereinafter “the Charter”) was adopted by the Czechoslovak Federal Assembly on 9 January 1991, and entered into force on 8 February of the same year. The reasons, objectives, and motivation for the adoption of the Charter are well captured in its preamble. The preamble was essentially mirrored by the speakers who addressed the 11th Joint Session of the two Houses of the Federal Assembly at which the Charter was adopted (Stenographic record, 1991). The adoption of the Charter was to be one of the steps towards fulfilling the demands of November 1989. This was manifested, among other things, by the efforts to approve a new catalogue of human rights symbolically on the first anniversary of 17 November 1989 (Pavliček et al., 1995, p. 14).

In relation to the demands of the civic initiatives of the autumn of 1989, the Charter was therefore primarily intended to create the basis for an enforceable legal framework for the truly free status (Pavliček, 2011, p. 463) of every person in Czechoslovakia (Pavliček et al., 1995, p. 13; Filip, 2010, p. 315). It was also intended to confirm a return to the values and ideals with which Czechoslovakia was founded (Pavliček et al., 1995, p. 15), and which a significant part of society aspired to or at least longed for in some form, even in the non-free times – i.e., democracy, self-governing principles, and civil society. However, the Charter also had an impact on international politics and Czechoslovakia’s position in the international community. Demonstrations in November and December 1989 included the demand for “Back to Europe” (Filip, 2010, p. 316) – i.e., to join the family of states that were committed to respecting the rights and freedoms of the individual as the basis for the functioning of society and the state. In order to uphold these values, these states gave up part of their sovereignty and submitted to the authority of international organizations, among which the Council of Europe (Copenhagen criteria, 1993,

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<sup>4</sup> Let us recall the words of Thomas Paine: “Every age and generation must be as free to act for itself, in all cases, as the ages and generation which preceded it. The vanity and presumptions of governing beyond the grave is the most ridiculous and insolent of all tyrannies”.

<sup>5</sup> See the term *positive constitutionalism* mentioned by prof. N. W. Barber.

Art. 1(2)<sup>6</sup> stands out. For Czechoslovakia, this also meant adopting the standards of this organization and harmonizing the Czechoslovak legal system with the European Convention for the Protection of Fundamental Rights and Freedoms (hereinafter “the Convention”) (Filip, 2010, p. 315). The adoption of a Charter compatible with the Convention was therefore also of national political significance.<sup>7</sup> This, however, significantly exceeded the State level of interest, because with regard to the direct enforceability of the Convention by the individual, it was of positive significance for every person in Czechoslovakia and for the guarantees of their rights and freedoms.

Like all things, the Charter reflects the time and circumstances of its creation and is the product of contemporary social processes (Pavliček, 2011, p. 464). It expresses the needs and expectations of contemporary society and is intended to address its problems (Pavliček et al., 1995, p. 14; Filip, 2010, p. 317). The thirty years that have elapsed since the adoption of the Charter are a long time not only in the life of an individual, but also in the life of society today. These thirty years were a period of great social, economic, technological, and political change. In the course of thirty years, generational change has reliably taken place. The society that gave itself the Charter no longer exists. It is therefore inevitable that the needs of contemporary society and the view of the Charter must also differ from those associated with the time of its creation.

The Charter was adopted as a legal document taking into account the experience of two totalitarian regimes – especially the communist regime, naturally (Filip, 2010, p. 317). Many of its provisions are still interpreted in this light (Decision of the Constitutional Court, 2006).<sup>8</sup> This is natural and it is right, because the Charter was created in response to the communist totalitarian regime. However, the developments of the past thirty years have brought new problems. Certainly, the Charter can also provide an answer to these, but it requires a fresh look at its provisions, a discussion of their interpretation, and the finding of a new social consensus.

In the author’s view, the questions thus opened up touch on virtually all the provisions of the Charter. This text touches on just a few issues to highlight the difference in social circumstances between thirty years ago and today. In particular, these are the issues of freedom of movement, the right to leave the territory of the Czech Republic, and the right to return. In all these cases, we can clearly see the differences between the social conditions of 1991 and those of 2021.

## **2. From the right to leave the homeland and possibly return to it to the right to holiday in Zanzibar without restrictions?**

As far as freedom of movement is concerned, its origins as a universal right are linked to the Enlightenment and the end of feudalism. This occurred at different times in different countries in Europe, but for the area of Western and Central Europe this was in the 18th century. Freedom of movement means, above all, the liberation of the rural population from its attachment to the land and the local authorities. It is also inextricably linked to the freedom to settle, in principle, anywhere in the territory of the state, and is so treated by Article 14(1) of the Charter, where the two freedoms are linked.

