Maria Rzeszutko

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

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INTRODUCTORY NOTES

In the 1950s there was no developed legal and institutional structure for protecting an individual’s fundamental rights\(^1\) in the Community system. The

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). However, all the divagations about the protection of an individual’s rights would remain unnoticed if the ECJ had not introduced in 1960s the principle of supremacy, stating that Community law has priority over domestic law. 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. Without a procedure for their authentic application fundamental rights are therefore – at least from a legal point of view – cheap talk. T. Tridimas in his article

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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.


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. 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) in the year 1993, whereas on the basis of the standards contained in the Treaty of Amsterdam (TA) the jurisdictional

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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” 2002, vol. 29, no. 4.

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”, as well as fear of the proliferation of Community structures.

This article is to present, on the basis of ECJ jurisdiction and selected literature of the subject, 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

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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*, constituting a point of departure for the next decision in the case of *Internationale Handelsgesellschaft*. 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. 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).
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 Constitution\textsuperscript{18} 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.\textsuperscript{19}

In Wachauf\textsuperscript{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;\textsuperscript{21} freedom of association;\textsuperscript{22} the principle of non-discrimination;\textsuperscript{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;\textsuperscript{24} right to confidentiality of correspondence.

\textsuperscript{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).

\textsuperscript{19} See the decision of FCC Second Senate in the case of Solange II, 2 BvR 197/83.


\textsuperscript{22} Case 12/84, Meryem Demirel v. Miasto Schwäbisch Gmünd, ECR 1987, p. 3719.


dence between a client and a lawyer;\textsuperscript{25} and freedom of religion.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{26} Case 130/75, *Preis*, ECR 1976, p. 1589.


\textsuperscript{29} M. Szyszkwoska’s divagations in this matter are of interest, see: M. Szyszkwoska, *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”. 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). A broader classification was determined by D. Simon, who
distinguishes: non-statutory and statutory law, as well as external and internal
law. The divergences 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.
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 divergences 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. 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. According to J. Jaskólska,

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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 prawa wspólnotowe. Zagadnienia teorii
J. Zajadło, Filozoficzne problemy ochrony praw jednostki, [in:] Ochrona praw jednostki, ed.
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
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. Krąpiec 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”.

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.
39 Ibid., p. 76.
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 Statute orders the Court to apply the customary law, i.e. practices of the states recognized as law. W. Czapliński and A. Wyrozumska claim that practice itself cannot lead to the formation of customary law, because a specific standard of conduct has to have binding force. 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, art. 56 pass. 2 of the RP Constitution).

ECJ has many a time pointed out to the special role of Strasbourg 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. 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,

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43 W. Czapliński, A. Wyrozumska, Prawo międzynarodowe publiczne. Zagadnienia systemowe, 2 ed., Warsaw 2004, p. 73. Cf. Podstawy prawa Unii Europejskiej, ed. J. Galster, p. 312, where the view is expressed that “usuś 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 ECHR. 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 ECHR 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 ECHR 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

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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.
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 on 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 hale their source in his ontical structure) and cognitive (affecting their understanding under the influence of various factors, both positive and negative), while 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. Weiler also stated that “what is fundamental in fundamental rights is the balance between private and public interests”. 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. According to M. A. Dauses “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.

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

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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. 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 *Grundsrechts* as “principal rights” (“principal law”), claiming that this term is more appropriate on the grounds of Community law. 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”. 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. 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” 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. 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. Besides, the author believes that “civil rights are connected with the positivist theory of law, and human rights arise from the law of nature”. 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.
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 ECHR 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 ECHRFF, 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 ECHRFF68 has been raised many a time by Polish69 and

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

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).


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.

is a contradiction between the provisions of ECPHRFF and the Charter. 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, joined the so-called British Protocol. 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.

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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 Matthews 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).


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 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,
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

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

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

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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. 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. 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. 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

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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”.


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 hierarchy 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 ECHR 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 ECHR 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 ECHR 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.

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, począwszy 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 dokument 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”).