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Fundamental rights of an individual – analytical review of selected issues : from jurisdiction of european court of justice to chart of basic rights

Annales Universitatis Mariae Curie-Skłodowska. Sectio K, Politologia 15/2,
69-93

2008

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej bazhum.muzhp.pl, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

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dozwolonego użytku.

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*Fundamental rights of an individual – analytical review
of selected issues: from jurisdiction of the European Court
of Justice to Charter of Fundamental Rights*

Prawa podstawowe jednostki – przegląd analityczny wybranych zagadnień od orzecznictwa Europejskiego Trybunału Sprawiedliwości do Karty Praw Podstawowych

INTRODUCTORY NOTES

In the 1950s there was no developed legal and institutional structure for protecting an individual's fundamental rights¹ in the Community system. The

¹ In this paper I will use the term "fundamental rights". In the Polish literature of the subject the authors most often use the term "human rights". The notion "fundamental rights" is ambiguous, as it occurs with reference to an individual's constitutional rights and is encountered in the international law of human rights. Sometimes the terms "human rights" and "fundamental rights" are used alternatively, see also on the subject: P. T. Tridimas, *General principles of EC Law*, Oxford 1999, p. 202. Cf. T. C. Hartley, *European Union Law in a Global Context. Text, Cases and Materials*, Cambridge 2004, p. 265; L. Henkin, *The Age of Rights*, New York 1990, p. 5; H.G. Schermers, *The European Communities Bound by Fundamental Human Rights*, "Common Market Law Review", no. 2/1990; R. R. Churchill, N. G. Foster, *Double Standards in Human Rights? The Treatment of Spanish Fishermen by the European Community*, "European Law Review", no. 6/1987; G. Meier, *Rechtsprechung Bundesverfassungsgericht. Beschluß vom 29.5.1974*, "Neue Juristische Wochenschrift", no. 38/1974; U. Scheuner, *Fundamental Rights in European Community Law and in National Constitutional Law – Recent Decisions in Italy and in the Federal Republic of Germany*, "Common Market Law Review", no. 2/1975; F. W. Scharpf, *Regieren in Europa. Effektiv und Demokratisch?*, Frankfurt 1999, p. 47–80; B. Simma, J. H. H. Weiler, M. C. Zöckler, *Kompetenzen und Grundrechte. Beschränkungen der Tabakwerbung aus der Sicht des Europarechts* (Schriften zum europäischen Recht 59) Berlin 1999, p. 142; C. Albiston, *The rule of law and the litigation process: the paradox of losing by winning*, "Law & Society Review" 1999, vol. 33, no. 4, p. 869–910; V. Olgiati, *Process and*

subject was *de facto* pragmatic, because it resulted from the fact that European Communities (EC) were formed especially being aimed at acceleration of economic growth after World War II. The earliest jurisdiction of the European Court of Justice (ECJ) was far from creating any relationships between EC and the questions of fundamental rights, because respecting these rights was secured already by the European Convention for the Protection of Human Rights and Fundamental Freedoms of the year 1950 (ECPHRFF), or the 1961 European Social Charter (ESC).² However, all the divagations about the protection of an individual's rights would remain unnoticed if the ECJ³ had not introduced in 1960s the principle of supremacy, stating that Community law has priority over domestic law.⁴ A differentiation by R. Alexy makes this particularly clear: he refers to the fact that most of the fundamental rights are in fact principles and not rules. The underlying structure of fundamental freedoms is finality; not conditionality. Fundamental rights do not make "if-then-statements" but impose aims on their addressees.⁵ Without a procedure for their authentic application fundamental rights are therefore – at least from a legal point of view⁶ – cheap talk. T. Tridimas in his article

policy of legal professionalization in Europe. The deconstruction of a normative order, [in:] *Professional Competition and Professional Power*, eds. Y. Dezalay, D. Sugarman, London–New York–Routledge 1995, p. 171–204; L. Waddington, *Testing the Limits of the EC Treaty Article Non-Discrimination*, "Industrial Law Journal" 1999, vol. 28, no. 2; C. Costello, *Gender Equalities and the Charter of Fundamental Rights of the European Union*, [in:] *Economic and Social Rights under the Charter of Fundamental Rights-A Legal Perspective* (Hart, 2004), eds. T. Hervey, J. Kenner, p. 111.

² D. Collins, *Social Policy*, [in:] *Institutions and Policies of the European Community*, ed. J. Lodge, London: Pinter 1983, p. 98; M. Maduro, *Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU*, [in:] *The EU and Human Rights*, ed. P. Alston, Oxford University Press 1999, p. 468. Social considerations were not seen as rights in themselves, but as derogations from economic rights, and therefore to be narrowly interpreted. Only the right to equal pay for equal work, because of its positive protection in the Treaty, was given the status of a fundamental right by the Court of Justice, see: case 55/94, *Gebhard*, ECR 1995, p. I-4165, para. 34; case 8/74, *Procureur du Roi v Dassonville*, ECR 1974, p. 837; case 120/78, *Cassis de Dijon*, ECR 1979, p. 649; case 43/75, *Defrenne v Sabena*, ECR 1976, p. 455.

³ J. Weiler, *The Reformation of European Constitutionalism*, "Journal of Common Market Studies" 1997, vol. 35, no. 1, p. 117–118; B. Crum, *Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit?*, "European Law Journal" 2005, vol. 11, no. 4, p. 452–467.

⁴ See on the subject: T. C. Hartley notices that the principle of priority is the fundamental rule of Community law, simultaneously indicating that there is one exception: the situation when the domestic law is necessary for the implementation of a state's international obligations, see: T. C. Hartley, *The Foundations of European Community Law*, 4th ed., Oxford 1998, p. 218.

⁵ R. Alexy, *Theorie der Grundrechte*, Frankfurt 1996, p. 17–158.

⁶ Political scientists are right in emphasising that symbolic policy can also have impacts. It may alter cognitive models or opinions, overcomes taboos and prepares the next political step.

entitled: *Judicial Review and the Community Judicature: Towards a New European Constitutionalism* emphasizes the importance of ECJ. He writes that the contribution of ECJ to the development of the European law is extraordinary, as a matter of fact, in certain respects it is a *novum* in the history of legal systems.⁷ The fundamental function of ECJ, as it was expressed in art. 220 (*ex* 164) of the Treaty establishing the European Community (TEC) secures controlled interpretation and application of Community law. This concise, unpretentious and seemingly inconspicuous article is probably the most important regulation in the Founding Treaties. On its basis ECJ commenced the process of the treaty constitutionalization from founding the Communities inspired by their goals and the idea of Union, closer than ever. Art. 220 establishes the principle of legalism as the leading principle of the Community law. However, it does not contain its own substantial principles and therefore it authorizes the Court to referring to the legal traditions of Member States and to making use of the legal principles expressed there, taking into consideration the development of the rule of law, appropriate for the Community. In result of that art. 220 is nothing but a guarantee of the Court jurisdiction to create, the constitutional doctrine by means of common law method. In the Community system the fundamental rights, as well as political and systemic issues gained significance in the 1970s, in the period of so-called “deficit of democracy”, caused by: firstly, extending the competence of EC onto more and more numerous areas of economic and social life and secondly: the increased consciousness of being strangers among the nationals of Member States before the Community organs that grew in strength but were not subject to democratic control. Besides, it is the period of principal influence of supranational institutions upon Member States: proclamation of the Luxembourg veto, or The Single European Act. Undoubtedly, the growing interest in the issue of the European Union fundamental rights was decided *expressis verbis* by coming into force of the Maastricht Treaty (The Treaty on European Union – TEU)⁸ in the year 1993, whereas on the basis of the standards contained in the Treaty of Amsterdam (TA)⁹ the jurisdictional

⁷ P. T. Tridimas, *Judicial Review and the Community Judicature: Towards a New European Constitutionalism?*, “Turku Law Journal” 2001, vol. 3, no. 1, p. 119.

⁸ Art. 2 TEU states that the goal of the Union is „strengthening the protection of the rights and interests of the citizens of its Member States by establishing the Union citizenship”, see: *Traktat o Unii Europejskiej; Traktat ustanawiający Wspólnotę Europejską. Komentarz*, ed. Z. Brodecki, 2nd ed., Warszawa 2006, p. 25. The additional warranty of protecting an individual’s rights is art. 6 pass. 2 TEU, see: *ibidem*, p. 33.