The freedom of movement and residence, or, where appropriate, establishment, has always taken two forms. One element has been the free movement of people within the state, the other has usually been cross-border movement. It is worth remembering that, until the 1857 publication of Imperial Decree No. 31/1857 of the Reich Code, Austria made the movement of its own inhabitants within its territory conditional on the possession of a valid

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<sup>6</sup> If membership of the Council of Europe was most important in terms of achieving high standards of human rights protection, human rights guarantees were also important in terms of Czechoslovakia’s other political aspirations, namely its prospective entry into the European Economic Community. The EEC declared the issue of respect for human rights in the form of the so-called “Copenhagen criteria” as one of the basic conditions for membership.

<sup>7</sup> This is also clear from the opening address of the President of the Federal Assembly, Alexander Dubček, at the aforementioned joint meeting of the two Houses of the Federal Assembly.

<sup>8</sup> In it, the Constitutional Court explicitly argues the “historical conditionality” of the constitutional prohibition on forcing a citizen to leave their homeland, as set out in Article 14(4) of the Charter. According to the Constitutional Court, this provision refers to the practice of the communist regime, which forced some of its opponents to emigrate. Now, in a democratic state, this prohibition cannot be applied to extradition under the EAW, and a euroconformist interpretation must be preferred and the limitations of the cited prohibition overcome by way of interpretation.

passport. In 1859, Austria acceded to the Dresden Convention of 22 October 1850, which established the free movement of citizens of the German States within its territory. Thus, the movement of persons between Germany and Austria was possible without restriction by border controls. Imperial Decree No. 116/1865 of the Reich Ordinance abolished all passport controls at the Reich borders. After the Austro-Hungarian settlement, Hungary enacted its own legislation and Austrian citizens were considered foreigners in the eyes of the law. That passport control between the two parts of the monarchy was not carried out in practice was another matter (Rychlik, 2007).

A fundamental change in the regulation of freedom of movement and residence was brought about by the First World War, after which there was essentially no restoration of the liberal conditions that prevailed in most of Europe before its outbreak. Of course, the period of Nazi and Communist totalitarianism is crucial for the consideration of freedom of movement and residence in the territory of the present-day Czech Republic. However, even in pre-war Czechoslovakia, conditions were not comparable to the period before the First World War. This was naturally due to the pan-European situation. As far as the so-called Third Czechoslovak Republic was concerned, the legal situation in 1945–1948 was not fundamentally different from the later communist situation (Rychlik, 2007, pp. 26–33). The experience of the communist regime's policies was of course decisive for the drafting of the Charter, and this is doubly true for freedom of movement. Indeed, this was repeatedly emphasized in the speeches preceding the final stage of discussion and approval (Stenographic record, 1991).

It is clear from all circumstances, whether unspoken or explicitly mentioned, that the Charter was primarily intended to guarantee every citizen the right to leave the country for political reasons and, regardless of political reasons, the right of return, which can also be described as the right to the homeland. These intentions are also consistent with the Fourth Additional Protocol to the Convention, in particular Article 2 para. 2 and 3, and Article 3 para. 2.

Neither the Charter nor its drafters ever conceived of this right as absolute. Similarly, the 4th Additional Protocol to the Convention is not conceived as an absolute, without the possibility of regulating or even preventing the movement of even its own citizens.

Moreover, there is no need to argue historically; the construction of the Charter itself is clear. The freedoms guaranteed by Article 14 par. 1 and 2 are clearly those freedoms which, for a number of reasons, paragraph 3 of the same Article allows for the restriction of (Klima, 2005, p. 709). It permits the restriction of the freedom of movement and residence by law where this is necessary for the security of the state, the maintenance of public order, the protection of health, or the protection of the rights and freedoms of others. In designated areas, such fundamental rights and freedoms of people may even be subordinated to the interests of nature.<sup>9</sup>

Let us add that the legal restrictions envisaged by the Charter do indeed exist in current law, ranging from the obligation to travel to many countries only with a passport and to return with it, to the possibility for the state to withdraw travel documents in justified cases, to the prohibition of travel, whether for pandemic reasons or for reasons of increased state threat – for example, in times of national emergency or a state of war.

Where proof of a personal document is not required when crossing national borders, as is the case within the Schengen area, the legislation, namely the so-called Schengen Borders Code (Regulation (EU) 2016/399, 2016), allows restrictions to be temporarily imposed for compelling reasons, and thus naturally the restriction of freedom of movement. However, it must be stressed that identity checks at the national border do imply a restriction of freedom of movement, but not its prevention. This matter is dealt with by the Treaty on the Functioning of the European Union, which allows, in Article 45 para. 3, for the restriction of this one of the fundamental freedoms of the European Union for, inter alia, reasons of health protection. Thus, while border checks or other

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<sup>9</sup> This aspect is noteworthy because, on the one hand, it is an abandonment of a rather anthropocentric conception of the Charter, and, unlike other grounds, no one has ever, in principle, made a major political or legal case against restricting freedom of movement and residence on environmental grounds, comparable to the debate on whether it is possible to restrict holiday travel to a country heavily burdened by an ongoing pandemic. In other words, no one has ever argued for a person's right to stay overnight without regulation in a designated protected area, even if the person in question has not caused any damage to the area. Respectively, restrictions and possible sanctions are generally accepted by society without embarrassment. However, the right to go on holiday without restrictions, even in a risk area, is fought for, even if the return is to increase the risk to other people.

accompanying checks are merely a procedural restriction and cannot, without a substantive reason, lead to a prohibition of entry and a restriction on freedom of movement and residence, the actual restriction is due to substantive reasons. Thus, the European Union also envisages the possibility that Member States may restrict freedom of movement and residence in relation to their territory for exhaustive reasons.

Although Article 14 par. 4 of the Charter does not explicitly speak of the limitability of a citizen's right to return to the Czech Republic, at least the first sentence of this provision is not absolute and unlimited (Klíma, 2005, p. 710; Pavlíček et al., 1995, pp. 142–143)<sup>10</sup> – Article 4 of the Charter can be applied to it. This is what happens in practice, since entry into the territory of the state is in some cases conditional on proof of a travel document, typically a passport. This requirement has also never been challenged as to its constitutionality.

More interesting is the question of the provisions of the second sentence of Article 14 para. 4 of the Charter. Its wording rather gives the impression of an unlimited nature. However, we know that this is not the case. This view was refuted by the Constitutional Court in its ruling in the case of the so-called Euro-warrant, file no. Pl. ÚS 66/04. The reasoning used by the Constitutional Court can be disputed. The preference for a teleological interpretation and the neglect of a grammatical interpretation is problematic. The author considers the argumentation to be particularly double-edged, when the Constitutional Court emphasized that the provision in question was expressly created as a reaction to the practice of the communist regime and was not intended to be applied, for example, to the extradition of Czech citizens abroad for the purposes of criminal proceedings.

In this case, we can observe a visible shift in the view of the Charter and its role in relation to the citizen – from extensive protection towards its reduction. What is interesting, however, is the justification for the reduction in the protection of the rights of the citizen. This is not the interest of the citizen concerned, but is a higher state interest, where the aim is to contribute to the Czech Republic being a good member of the European Union.

However, the key point in relation to freedom of movement is that the freedoms guaranteed by Article 14 of the Charter have never been seen as unlimited, either by their framers or by the Constitutional Court.

All the more surprising was the statement by the President of the Constitutional Court, P. Rychetský, who, in an interview with Czech Television on 29 November 2020, described the government's action, which restricted the cross-border movement of people during the fight against the COVID-19 pandemic, as “absolutely unconstitutional”. Specifically, he said:

At one point (the government) closed the borders and no one was allowed to leave the Czech Republic. So that is absolutely unconstitutional. The government can close the borders in that crisis situation, but for the return or for the entry into the country. But we have in the constitution, for reasons that only older people remember, for that totalitarian regime, we have an explicit provision that no one can be prevented from leaving this country (Rychetský, 2020, 25:50–26:25).

This statement is clearly erroneous in light of the text of Article 14 of the Charter. There is no point in discussing it further, as it provoked a number of reactions, all of which pointed to the fact that in May 2020 the Constitutional Court refused to address this very issue (Hasenkopf, 2020; Malecky, 2020).<sup>11</sup> This was under the leadership of P. Rychetský, not only as President of the Constitutional Court, but also as Judge-Rapporteur (Resolution of the Constitutional Court, 2020). This stance is noteworthy because it fits into a broader current of opinion, where from the beginning of the introduction of restrictions on travel abroad, criticism has been voiced that such a procedure is unconstitutional because freedom of movement is (or should be) unlimited. Given the social authority of the President of the Constitutional Court, the interview undoubtedly strengthened and legitimized this current of opinion in Czech society.

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<sup>10</sup> Moreover, Professor Karel Klíma draws attention to the substance of Article 12(4) of the International Covenant on Civil and Political Rights, which prohibits the “arbitrary” denial of a citizen's entry into the territory of their own state.