⁹ TA was signed on the 2nd day of October 1997 and entered into force on the 1st day of May 1999. TA introduced into the TEC art. 13 TEC, which is a source of legislative competence of European Union Council regarding combating discrimination on the basis of sex, race,

activity of ECJ was still based on the constitutional traditions of the Member States and, formally, it was not fully correlated with the parallel legal order of the European Court of Human Rights in Strasbourg (ECHR), which constituted a threat of institutional dualism in Europe.¹⁰

To a substantial extent it was these tendencies that determined taking to works on the EU Constitution. The Charter of Fundamental Rights (hereinafter: CFR) was proclaimed together with the Treaty of Nice in February 2001, as a document with the nature of a political declaration, constituting an

ethnic origin, religion or outlook on the world, disability, age or sexual preference, see: *ibidem*, p. 166. Originally, the competence of the EC in the field of gender equality, embodied in Article 119 of the Treaty of Rome (now Article 141 EC), was exclusively restricted to the scope of employment law and social policy. The introduction of Article 13 EC in the Treaty of Amsterdam changed this situation when, for the first time, competence was given to the Community to take appropriate actions to combat discrimination based on gender (racial or ethnic origin, religion or belief, disability, age or sexual orientation) outside the field of employment. The Council adopted very quickly two directives based on Article 13 EC. The Racial Equality Directive Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22, 2000 – prohibits racial discrimination in and outside the workplace and the Employment Equality Directive 2000/78/EC (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16, 2000) prohibits discrimination in the workplace on the grounds of religion or belief, disability, age or sexual orientation. A Community Action Programme to combat discrimination 2001–2006 (Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination 2000/750/EC, OJ L 303/23, 2000) was also adopted with the particular objectives of evaluating the extent of discrimination in the Union and the effectiveness of anti-discrimination measures. Yet, while sex equality law is arguably fairly developed in the area of employment, an anti-discrimination law on the ground of sex outside the workplace was not adopted until the end of 2004. For some time, because of a hostile political context, it was even doubtful that this measure could ever be adopted. However, following a lengthy and arduous process, the Goods and Services Directive 2004/113/EC (hereafter the Goods and Services Gender Directive), was finally adopted. Although the actual legislative process only took over one year from the Commission's proposal on 5 November 2003 to the adoption of the Directive by the Council on 13 December 2004, the drafting of this legislation by the Commission had almost taken a year prior to the adoption of the proposal. A working draft proposal was leaked to the public in the summer of 2003, leading to some industries voicing their strong opposition. The Commission had then to re-draft a new proposal following consultation with the industry in question. Cf. A. Masselot, E. Caracciolo di Torella, *The Value of Gender Equality*, [in:] *Values in the Constitution of Europe*, eds. S. Millns, M. Mateo Diaz, Dartmouth, forthcoming 2007; C. Brown, *The Race Directive: Towards Equality for All the People of Europe?*, "Yearbook of EU Law" 2002, vol. 21, p. 195; E. Guild, *The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations*, "Industrial Law Journal" 2000, vol. 29, no. 4.

¹⁰ See: G. C. Rodriguez Iglesias, *Cour de justice des Communautés européennes et Cour européenne des Droits de l'Homme*, [in:] *Protecting Human Rights: The European Perspective – Studies in Memory of Rolv Ryssdal*, eds. P. Mahoney, F. Matcher, C. Heymanns Verlag (et al.), Berlin 2000, p. 19–20.

inherent part of the Treaty signed in the year 2004, establishing Constitution for Europe (in the form of the second part of EU Constitution). In my opinion, proclaiming CFR was significant because it responded to the need for regulating the fundamental rights of an individual with lack of worked out doctrine of these rights in the EU system. I fully share the view of J. Menkes that it was in a sense a compromise response, taking into account various views on the issue of human rights in European societies, an indication of restraint towards extending the catalog of the “2nd generation human rights”,¹¹ as well as fear of the proliferation of Community structures.¹²

This article is to present, on the basis of ECJ jurisdiction and selected literature of the subject,¹³ the most significant issues concerning in. a. the origin of fundamental rights protection in ECJ jurisdiction, sources of fundamental rights in the Community law, the notion of fundamental rights in EU and objections against CFR from the Polish perspective.

THE ORIGIN OF FUNDAMENTAL RIGHTS PROTECTION IN ECJ JURISDICTION

The significance of legal regulations created by main EC organs serving the development of human rights protection doctrine in the union system, is disproportionate to the role that the jurisdictional activity of ECJ has had to play in this process. *Prima facie* this Court initiated the process of growing importance of individual rights within the Community law, which, at first, was mainly to serve normalizing the economic activity. In connection with

¹¹ The typology of human rights, based on three generations, was suggested in 1970 by K. Vasak, who mentions as the 1st generation of human rights: personal and political rights, 2nd generation: economic, social and cultural rights, 3rd generation: solidarity rights, see: K. Vasak, *Avant-projet de troisième pacte international relatif aux droits de solidarité*, [in:] *Les dimensions universelles des droits de l'homme. Publié avec le concours de l'UNESCO*, eds. A. Lapeyer, F. de Tinguy, K. Vasak, Bruxelles 1990, p. 312.

¹² J. Menkes, *Karta Praw Podstawowych Unii Europejskiej a konstytucja Europy*, „Studia Europejskie” 2001, no. 2, p. 27.

¹³ See for example: E. Bribosia, *La protection des droits fondamentaux*, [in:] *La constitution de l'Europe*, ed. P. Magnette, Bruxelles 2000, p. 60; M. Hilf, *The Protection of Fundamental Rights in the Community*, [in:] *European Law and the Individual*, ed. F. G. Jacobs, Amsterdam 1976, p. 56; A. Rosas, *The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?*, [in:] *European Integration through Interaction of Legal Regimes*, eds. C. Baudenbacher, H. Bull, Oslo–Universitetsforlaget 2007, p. 30. Cf. J. Bering Liisbert, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?*, „Jean Monnet Working Paper” 2001, no. 4; J. Wouters, *The EU Charter of Fundamental Rights: Some Reflections on its External Dimension*, *Institute for International Law*, „Working Paper”, May 2001, no. 3, p. 3; A. G. Toth, *The European Union and Human Rights: The Way Forward*, „Common Market Law Review” 1997, no. 3.

the evolution taking place in the sphere of EC competence, ECJ has codified the human rights protection system, referring to general principles of law.

For the first time ECJ applied the category of fundamental rights in the case of *Stauder*,¹⁴ constituting a point of departure for the next decision in the case of *Internationale Handelsgesellschaft*.¹⁵ A German company *Internationale Handelsgesellschaft* obtained a licence for exporting corn in the year 1967. According to the ordinance of the Council on the organization of cereal crop market, obtaining such a permission was conditioned by contributing a pecuniary deposit. After the licence expiration a part of the deposit paid by the Company was confiscated because a certain batch of corn has not been exported. The Company initiated proceedings before a German court, challenging the legality of pecuniary collaterals and demanding repayment of the seized amount. According to the domestic court, the challenged system was inconsistent with the Constitution, and especially with the principle of free economic activity and therefore it directed at the ECJ the prejudicial question about the legality of this system.¹⁶ The Court of Justice in Luxemburg stated that the validity of fundamental laws applied by the EC institutions constituted the fundamental part of general legal principles preserved by the Court. In this respect ECJ referred to the constitutional traditions of Member States, treating them as inspirations for the jurisdiction of domestic courts within the Community protection of human rights.

In the decision of *Solange I of the year 1974* the German Federal Constitutional Court (FCC) decided that the EU law is the legal system independent of the law in force in the Member States and of the international law. Therefore, the only competent organs as to its binding force and interpretation are the EC organs (especially ECJ). ECJ cannot authoritatively say (in a binding way) whether a specific regulation of the EU law is consistent with the state constitution. In the case of Germany the appropriate organ is the FCC, which is entitled to decide that a specific regulation of the EC law to the extent to which it is inconsistent with the Constitution, it cannot be applied by the organs of administration and courts of Federal Republic of Germany (FRG).¹⁷

¹⁴ In the case 29/69, *Stauder v. Stadt Ulm*, ECR 1969, p. 425, ECJ found that “if the decision is addressed to all Member States the necessity of uniform application and interpretation prevents from considering only one version of the text separately from the remaining ones, but it requires making an interpretation on the basis of both the legislator’s intention and the purpose it is to accomplish in the light of particular language versions”, see: T. C. Hartley, *European Union Law...*, p. 297.

¹⁵ Case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, p. 1161.

¹⁶ More on the subject: T.C. Hartley, *European Union Law...*, p. 300–311.

¹⁷ See: decision of the FCC Second Senate in the case of *Solange I*, 2 BvL 52/71. Cf. case 13/05, *Sonia Chacón Navas v Euresť Colectividades SA*, ECR 2006, p. I-6467.

However, in the case of *Solange II* of the year 1986 FCC found that authorization on the basis of art. 24 pass. 1 of the Constitution¹⁸ is limited to the extent that granting superior rights to international institutions cannot breach the constitutional order of FRG by undermining the principles constituting it. They include especially the legal principles forming the basis of constitutional normalization of the fundamental rights. In the situation when the activity of such institutions may enter the sphere of fundamental rights contained in the Constitution, without undergoing legal protection executed on the basis of the Principal Statute, there must exist an appropriate protective system for the fundamental rights, equal in its contents and effect to that assumed by the Constitution.¹⁹

In *Wachauf*²⁰ case ECJ provided a specific interpretational directive through stating that the fundamental rights recognized by the Court are not exclusive by nature, but they must be taken into consideration with reference to their social function. Besides, limitations may be imposed upon executing these rights, especially in connection with the common organization of the market. These limitations should in fact correspond to the aims of the general Community interest and not constitute a disproportionate interference, breaching the essence of these rights in relation to the accomplished purposes. It should be assumed that this instruction is addressed to all the organs applying Community law, including domestic organs.

Summing up, we should note that the jurisdictional line referring to human rights protection, formed by ECJ, secures respect for these rights not only in the work of Community institutions, but also in the conduct of Member States. This Court referred in its jurisdiction in. a. to the right to privacy;²¹ freedom of association;²² the principle of non-discrimination;²³ the problem of how to establish whether a definite person can – for the needs of Community law – be regarded as a Member State national;²⁴ right to confidentiality of correspon-

¹⁸ Art. 24 pass. 1 of the Constitution provides that “the federation can transfer, by statute, the superior rights to interstate institutions”, see the text of the FRG Constitution available at the website of German Embassy in Warsaw, source: http://www.warschau.diplo.de/Vertretung/warschau/pl/01/Informacje_20ogolne/download__grundgesetz__PL,property=Daten.pdf (24.01.2008).

¹⁹ See the decision of FCC Second Senate in the case of *Solange II*, 2 BvR 197/83.

²⁰ Case 5/88, *Wachauf*, ECR 1989, p. 2609.

²¹ Case 136/79, *National Panasonic*, ECR 1980, p. 2033; case, *Niemietz v. RFN*, seria A, no. 251, para. 31.

²² Case 12/84, *Meryem Demirel v. Miasto Schwäbisch Gmünd*, ECR 1987, p. 3719.

²³ Case 186/87, *Ian William Cowan v. the Public Treasury*, ECR 1989, p. 195; case C-158/91, *Levy*, ECR 1993, p. I-4287, see: T. C. Hartley, *European Union Law...*, p. 337-339.

²⁴ Case C-369/90, *M. V. Micheletti v. Delegacion del Kobierno en Cantabria*, ECR 1992, p. I-4239.

dence between a client and a lawyer;²⁵ and freedom of religion.²⁶ In order to establish the material thesis of adjudication, ECJ was drawing the general principles of Community law from observing a substantial similarity of regulations in the internal legal systems of Member States with ECPHRFF.²⁷ What is significant, the fundamental rights of an individual become binding for the organs of Member States as a result of their implementation to the internal legal order.²⁸ The domestic judge, deciding within the scope of Community law, is obliged to interpret such acts in accordance with human rights, included in the general principles of the EC law, developed in the Court jurisdiction. In the matters outside the EU regulation scope, in turn, the Member States are not bound by the Community idea of fundamental rights protection.

SOURCES OF FUNDAMENTAL RIGHTS IN THE COMMUNITY LAW

The existence of an individual's legal capacity in the Community system gives rise to the necessity of examining the sources of its rights.²⁹ In the 1960s and 1970s the assimilation of these values occurred through the creative interpretation by ECJ. At present these issues are regulated e.g. in art. 6 TEU, or *last but not least* in CFR. Art. 308 of TEC also gives to *acquis communautaire* the open character through the statement: "if the Community action turns out to be indispensable to achieve, within the functioning of common market, one of the Community goals, and this Treaty did not provide

²⁵ Case 155/79, *AM and S Europe Ltd. v. Commission*, ECR 1982, p. 1575.

²⁶ Case 130/75, *Preis*, ECR 1976, p. 1589.

²⁷ See: case C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotili Etairia Pliroforisis and Sotirios Kouvelas* (ERT), ECR 1991, p. I-2925. The domestic court in Greece, considering the case, referred prejudicial questions to ECJ. They concerned the attitude of the television monopoly to art. 10 ECPHRFF, which is a warranty of the right to receiving and spreading information. The Court stated that the duty of the domestic judge and ECJ is finding *ex officio* of a possible breach of ECPHRFF regulations. Cf. *The Relationship between European Community Law and National Law. The Cases*, ed. A. Oppenheimer, Cambridge 1994, p. 412.

²⁸ See: H. Schermers, D. Waelbroeck, *Judicial Protection in the European Union*, Kluwer Law International, 6th ed., 2002, p. 154-159; B. de Witte, *Sovereignty and European Integration: the Weight of Legal Tradition*, [in:] *The European Court and National Courts – Doctrine and Jurisprudence*, eds. A. M. Slaughter, A. S. Sweet, J. H. H. Weiler, Oxford 1998, p. 277-308. E.g. in the case of *Factortame* the British domestic court obtained, by virtue of Community law, the competence to issue a domestic order against the Clown, despite the fact that on the grounds of domestic law it had no such competence, see: case C-213/89, *Factortame*, ECR 1990, p. I-2433.

²⁹ M. Szyszkowska's divagations in this matter are of interest, see: M. Szyszkowska, *Filozoficzne interpretacje prawa*, Warsaw 1999, p. 30.

the competence to action required in this purpose, the Council, enacting unanimously, upon a motion of the Commission and having consulted the European Parliament undertakes appropriate actions”.³⁰ The disposition of this regulation is the source of the so-called supplementary powers of the Communities. For art. 308 TEU enables the EU Council to adopt the acts that have not been *expressis verbis* provided by treaties.

The sources of fundamental rights constitute a part of a broader issue: the dichotomy of EU law sources. The EU law distinguishes the primary law (including the EC founding treaties, i.e. the TEC, Treaty establishing the European Atomic Energy Community and the treaties that amend them), as well as the secondary law adopted by the organs of Communities (defined as institutional).³¹ A broader classification was determined by D. Simon, who distinguishes: non-statutory and statutory law, as well as external and internal law.³² The divagations of M. Dybowski in this master are of interest. He believes that the sources of fundamental rights have two aspects. The first one concerns what decides about the contents of a given fundamental right. Therefore, according to Dybowski, their source, in the factual sense, cannot be limited to any kind of legal system, as it is common for all legal systems.³³ *Ex definitione* – in so far as the fundamental rights are human rights – they are of universal nature and are derived from the dignity of a person. In my evaluation, the author’s divagations refer to the assumptions, on which the contemporary legal positivism is based, i. e. that such values as freedom, dignity, or social order are at the sources of statutory law.³⁴ The second aspect of the sources of fundamental rights – as Dybowski believes – concerns the way in which rights of the contents specified in sources in the factual sense start functioning in the system of Community law.³⁵ According to J. Jaskólska,

³⁰ See: *Traktat o Unii Europejskiej; Traktat ustanawiający...*, ed. Z. Brodecki, p. 811.

³¹ However, in the subject literature many kinds of classification referring to sources of Community law can be found, as the EC law has not got, contrary to the international law, any list of law sources. According to C. Mik sources of EC law can include: the primary law, the secondary law, international treaties that the Community is a party to, as well as the general principles of law, see: C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, vol. 1, Warsaw 2000, p. 481; *Prawo instytucjonalne Unii Europejskiej*, ed. M. M. Kenig-Witkowska, Warsaw 2006, p. 146–151.

³² D. Simon, *Le système juridique communautaire*, Paris 1997, p. 189.

³³ M. Dybowski, *Prawa fundamentalne w orzecznictwie ETS*, Warsaw 2007, p. 71. Cf. J. Zajadło, *Filozoficzne problemy ochrony praw jednostki*, [in:] *Ochrona praw jednostki*, ed. Z. Brodecki, Warsaw 2004, p. 71.

³⁴ H. L. Hart interestingly writes about it in *Pojęcie prawa*: “it is not a necessary truth in any sense that law reproduces morality or meets some of its requirements, although it often so happens, indeed”, see: H. L. Hart, *Pojęcie prawa*, trans. J. Woleński, Warsaw 1998, XIII–XIV, p. 252.