<sup>11</sup> See, e.g., the commentary by lawyer P. Hasenkopf, or a commentary by journalist Robert Malecky, a long-time specialist in law and justice issues.

Even if this was only one of the currents of opinion, other opinion groups were in favor of much more drastic restrictions on cross-border movement, and, in the author's opinion, they deserve attention as they show a shift in the thinking of a not-insignificant section of society. Whereas at the time of the adoption of the Charter freedom of movement was strongly political in nature, i.e., emigration or return to the homeland was to be prevented for political reasons, over the past thirty years this reason has essentially receded into the background, and Article 14 of the Charter is given a much wider meaning by a significant section of society – it is intended to provide protection against any restriction by the state. Thus, the right to leave the country for political reasons has become the right to go on holiday at anytime and anywhere, even to Zanzibar, which was at one moment a proverbial place in the Czech Republic.<sup>12</sup>

## Conclusions

It is hardly surprising to see such a shift in thinking. As mentioned at the outset, today's society is fundamentally different from the one that gave itself the Charter thirty years ago.<sup>13</sup> This is a society that is generally affluent, civically confident, accustomed to a much higher standard of living, and which feels what society took for granted thirty years ago as a difficult-to-carry limitation.

The Charter itself has not changed in the past thirty years. Society's view of itself and of what is acceptable and unacceptable has changed fundamentally. It has done so in an essentially unobtrusive manner, without wider social discussion. It was only the case of the so-called 'euro-warrant', mentioned by experts, that sparked this debate. However, this discussion did not, for natural reasons, reach a significant part of society. This was only proved by the COVID-19 pandemic, which affected everyone without exception and has already caused a society-wide debate. The conclusions so far are of a rather practical nature. In practical terms, the restrictiveness of the freedoms guaranteed by Article 14 of the Charter has so far held out.

If the opposite view should prevail, then the discussion should be more thorough. The possibility of preventing the departure of, for example, persons with final convictions and perhaps even criminal prosecutions, would probably stand up to a deeper and more intensive discussion. The question is, however, how the discussion would proceed, for example, on the provisions of Section 24 of Act No. 585/2004 Coll. on Conscription and Enlistment (the Conscription Act), as amended. In the case of a citizen subject to conscription, this provision makes their travel abroad during a state of national emergency or a state of war conditional on the state's consent. Although this matter is now rather hypothetical, it can be assumed that at a time of heightened national emergency, the social debate on the subject would undoubtedly be stormy – leaving aside the fact that it is somewhat belated.

Changes in the way the state views itself, society, and the individual, what its role should be, and what capabilities it should have also play a role. The state, which is made up of people, is of course subject to the same changes as society as a whole. If the issues of implementing conscription have been mentioned, it is worth mentioning that the state has completely lost the ability to use this obligation quickly and to replenish the armed forces if necessary.<sup>14</sup> Another example of an absolute change in the state's view of its role in relation to society is the abolition of the possibility of the blanket removal of legally held weapons from their owners if necessary in a state of national emergency and in a state of war. It is worth noting, in this case, that these were not demands from below but were an initiative of the Ministry of the Interior itself.

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<sup>12</sup> This happened at the turn of 2020 and 2021, when Zanzibar, unlike other holiday destinations, was not included in any pandemic travel restrictions, and interest in holidays there skyrocketed. When travel between districts within the Czech Republic was banned in March 2021, travel to Prague airport was a holiday, so Czechs could not visit their relatives in the next district, but, paradoxically, they could travel to and from Zanzibar with virtually no restrictions.

<sup>13</sup> Indeed, we can see the same at the level of the European Union. At the beginning of the 1990s, one of the fundamental pillars of European integration, freedom of movement, was only a freedom for workers, and for a limited period of time. In 2021, it is the right of anyone to move and settle anywhere in the European Union, essentially without restriction. However, this shift in thinking has also caused problems within the European Union.

<sup>14</sup> It is beyond the scope of this paper to describe the reasons for this, except to mention that there is a whole complex of causes. Starting with the virtual non-existence of army reserves, through the state's ignorance of potential conscripts and their capabilities, to the legally and administratively complex system of conscription.

Although the Charter is an extremely rigid document in terms of direct normative changes, it is subject to even fewer visible changes due to the way society changes and perceives itself, and, thus, what it expects from the Charter. Article 14 is a testament to this, and offers good inspiration for possible future considerations. These considerations should also leave room for so-called positive constitutionalism, which also considers the social interest and the knowledge that every individual is part of society and that their rights can hardly, if at all, be realized outside society (Barber, 2018, pp. 6–9).

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