³⁵ M. Dybowski, *op. cit.*, p. 73.

the *sine qua non* condition for the appropriate understanding of human rights is, first of all, an individual – a certain philosophically defined idea of human existence, assuming the superiority of such values as freedom and dignity.³⁶ M. Krapiec notes that rejecting dignity in the present globalization process is the superior reason for armed conflicts in the world, because “man [...] is convinced about the existence of his imprescriptible rights to freedom, justice and peace, and it is in the name of these rights that a protest can arise against the conventional law, against positive rights that negate freedom”.³⁷

In the context of the view that the jurisdiction of ECJ is the source of Community law, the question arises: what is the relationship between the fundamental rights and the jurisdictional activity of this Court. In the text under discussion, a special attention should be paid to the divagations of J. Plaňavová-Latanowicz, who claims that “jurisdiction is the same in relation to fundamental rights as the relationship between the codification treaties and the common law in the international law”.³⁸ The author believes that the fundamental rights exist as non-statutory law, irrespective of ECJ jurisdiction. According to Plaňavová-Latanowicz the contents of fundamental rights usually originates from two sources: 1) from the constitutional traditions of Member States; 2) from international treaties³⁹ in a.: ECPHRFF, International Covenants on Human Rights, ESC [especially in the context of prohibition of discriminating employees on the basis of sex – note: M. Rz.], convention of the International Labour Organization [with regard to trade union liberties – Note: M. Rz.]. G. Robbers, in turn, indicates that “fundamental rights served a citizen’s emancipation in relation to the traditional authority and constituted the basis and structure of such a legal and social order that could develop the civil sense and individual initiatives”.⁴⁰ M. Akehurst formulates the view that ECJ in its jurisdictional practice very often refers to ordinary legal principles, as well as to the fundamental principles of law and the first ones refer to domestic legal orders and the second ones usually stem from the constitutional traditions of EC Member States.⁴¹

³⁶ J. Jaskólska, *Powody i okoliczności proklamowania Powszechnej Deklaracji Praw Człowieka*, “Człowiek w Kulturze” 1998, no. 11, p. 27.

³⁷ M. Krapiec, *O ludzką politykę!*, Katowice 1995, p. 154.

³⁸ J. Plaňavová-Latanowicz, *Trybunał Sprawiedliwości Wspólnot Europejskich i ochrona praw podstawowych*, Warsaw 2000, p. 76.

³⁹ *Ibid.*, p. 76.

⁴⁰ G. Robbers, *Podstawowe prawa i wolności obywateli w Unii Europejskiej*, [in:] *Materiały z I Międzynarodowej Konferencji na temat: “Podstawy jedności europejskiej”*, Lublin 23–25 września 1998 r., Lublin 1999, p. 236.

⁴¹ M. Akehurst, *The Application of General Principles of Law by the Court of Justice of the European Communities*, “The British Yearbook of International Law” 1981, vol. 52, p. 40.

In my opinion, on the basis of hitherto divagations, we should emphasize that there is the principal separateness of fundamental rights from custom as a source of law. The international custom can, in certain situations, be a source of Community law, but it is first of all the source of international law. Article 38 pass 1. pt b of the ECJ Statute⁴² orders the Court to apply the customary law, i. e. practices of the states recognized as law. W. Czapliński and A. Wyrozumski claim that practice itself cannot lead to the formation of customary law, because a specific standard of conduct has to have binding force.⁴³ I think that customary law can be applied in the internal legal order, e.g. on the basis of reference contained in a ratified international treaty or in an act (e.g. art. 1111 § 1 pt 3 of the Civil proceedings code,⁴⁴ art. 56 pass. 2 of the RP Constitution⁴⁵).

ECJ has many a time pointed out to the special role of Strasburg jurisdiction as a criterion that could make it possible to establish the contents of fundamental rights protected in the Community law. In the case of *Nold*, the plaintiff, the firm J. Nold, found that it had fallen victim to discrimination. The plaintiff believed that excluding them from coal trade corresponded to expropriation. The decision of European Commission was to be taken in breach of the right to freedom of economic activity and the principle of proportionality, whereas the defendant party asserted that ECJ has no right of interpreting and applying the principles of the domestic law of Member States, because the Treaty establishing the European Coal and Steel Community did not contain any guarantee of acquired rights.⁴⁶ ECJ stated that “if rights in property are protected by the constitutional laws of all Member States and if similar guarantees exist with reference to the right of free choice and practicing trade or profession, the rights created by that,

⁴² Text [in:] *Prawo międzynarodowe publiczne*, prepared by M. Sykulska, Gdańsk 1996, p. 426.

⁴³ W. Czapliński, A. Wyrozumski, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, 2nd ed., Warsaw 2004, p. 73. Cf. *Podstawy prawa Unii Europejskiej*, ed. J. Galster, p. 312, where the view is expressed that “usus can also be an effect of Community practice. Literature refers to the example of the right to question the Council by the European Parliament despite the lack of appropriate treaty standard”. See also: J. Plaňavova-Latanowicz, *Trybunał Sprawiedliwości...*, p. 76.

⁴⁴ Art. 1111§ 1 pt 3 of the Civil proceedings code provides that “other persons taxing advantage of diplomatic immunities by virtue of laws, treaties, or universally established international customs [...] can’t be summoned to Polish courts”, see: Dz. U. 2007, no. 121, item. 831.

⁴⁵ Art. 56 pass. 2 of the RP Constitution provides that “a stranger who is seeking protection against prosecution in the Republic of Poland can be awarded the status of a refugee, in accordance with international treaties binding for the Republic of Poland”.

⁴⁶ Cf. T. C. Hartley, *European Union Law...*, p. 301.

although far from immovable prerogatives, must be interpreted in the light of the social function of property and the activities protected by them”.⁴⁷

In the case of *Hauer*,⁴⁸ in turn, ECJ in the fullest possible way referred to the fundamental human rights as general principles of Community law. In this case the Court examined the legality of the ban on setting up new vineyards, taking into account the fundamental rights arising from the common constitutional tradition of Member States and the international treaties. It indicated the special necessity to protect the right to property on the basis of the additional protocol to ECPHRFF. In connection with the uncertainty of the German court as to the consistence of the Council Regulation No. 1162/76 with the fundamental rights guaranteed in the Constitution of FRG, ECJ – in my view – strengthened, rhetorically, in a sense – the thesis contained in the *Internationale Handelsgesellschaft* judgement, concerning the fundamental features of Community law: primacy, unity and effectiveness.⁴⁹

Summing up, it has to be said that the Community law does not contain any list of its sources. The ECJ jurisdiction and the representatives of the European legal doctrine include the fundamental rights into the unwritten sources of Community law as a part of the so-called general principles of law. The fundamental rights include the principles of ECPHRFF and the constitutional traditions of Member States. ECJ, making decisions in matters of fundamental individual rights is inspired by the general principles of law contained in ECPHRFF and the constitutional traditions of Member States.

THE NOTION OF FUNDAMENTAL RIGHTS IN EU

The representatives of the Community law agree that the “fundamental rights” constitute the result of the ECJ jurisdictional activity.⁵⁰ Differences

⁴⁷ Case 4/73, *J. Nold-Kohlen – und Baustoffgrosshandlung vs. Commissioni*, ECR 1974, p. 491.

⁴⁸ Case 44/79, *L. Hauer v. The federal land Land upon Rhine-Palatinate*, ECR 1979, p. 3727, more: T. C. Hartley, *European Union Law...*, p. 302–307.

⁴⁹ “[...] the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure”. See: case 11/70, *Internationale Handelsgesellschaft* discussed earlier, ECR 1970, p. 1125, pt 3 of the justification.

⁵⁰ See generally: L. Neville Brown, T. Kennedy, *The Court of Justice of the European Communities*, London 2000, p. 357; A. Arnulf, *The European Union and its Court of Justice*, Oxford 1999, p. 95; *Human Rights in Europe. A Fragmented Regime?*, ed. M. Brosig, Frankfurt am Main–Berlin–Bern 2006, p. 9; P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, “Common Market Law Review” 2002, vol. 39; S. Ghandi, *Interaction between*

occur, however, when the function of these rights is emphasized, which seems to be the fundamental element of the notion “fundamental rights” in the approach of a certain author, or a group of authors. Undoubtedly, it seems significant to make the very definition of “fundamental rights” more detailed and to give possibly accurate answer to the question of what are these rights. We should pay attention to the fact that the scientific publications devoted to the “fundamental rights” of an individual usually contain different opinions of the researchers as to the definition of these rights. The following terms are used most frequently: “principal rights”, “fundamental rights” and “human rights”. The authors, selecting one of the terms, try to determine its definition, yet they sometimes use mutually exclusive notions.

J. Maritain emphasizes in the context of divagations concerning individual rights that two elements play a significant role here: the ontological element (assuming that human rights have their source in his ontical structure) and cognitive (affecting their understanding under the influence of various factors, both positive and negative),⁵¹ whereas J. H.H. Weiler treats “fundamental rights” as an axiological system determining a certain legal (as well as social) space of an individual, separated by „fundamental boundaries”, demarcating the autonomy of EC.⁵² Weiler also stated that “what is fundamental in fundamental rights is the balance between private and public interests”.⁵³ H. G. Schermers in turn, believes that the boundary between the “fundamental rights” and “ordinary fundamental rights” is indiscernible and differentiated in terms of the time and place of their application.⁵⁴ According to M. A. Dausés “fundamental rights” originate from general principles of law and thus they become real enough to be applied by ECJ judges who give it a specific shape in a specific case by means of legal interpretation.⁵⁵

In Polish science C. Mik vastly presented the relationships between “human rights” and “fundamental rights”, “individual rights” and “citizens rights” in EC.

the Protection of Fundamental Rights in the European Economic Community and under the European Convention on Human Rights, “Legal Issues of European Integration” 1981, no. 2, p. 3; J. Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten*, Berlin 1992.

⁵¹ Quoted after: F. J. Mazurek, *Godność osoby ludzkiej podstawą praw człowieka*, Lublin 2001, p. 112.

⁵² See: J. H. H. Weiler, *Fundamental Rights and Fundamental Boundaries: On The Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, [in:] *The Constitution of Europe*, Cambridge 1999, p. 102.

⁵³ Idem, *The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes*, Cambridge 1996, p. 9 and next.

⁵⁴ H. G. Schermers, *Is there a Fundamental Human right to Strike?*, “Yearbook of European Law” (Oxford) 1990, vol. 9, p. 225.

⁵⁵ M. A. Dausés, *The Protection of Fundamental Rights in the Community Legal Order*, “European Law Review” 1985, vol. 10, p. 406.

Finally, he came to the conclusion that with regard to the extensively understood “fundamental rights” the classic principle of indivisibility should be applied in connection with the terminological differentiation occurring there.⁵⁶ However, in my view, the definition of “fundamental rights” given by J. Sozański is not exactly adequate. He suggests interpreting the English *fundamental rights* and German *Grundrechts* as “principal rights” (“principal law”), claiming that this term is more appropriate on the grounds of Community law.⁵⁷ Sozański defines “fundamental rights” as the: “autonomous Community legal category, connecting, through the general principles of EC law and common practice of the Member States, the recognized rights of individuals, provided by Community standards, including those concerning citizenship of the Union and the freedoms of common and internal market”.⁵⁸ In my opinion, the notion of “fundamental rights” includes “human rights” *sensu largo*, that is not only those that have their source in the primary law, but also the rights arising from constitutions of Member States (the so-called “civil rights”) and from international treaties that Member States are parties to.⁵⁹ M. Ahlt and M. Szpunar in turn, do not use the term “fundamental rights”, but define them as “provisions of the nature prohibiting discrimination and establishing fundamental freedoms”⁶⁰ while according to K. Wójtowicz, “human rights” are in the form of “fundamental rights” with reference to the activities within the Community legal order, whereas in the external relations of EU/the Communities, the term “human rights” is usually used.⁶¹ J. Banach-Gutierrez defines the “fundamental rights” as: “human rights”, which, as non-transferable rights, provide protection to all the people, or, as civil rights that work only for the benefit of their own citizens.⁶² Besides, the author believes that “civil rights are connected with the positivist theory of law, and human rights arise from the law of nature”.⁶³ According to F. Jasiński, the “fundamental rights” are “general principles of law that take their origin from the constitutional

⁵⁶ C. Mik, *Europejskie prawo...*, p. 444.

⁵⁷ J. Sozański, *Prawa człowieka w systemach prawnych Wspólnot i Unii Europejskiej*, Warszawa–Poznań 2005, p. 37.

⁵⁸ See: Idem, *Prawa zasadnicze a prawa człowieka we wspólnotowym systemie prawnym*, Warszawa–Poznań 2003, p. 37. Cf. J. Plaňavova-Latanowicz, *Trybunał Sprawiedliwości...*, p. 20.

⁵⁹ “Fundamental rights” are similarly defined by B. De Witte, see: B. De Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, [in:] *The EU and Human Rights*, ed. P. Alston, Oxford 1999, p. 859 et seq.

⁶⁰ M. Ahlt, M. Szpunar, *Prawo europejskie*, Warsaw 2002, p. 39.

⁶¹ K. Wójtowicz, *Ochrona praw człowieka w Unii Europejskiej*, [in:] B. Banaszak (et al.), *System ochrony praw człowieka*, Kraków 2003, p. 199.

⁶² J. Banach-Gutierrez, *Ochrona praw podstawowych w Unii Europejskiej a prawo karne*, “Jurysta – Magazyn prawny” 2005, no. 9, p. 3.

⁶³ *Ibid.*, p. 3.

traditions, common for the EU Member States and from the international treaties that these states are parties to, or the drafting of which they participated in, with special consideration of the agreements in the field of international law of human rights protection and the newly-forming, ambitious, extra-economic rights”.⁶⁴ M. Dybowski, in turn, defines “fundamental rights” as „initially belonging to the sphere as different as possible from the Community law. They are to distinguish the legal system “claiming” being competent to set the Community law and they are – in the understanding of a domestic court – of strictly constitutive nature, as formulated in the Principal Statute (Constitution).⁶⁵ The only coherent definition of “fundamental rights”, adopted during the works of Community institutions was presented in the explanatory declaration to the report of Legal Community of the 28th day of February 1973, drafted by the Member of European Parliament L. Jozeau-Marginč. It reads: “the term of ‘fundamental rights’ is applied to rights and freedoms supported by positive guarantees, these rights and freedoms can be formulated in writing, within constitutions, or form a part of continuous constitutional tradition, whose survival is secured by the legislator and the jurisdiction”.⁶⁶ Art. 6 pass. 1 TEU provides that the general principles of Community law are the fundamental rights originating from the common constitutional traditions of the Union Member States, whereas the European Commission in its bulletin of the 13th day of September 2000 on the CFR decided that “the main purpose of fundamental rights is making it possible to control the existing authorities on every political level”.⁶⁷

CFR AND THE ECPHRFF SYSTEM

The catalog of rights protected by CFR is extensive and they are of heterogeneous nature. The Charter combines both the rights that can be found in other international documents (e.g. in TEC, TEU, ESC, in ECPHRFF, in the International Covenants on Human Rights), as well as powers rooted in the constitutional traditions of the Member States. The aspect of the Community joining ECPHRFF⁶⁸ has been raised many a time by Polish⁶⁹ and

⁶⁴ F. Jasiński, *Karta Praw Podstawowych Unii Europejskiej*, Warsaw 2003, p. 209.

⁶⁵ M. Dybowski, *op. cit.*, p. 10.

⁶⁶ The European Parliament, Working Documents 1972–73 of the 6th day of March 1973, PE 30. 941/fin, Doc. 297/72.

⁶⁷ COM (2000) 559 final, p. 5.

⁶⁸ So far it has been the ECJ that has tried to avoid possible conflicts with the ECHR. There are only two cases where the interpretation of the ECJ differs from that of the ECHR, and in these two cases the ECJ ruled prior to the ECHR decisions. Since there was no

foreign⁷⁰ scholars dealing with the problems of European integration. This accession is regulated in. a. in art. 59 ECPHRFF⁷¹ and in art. I–9 pass. 2 of

jurisdiction of the ECHR, the ECJ could not foresee the arising conflict. See on Article 8 ECHR the judgment of the ECJ of 21 September 1989, joined cases 46/87 and 247/88; *Hoechst AG, Dow Benelux NV a.o. v. Commission*, ECR 1989, p. I-2859. On Article 6 ECHR the judgment of the ECJ of case 374/87, *Orkem v. Commission*, ECR 1989, p. 3283; judgment of the ECHR of 25 February 1993 (Application no. 00010828/84), *Funke i. France*, Reports of Judgments and Decisions 1993-XV 297.

⁶⁹ A. Wyrozumska rightly claims that the accession of EC to ECPHRFF will make it possible to maintain coherence between human rights protection in the Union and the convention system. At the same time, the author emphasizes that there are many problems related to this to be solved, in. a. the issues of an EU judge in ECHR, accession of EU to the additional protocols to ECPHRFF, see: A. Wyrozumska, *Umocnienie ochrony praw podstawowych*, “Prawo europejskie w praktyce”, no. 7/8 (37/38), 2007, p. 64. Cf. E. Dynia, *Integracja europejska*, Warsaw 2004, p. 71. Cf. S. Koukoulis-Spiliotopoulos, *Incorporating the Charter into the Constitutional Treaty: What Futures for Fundamental Rights?*, [in:] *Problèmes d'interprétation à la mémoire de Constantinos N. Kakouris*, ed. Rodrigues Iglesias, Bruylant 2004; S. Prechal *Right v Principles, or how to Remove Fundamental Rights from the Jurisdiction of the Courts*, [in:] J. W. de Zwaan, J. H. Jans, F. A. Nelissen (eds.), *The European Union.-An Ongoing Process of Integration* (Liber Amicorum A. E. Kellermann, T. M. C. Asser Instituut 2004).

⁷⁰ H. G. Schermers claims that leasing two systems related to protection of individual rights may lead to a split in Europe, see: H. G. Schermers, *Human Rights in the European Union after the Reform of 1 November 1998*, “European Public Law” 1998, vol. 4. no. 3, p. 341 et seq. Cf. A. H. Robertson, J. G. Merrills, *Human rights in the world. An introduction to the study of the international protection of human rights*, Manchester–Nowy Jork 1996, p. 187; F. G. Jacobs, *European Community Law and the European Convention on Human Right*, [in:] *Human rights and constitutional law. Essays in honour of Brian Walsh*, ed. J. O'Reilly, Dublin 1992, p. 565; A. Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts*, [in:] *The EFTA Court: Ten Years On*, eds. C. Baudenbacher, P. Tresselt, T. Örylgsson, Oxford–Hart 2005, p. 164–176. See the Commission communication of 11 October 2000–COM (2000) 644 final, para. 9: “question remains open”, and the Commission for legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly, Report on the Charter of the Fundamental Rights of the European Union of 14 September 2000 – CHARTE 465/00 CONTRIB 319: “aim of the draft Charter ...can only be reached if institutions and bodies of the European Union are bound not only by the Charter, but also by the ECHR”; along the same lines see the Council of Europe observers in the Convention, CHARTE 4961/00 CONTRIB 356, 13 November 2000, see: the judgment of the ECJ of 26 June 1997, C–368/95, *Familiapress*, ECR 1997, p. I–3709, para 24.

⁷¹ See text, [in:] *Prawo międzynarodowe publiczne. Wybór dokumentów*, ed. A. Przyborowska-Klimczak, Lublin 2006, p. 225. The Court of Justice has developed the following well-known formula for its approach to the ECHR, the *ERT*-formula: “Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance”, see: case 260/89, *ERT*, ECR 1991, p. I–2925, para 41; case 299/95, *Kremzow*, ECR 1997, p. I–2629: “Where national legislation

the Constitutional Treaty which provides: “The Union accedes to the European Convention for the Protection of Human Rights and Fundamental Freedoms . Accession to the Convention does not breach the powers of Union specified in the Constitution”.⁷² This means that the obligations arising from ECPHRFF shall refer to the EU only to the extent to which it is empowered to act.

Differences in the formulations included in CFR compared to other treaties may, however, raise doubts with reference to the manner of interpreting particular rights. Aware of these risks, the authors of the Charter explain that: “within the scope in which this Charter contains rights corresponding to the rights guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and range are the same as those of the rights granted by this Convention” (art. 52 CFR). On the basis of art. 52 CFR the rights that have their sources in the Community treaties can be executed only within the limits indicated in these treaties. Disposition of this CFR regulation on referring to ECPHRFF and the clause of interpreting the Charter in accordance with the ECHR does not, however, eliminate-in my view- the possibility that the specific rights clash when there

falls within the field of application of [Union] law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to the interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures” (para 15). Cf. A. Rosas, *The legal sources of EU fundamental rights: a systemic overview*, [in:] *Une communauté de droit-Festschrift für Gil Carlos Rodríguez Iglesias*, eds. N. Colneric, D. Edward, J.-P. Puissochet, D. Ruiz-Jarabo Colomer, BWV 2003, p. 97–98 (referring to case 238/99, *P. Montedison*, ECR 2002, p. I–8375, para 274. However, even if numerous Advocates General and the Court of First Instance have referred to the Charter, it is striking that the Court of Justice itself has to date not mentioned it. This apparent hands-off approach, standing in stark contrast to the Court of Justice’s practice to refer to other legally non-binding instruments as interpretational aid, can be interpreted in different ways. A. Biondi, for example, has claimed that while not explicitly referring to the Charter, the Court is in fact “rapidly developing a [fundamental] rights discourse which is already implicitly incorporating the rights and values expressed in the Charter”, see: A. Biondi, *Free Trade, A Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights*, “European Human Rights Law Review” 2004, vol. 51, no. 1. It is submitted that, quite to the contrary, the Court of Justice’s hands-off approach with regard to the Charter should be understood in terms of explaining the extent to which the Court of Justice’s highest judges have *great reservations* about the legal usefulness of the Charter as a preferential source of fundamental rights in Union law at this stage. Rather than regarding the Charter as ‘another blank canvas to paint’ inviting ‘even more creative’ interpretation than in the initial European Community setting where no mention of fundamental rights was made, the Court of Justice sees the Charter as too problematic a text to provide interpretative guidance with regard to fundamental rights.

⁷² See text of the Constitutional Treaty, source: <http://www.ms.gov.pl/files/docs/Traktat%20Konstytucyjny%20291004.pdf> (22.01.2008).

is a contradiction between the provisions of ECPHRFF and the Charter.⁷³ To maintain consistence, one should aim at excluding them, e.g. by means of teleological interpretation, so that they do not have negative effects with reference to other rights.

CFR IN THE LIGHT OF CONTROVERSIES CONNECTED WITH THE SO-CALLED “BRITISH PROTOCOL”

In spite of the warranties contained both in CFR and the EU Treaty, the British have negotiated the so-called British Protocol. It alludes to the doubts concerning the application of the Charter regulations, i.e. especially with its division into provisions concerning civil rights as well as economic and social rights. During the summit in Lisbon, from 18th to 19th October 2007,⁷⁴ joined the so-called British Protocol.⁷⁵ The first paragraph of the new art. 6 of TEU grants binding force to the Charter by stating that EU recognises the rights, freedoms and principles indicated in the Charter, which is of identical legal status as the treaties. In my opinion, this step principally strengthens the protection of fundamental rights in the order of EC. The nationals of EU Member States will be able to take legal action with their claims both before the EU courts and domestic courts.⁷⁶

⁷³ Examples of “separation” of the interpretations of ECPHRFF provisions are the decisions of ECHR and ECJ concerning, first of all the interpretation of art. 6 (right to honest court trial) and art. 8 (right to respect for private and family life) of the Convention, as to which the Luxemburg Court of Justice maintained a restrictive interpretation. This danger was emphasized by the President of the ECHR—Lizius Wildhaber, see: *Parliamentary Assembly of the Council of Europe*, Strasbourg – 8th of June 2000, Doc. 8767, p. 2. See also: case *Mathews v. United Kingdom*, Application no. 24833/94, § 63, ECHR 1999; case *Loizidou v. Turkey*, Application no. 15318/89, ECHR 1996, § 43, available at <http://cmiskp.echr.coe.int> (12.04.2008).

⁷⁴ See the text of Lisbon Treaty, source: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:PL:HTML> (25.01.2008). Another name for Lisbon Treaty is the Revision treaty, (the so-called EU Reforming Treaty) It is an international agreement, assuming the reform of UE institutions, signed on the 13th day of December 2007 in Lisbon. It is to enter into force on the 1st day of January 2009, if it is ratified by the EU Member States. See for analysis: J. Morijn, *Judicial Reference to the EU Fundamental Rights Charter – First Experiences and Possible Prospects*, „Coimbra Human Rights Centre Working Paper” (June) 2002, no. 1.

⁷⁵ See: M. Beunderman, *Experts Question Scope of UK Treaty opt-out*, www.euobserver.com (27.06.2007).

⁷⁶ The link between gender equality and human rights was also made in the EU Charter of Fundamental Rights (hereafter the Charter) and the Treaty establishing a Constitution for Europe (hereafter the Constitutional Treaty). Equality is identified in the Constitutional Treaty as a value of the EU. Furthermore, the prohibition of discrimination and equality between men and women are mentioned as characteristics of the European society. The values of the EU, as set in the Constitutional Treaty, assume a shared heritage in the EU and simultaneously

The British Protocol provides that especially the rights and principles contained in Chapter IV of CFR entitled: *Solidarity* are “juridical” rights (they can be referred to at court as the fundamental of rights that an individual is entitled to), but only within the scope provided by the United Kingdom.⁷⁷ For instance, art. 27 CFR (“Right of employees to information and consultation within the enterprise”) provides that: “employees and their representatives should be guaranteed the appropriate levels of information and consultation in appropriate time, in the cases and on conditions provided in Union law as well as in domestic legislations and practices”. The regulation of this article can be found in the Community Charter of the Fundamental Social Rights of Workers (pt 17 and 18) as well as in the European Social Charter (art. 21). The analysis of art. 27 CFR leads to the conclusion that an individual could refer to the right to information and consultation in the range within which it is not regulated in the EU law, only within the limits of an established domestic standard. The Charter does not extend the understanding of this law. The British Protocol does not generally exclude the already existing powers of Community courts with reference to the Charter. It only limits the powers of ECJ to self-enforceable CFR provisions, i.e. those to which the Member States apply domestic law. In my view, the British Protocol does not change much in legal sense with regard to the application of CFR in the internal order of the Republic of Poland (RP).⁷⁸ For this concerns only some CFR regulations,

express a commitment for the future. Accordingly, decisions to suspend a Member State will be made on the grounds of the respect for the values and candidate States to the European Union will have to demonstrate that they respect and support these values. It is therefore very important that the concept of equality is identified as one of the fundamental values of the Union. Second, the Charter raises the issue of gender equality to the level of a fundamental right. The Charter aims to reaffirm and guarantee fundamental rights in the European Union. As the Charter mentions gender equality in a number of places, this implies that questions of equality are transformed from employment and social rights issues into issues of human rights. The Charter not only confirms the case law of the European Court of Justice but it also enhances the visibility and the clarity of gender equality as human rights. This is important because in cases of competing interests, human rights standards benefit from special protection. Thus, individuals have a better chance of success when claiming a fundamental right rather than a mere protection under labour law, see: Article I–2 Constitutional Treaty; Article I–2 Constitutional Treaty; Article I–59 Constitutional Treaty; Article I–59 Constitutional Treaty; Preamble of the CFR. See for instance: case 43/75, *Defrenne* (no. 2), ECR 1976, p. 455; case 50/96, *Schröder*, ECR 2000, p. I–774; case 270/97, *Sievers*, ECR 2000, p. I–929. See also: J. Kenner, *Economic and social rights in the EU legal order: the mirage of indivisibility*, [in:] *Economic and Social Rights under the EU Charter of Fundamental Rights*, eds. T. Herve, J. Kenner, Hart 2003, p. 25.

⁷⁷ See: art. 1 of the Protocol on Applying the EU Charter of Fundamental Rights to Poland and to the United Kingdom.

⁷⁸ A similar opinion is expressed by: J. Barcz, *Polskie postulaty – aspekty prawne*, “Prawo europejskie w praktyce” 2007, no. 10 (40), p. 4; Z. Brodecki, J. Zajadło, T. Konciewicz, *Karta*

mainly those that clearly indicate the domestic law, or refer to it. Some regulations of the Charter clearly show that certain issues are reserved for the competence of Member States. For instance: art. 9 CFR (“Right to marry and to found a family”) provides that “the right to marry and to found a family is guaranteed in accordance with domestic laws regulating the use of these rights”; art. 10 CFR (“Freedom of thought, conscience and religion”): “the right to refuse military service for the reasons of conscience is recognized in accordance with domestic laws regulating the use of this right”.

I think that the CFR regulations that define the scope of its application are significant for the Member States. These are in. a. the articles contained in Chapter VII of the Charter (“General provisions concerning the interpretation and application of the Charter”, i.e. from art. 51 to art. 54). These regulations – as I believe – constitute the principal legal protection for the Member States in case of possible extension of EU powers. Recognizing the autonomy of Union law means that its justification does not come from international law, or from the legal orders of Member States – it is valid *per se*. Autonomy is the fundamental condition, which, from the point of view of ECJ makes it possible to form the Community law. On the basis of hitherto divagations, it has to be emphasized that it is Member States that by their joint, sovereign decision created EU and it is them that gave it the powers specified in treaties. The subjects of objections raised by national constitutional courts as to unconditional acceptance of the primacy of Community law were, principally, two questions: 1) establishing the powers of EU and 2) relationship between the constitutional principles, together with the fundamental rights protected by them and by the Community law. It is a vastly known fact that the opposition of national courts against the unlimited acceptance of the primacy of Community law grew with special intensity in the countries that rejected the “European monism”, represented by ECJ and assumed the dualist paradigm of implementing the international law into the national law. This paradigm was applied *mutatis mutandis* in order to determine the relationship between the Community law and the national law. The best known example

Praw podstawowych, czyli o cywilizowanym wyborze i obalaniu mitów, “Rzeczpospolita”, 30.11.2007, no. 170 (7767), p. A11; A. Wyrozumska, *Karta Praw Podstawowych – polskie obiekcje*, “Sprawy międzynarodowe” 2007, no. 4, p. 69; idem, *Traktat reformujący UE – umocnienie ochrony praw podstawowych (status Karty Praw Podstawowych i przystąpienie UE do EKPCz)*, “Kožmiński Law School Papers” 2007, no. 5, p. 51; idem, *Znaczenie prawne zmiany statusu Karty Praw Podstawowych Unii Europejskiej w Traktacie lizbońskim oraz Protokołu polsko-brytyjskiego*, “Przegląd Sejmowy” 2008, no. 2 (85), p. 27; R. Wieruszewski, *Rola i znaczenie Karty Praw Podstawowych Unii Europejskiej dla ochrony praw człowieka*, “Przegląd Sejmowy” 2008, no. 2 (85), p. 43; W. Sadurski, *Nie bójmy się Karty praw podstawowych*, “Rzeczpospolita”, 23.07.2007, no. 280 (7877), p. C7.

is the German Federal Constitutional Court – *Bundesverfassungsgericht* (BVerfG). For instance, FCC FRG in the judgment of 12.10.1993 in the case of Maastricht Treaty found that “The Treaty of EU establishes a union of states aiming at realization of a closer and closer union of European nations organized in states, it does not, however, establish one state, based on a certain – European-state nation”.⁷⁹ Therefore, EU has no sovereignty *ex definitione*. The political power it possesses, is entrusted to it by Member States.⁸⁰ According to me, the monist approach, represented by ECJ does not reflect the situation *de lege lata*. It is denied by actual borrowings from the constitutions of Member States and numerous references to them in the EU law. Also the position of Member States as “rulers of treaties” is indisputable.

CFR FROM THE POLISH PERSPECTIVE

The Chairmen of the Parliament, Commission and Council solemnly proclaimed the CFR on the 12th day of December 2007 during the plenary session of European Parliament in Strasbourg. The subject of Charter regulations to a substantial extent corresponds to what is contained in Chapter II of the constitution of the RP, entitled “Freedoms, rights and duties of man and citizen”. Some provisions of the Charter raised ethical and legal objections in Poland. CFR was addressed to everyone and its formulation used *gender-neutral* language.⁸¹ I share the view of J. Menkes that it is this universality of the Charter may cause serious litigation about the axiological values it is based on.⁸² For instance, certain political and opinion-forming circles criticize the view that the CFR preamble is lacking references to Christian values.⁸³ Also

⁷⁹ Judgement of FCC 2nd Senate, 2 BfR 2134,2159/92, http://www.trybunal.gov.pl/publikacje/download/EUROPA_2006.pdf (22.01.2008). Cf. J. Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten*, Berlin 1992.

⁸⁰ See: art. 5 TEC, providing that “The Community acts within the limits of powers entrusted to it by this Treaty and the purposes set up in it. In the domains that are outside its exclusive competence the Community undertakes actions according to the principle of subsidiarity, only then and only to such an extent in which the purposes of suggested actions cannot be sufficiently achieved by Member States [...]”, see: *Traktat o Unii Europejskiej; Traktat ustanawiający...*, ed. Z. Brodecki, p. 154–155. See judgement of the Constitutional, Court K 18/04, OTK 2005/5A/49, where the Court recognized its own power to verify whether the legislative organs of EC, issuing a particular act, “acted within the transferred competence and whether they executed their rights in accordance with the principles of subsidiarity and proportionality” (pt 10.2).

⁸¹ See: J. Menkes, *Karta praw...*, p. 39.

⁸² *Ibid.*, p. 39.

⁸³ It should be emphasized that already during the session of European Council in Brussels its members agreed to add to the TEU preamble a new paragraph transferred from the

certain Charter regulations raise criticism: in. a. art. 2 CFR (“Right to life”), art. 3 CFR (“Human right to integrity”), art. 9 CFR (“Right to marry and found a family”), art. 21 CFR (“Nondiscrimination”).⁸⁴

According to critics of the Charter, art. 2 CFR lacks the statement that life is protected from the moment of conception.⁸⁵ In the text under discussion, a special attention should be paid to the divagations of E. Regan, who claims that “the Charter is irrelevant to the abortion debate because Ireland is protected by the Maastricht Treaty and its protocols and, in any event, the ‘right to life’ guarantee of Article 2 cannot, be interpreted as conferring a right to abortion”.⁸⁶ Article 3 CFR, in turn, contains the ban on reproductive cloning

Constitutional Treaty) of the following contents: “Inspired by the cultural religious and humanist heritage of Europe, from which the universal values arise, constituting the inviolable, non-transferable human rights”, as well as “freedom, democracy, equality and the state of law” (Annex 1 pt 1). See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0010:0010:PL:PDF> (23.01.2008); Official Journal of European Union C 306/10, 17 December 2007. In *Schmidberger* and *Omega* the Court of Justice developed a Union law approach to deal with Member States’ invocation of fundamental rights as laid down in their national constitutions for the purpose of derogating from the common market freedoms of the European Community. The way in which the Court of Justice deals with this matter is of great importance, particularly since fundamental rights protection “is the imperative and the objective that both the Union and its Member States are bound to pursue”, see: case C-112/00, *Eugen Schmidberger Internationale Transporte und Planzüge v Republic of Austria*, ECR 2003, p. I-5659 (Schmidberger Judgment); case C-36/02, *Omega Spielhallen – und Automaten-aufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, 14 October 2004, not yet reported (*Omega* Judgment). See also: M. Avbelj, *The European Court of Justice and the question of value choices-fundamental human rights as an exception to the freedom of movement of goods*, Jean Monnet Paper n. 6/04, available at <http://www.jeanmonnetprogram.org/> (23.01.2008).

⁸⁴ See the CC judgement of 16.12.1997, K/97. European Commission against Racism and Intolerance (ECRI) stated in its domestic report concerning Poland that an incomplete list containing prohibited reasons for discrimination, including race and ethnic origin, should be incorporated into the provisions of art. 32 of the Constitution of RP, see: second report of the European Commission against Racism and Intolerance (2000) concerning Poland, adopted 10.12.1999, Strasbourg: council of Europe, p. 5.

⁸⁵ I think that the principle of protecting life from the moment of conception emphasizing the importance of human life, does not specify how to solve the clash of right to life with the threat to the pregnant woman’s health, see on the subject: B. Banaszak, *Co wynika z wprowadzenia do konstytucji zasady ochrony życia od momentu poczęcia*, “Rzeczpospolita”, 10.01.2007, no. 8 (7605), supplement “Prawo co dnia”, p. C4. Cf. N. Nic Shuibhne, *The Value of Fundamental Rights*, [in:] *Values in the European Constitution*, eds. M. Aziz, S. Millns, Dartmouth 2005 (forthcoming).

⁸⁶ See: E. Regan, *The Charter of Fundamental Rights*, The Institute of European Affairs 2002, p. 11–12. Cf. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, p. 31–50, 23 November 1995.

of people, but it does not explicitly exclude it for therapeutic purposes. In art. 9 CFR the Charter refers to the problematic issue of the right to marry and found the family. In the opinions of critics, the disposition of this regulation does not exclude granting the status of matrimony to the union between persons of the same sex.⁸⁷ The Polish Constitution, in art. 18, defines marriage as “the union between a woman and a man”. In my belief, the interpretation of the Charter in such a spirit that a marriage (significantly insufficiently defined in it) is also a union between persons of the same sex persons would not be possible in our country.

The Polish reservations about CFR are also connected with the fear of the possibility of imposing moral standards upon the Polish law, especially the absolute prohibition of discrimination (art. 21 CFR), including discrimination on account of sexual preferences.⁸⁸ Article 32, pass. 2 of the Constitution of RP, in turn, corresponding to this regulation, provides that “nobody can be discriminated in the political, social, or economic life, for any reason whatsoever”. The expression “for any reason whatsoever” is general enough to include all the circumstances to which the Charter refers. According to the Constitutional Court, the manner of regulating the nondiscrimination principle, contained in art. 32 of the Constitution of RP means that the system-giver (legislator) granted to the principle of equality the universal meaning, including all forms of differentiation that can occur in the political or social life, irrespective of the reasons for this differentiation.⁸⁹ We should give some thought to whether the present form of the regulation of the principle of equality and nondiscrimination in the Polish Constitution should not be amended and if an act should not be prepared, containing new differentiation of all forms of discrimination.

In my opinion, the regulations contained in CFR contain no threats for Poland. In all the so-called “sensitive areas” the Charter refers to the domestic law. The Polish Constitution, defining the legal and territorial frames of the democratic state, became, for its citizens, an effective means enabling them

⁸⁷ T. Terlikowski, *Nieznośna niejasność Karty*, “Rzeczpospolita”, 30.11.2007, no. 276 (7873), p. A3, where the author writes: “[...] the fundamental problem with the Charter is the following: we do not know how it is going to be interpreted and what it is going to be used for by the European courts. This concerns especially the matter of upbringing, as well as the definitions of marriage and family”.

⁸⁸ On the basis of art. 13 TEC Poland adopted the Council Directive 2000/78/EC of 27.11.2000 establishing the general framework conditions of equal treatment with reference to employment and work, fighting discrimination on account of sexual preferences, see: http://mfe.free.ngo.pl/rowni_w_roznorodnosci_i_wobec_prawa/prawo/dyrektywa_rady_ue_2000_78_we.pdf (23.01.2008).

⁸⁹ See: CC judgement of 16.12.1997, K 8/97.

to assert their fundamental right before the organs appointed for this purpose, i.e. courts, the Commissioner for Civil Rights Protection and the Constitutional Court.

CONCLUSIONS

The protection of fundamental rights in the *acquis communautaire* system, thanks to the hierarch of this legal system, as well as the position and role of the general principles of EC law constitutes a uniform, coherent and consistent system of regulations, harmoniously composed into the whole of *acquis*. Like the Community legal achievements, the set of these regulations underwent gradual extension, i.e. adjustment to the needs and functions of the Communities and the Union. The fundamental rights of an individual did not play a significant role in the initial period of the European integration process. It was so, because, as we know, the Communities were formed first of all with the purpose of accelerating the economic growth after the World War II. The consequence of the lack of regulations concerning fundamental rights protection in the primary Community law was the *ad hoc* creation of regulations in this field, mainly by the jurisdiction of the ECJ whose jurisdictional interventions supplemented the Community law on the basis of general legal principles. The ECJ jurisdiction and the representatives of the European legal doctrine include the fundamental rights into the unwritten sources of Community law as a part of the so-called general principles of law. The fundamental rights include the principles of ECPHRFF and the constitutional traditions of Member States. ECJ, making decisions in matters of fundamental individual rights is inspired by the general principles of law contained in ECPHRFF and the constitutional traditions of Member States. A significant breakthrough in guaranteeing fundamental rights to an individual is granting, by virtue of Lisbon Treaty, of binding force to CFR for all the Union states, except Poland and the United Kingdom. For the British Protocol excludes binding force of the Charter in Polish legal order.

As to the CFR, it has to be said that it is a consistent, modern act, containing a vast catalogue of human rights: freedoms, political, social, economic and cultural rights. It establishes many fundamental rights, not to be found in other conventions of this kind, such as the right to psycho-physical integrity, protection against biomedical experiments, right to good administration, or protection of minorities. This catalogue is definitely broader than ECPHRFF and it can secure the desirable protection of human rights in the Community system. CFR is the response of union legislators to the contemporary tendencies in the field of human rights protection. Despite the

fact that it is a document of compilation character, by means of putting into it the provisions that have not been sufficiently emphasized, is a subsequent step towards creating a transparent system of human rights protection in Europe. However, heading in this direction, the Union will not be able to “pass by” the issue of competitiveness of this system as compared to the Strasbourg mechanisms.

Słowa kluczowe: prawa fundamentalne; Karta Praw Podstawowych; Międzynarodowe Pakty Praw Człowieka; Europejski Trybunał Sprawiedliwości; Protokół Brytyjski

Keywords: fundamental rights; Charter of Fundamental Rights; The International Covenants on Human Rights; European Court of Justice; British Protocol

STRESZCZENIE

Niniejszy artykuł stanowi przegląd analityczny wybranych zagadnień w odniesieniu do praw fundamentalnych jednostki, poczynając od modelowych orzeczeń Europejskiego Trybunału Sprawiedliwości aż do Karty Praw Podstawowych. Ogłoszenie Karty Praw Podstawowych wraz z Traktatem Nicejskim nastąpiło w lutym 2001 r. jako dokumentu o charakterze deklaracji politycznej, który stanowi integralną część podpisanego w 2004 r. Traktatu ustanawiającego Konstytucję dla Europy (w postaci drugiej części Konstytucji Unii Europejskiej). Zakres praw chronionych w Karcie jest szeroki, a ich charakter różnorodny. Karta Praw Podstawowych kompiluje zarówno prawa zawarte w innych dokumentach międzynarodowych, jak np. w Europejskiej Konwencji Praw Człowieka, Paktach Praw Człowieka, Europejskiej Karcie Socjalnej, a także prawa wynikające z tradycji konstytucyjnej Państw Członkowskich. Istotnym przełomem w zagwarantowaniu praw podstawowych jednostce było nadanie na mocy Traktatu z Lizbony mocy wiążącej Karcie Praw Podstawowych wobec wszystkich państw Unii, z wyjątkiem Polski i Wielkiej Brytanii. Protokół brytyjski wyłącza bowiem obowiązywanie Karty w polskim porządku prawnym. Polskie obiekcje wobec Karty dotyczą jej przepisów m.in. art. 2 (Prawo do życia”), art. 3 („Prawo człowieka do integralności”), art. 9 („Prawo do zawarcia małżeństwa i założenia rodziny”), a także art. 21 („Niedyskryminacja”).