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FACTOR INFLUENCING THE REGULATION OF HUMAN RIGHTS IN EU AND ITS MEMBERS STATES

Boguslaw Banaszak Prof. Dr. hab. Dr. h.c. mult.
Dean of Law Faculty in Zielona Gora and Member of the Tribunal of State, Polonia

Resumen:

La regulación constitucional de los derechos, libertades y deberes de un individuo en cada país no forma un conjunto accidental de normas, sino que está más bien determinada por un concepto particular del estado del individuo en el Estado. Esto no significa necesariamente que deba reflejar dicho concepto y que las constituciones basadas en el mismo concepto deban ser exactamente iguales. A los factores que influyen en las diferencias y similitudes en la regulación de los derechos humanos en la UE y sus Estados miembros pertenecen multitud de conceptos de derechos humanos y libertades en los Estados democráticos europeos (los más importantes son los conceptos jurídico-naturales, el liberalismo, el concepto típico del Estado social regido por la ley) y la falta de un concepto común de derechos humanos en el período inicial de formación de la CEE y la UE.

La actitud hacia los derechos humanos en la UE experimentó una interesante evolución. Su regulación se omitió deliberadamente en los tratados que constituyen las Comunidades Europeas, ya que el tema estaba regulado por una parte por las leyes internas de los Estados miembros (principalmente las constituciones) y por la otra, por el Derecho Internacional Público universal y regional. Los creadores de la integración europea no querían duplicar los estándares de protección y los catálogos de derechos humanos. En los años 70 del siglo pasado, el sistema de derechos fundamentales se basaba en los principios propuestos por el Tribunal Europeo de Justicia.

La Carta de los Derechos Fundamentales común para toda la UE se adoptó el 7 de diciembre de 2000. Era un acuerdo entre instituciones y no era un acto legalmente vinculante. La situación cambió después de la ratificación del Tratado de Lisboa. Gracias a la Carta, la UE por primera vez ha adoptado una actitud compleja con respecto a la protección de los derechos de las personas. Debe subrayarse que las nociones utilizadas en la Carta también se refieren a los términos empleados por las Constituciones de la mayoría de los Estados miembros de la UE, que las ciencias jurídicas conocen bien incluso en los países que no emplean términos apropiados en su legislación (por ejemplo, el de dignidad humana). Sería difícil asumir que la Carta crea nuevos estándares y un concepto de derechos humanos o proporciona una interpretación más o menos uniforme de los derechos individuales tanto dentro del alcance del Derecho Europeo ampliamente concebido (UE y Consejo de Europa) como del Derecho interno de los Estados miembros de la UE.

Abstract:

The Constitutional regulation of rights, freedoms and duties of an individual in every country does not form an accidental set of norms, but is rather determined by a particular concept of the status of the individual in the state. This does not necessarily mean that it must reflect such concept and that constitutions based on the same concept should be exactly alike. To the

factors influencing the differences and similarities in the regulation of human rights in EU and its member states belong: multitude of concepts of human rights and liberties in European democratic states (most important are legal-natural concepts, liberalism, concept typical of social state ruled by law) and the lack of common concept of human rights in the initial period of forming EEC and EU.

Attitude to human rights in the UE underwent an interesting evolution. Their regulation was deliberately omitted in the treaties constituting European Communities as the issue was on the one hand regulated by member states' internal laws (mainly the constitutions) and on the other – by both universal and regional public international law. The creators of European integration did not want to duplicate both the standards of protection and the catalogues of human rights. In the seventies of the last century the system of fundamental rights was based on the principles proposed by the European Tribunal of Justice.

The Charter of Fundamental Rights (CFR) common for the whole EU was adopted on 7 December 2000. It was an agreement between institutions and was by no means a legally binding act. The situation changed after ratification of the Treaty of Lisbon. Thanks to the Charter the EU for the first time has adopted a complex attitude to the issue of the protection of the rights of an individual. It should be underlined that the notions used by the Charter also refer to the terms employed by the constitutions of most EU member states, which legal sciences are well acquainted with even in the countries which do not employ appropriate terms in their legislation (e.g. human dignity). It would be difficult to assume that the Chart creates new standards and one concept of human rights or provides a more or less uniform interpretation of individual rights both within the scope of widely understood European law (EU and Council of Europe) and internal law of EU member states.

PALABRAS CLAVE: *Derechos Humanos, Conceptos de Derechos Humanos y libertades, Unión Europea, Carta de Derechos Fundamentales, Derecho Europeo*

KEYWORDS: *Human Rights; Concepts of Human Rights and Liberties; European Union; Charter of Fundamental Rights; European law*

1. INTRODUCTION

Constitutional regulation of rights, freedoms and duties of an individual in every country does not form an accidental set of norms, but is rather determined by a particular concept of the status of the individual in the state. This does not necessarily mean that it must reflect such concept and that constitutions based on the same concept should be exactly alike. In fact, we must be mindful of the fact that any basic law does not come into existence in a vacuum and often applies institutions or solutions existing in a given country. On the other hand, despite widespread acceptance of one concept by the authors of an organic law, they may find it necessary to admit some elements typical of another (e.g. Declaration of Rights of Man and Citizen of 1789 connected liberal ideas with elements of the natural-law concept). Moreover, concepts of the status of an individual themselves are not monolithic. They maintain only certain fundamental assumptions, but are subject to modification in respect of other questions and apply different approaches in resolving detailed issues. The result is that some — and sometimes far-reaching — differences can exist between individual countries, even those whose constitutional norms concerning rights, freedoms and duties of an individual have been based on the same concept.

Generally speaking, regulations of individual freedoms and rights in the

constitutions and treaties take into account, both in the catalogue of such rights and freedoms and specific provisions concerning them, norms of international law and customs binding on European countries as well as constitutional standards existing in democratic states and Member-states of EU.

2. CONCEPTS OF HUMAN RIGHTS AND LIBERTIES INFLUENCING INTERNATIONAL, SUPRANATIONAL AND INTERNAL NORMATIVE REGULATIONS

As there is a multitude of concepts of human rights and liberties, it is reasonable to restrict the discussion only to these which in the past substantially influenced or are currently influencing normative regulations concerning individual rights, focusing solely on their most fundamental assumptions and ignoring detailed analyses, presentations of their different versions, etc. After all, every concept may to a greater or lesser degree be modified and adapted to the current social, economic and political premises. This is an issue constituting a separate subject of research, which can not be elaborated here.

a/ Legal-natural concepts

Legal-natural concepts constitute an internally diversified group, which results from the possibility of adopting various assumptions for their existence – philosophical, religious, historical or biological. Leaving aside a detailed discussion, a general thesis may be formulated, proposing that all the natural concepts are characterised by the recognition that people are equal and free by nature and that they are entitled to certain inherent rights. Positive law only declares natural laws which already exist and does not enact them. Its primary task is to restrict the rights in the interest of individuals co-existing in an organised society. It thus acquires a negative character identified with interference in the sphere of natural rights with an aim of restricting them in exceptional cases. In this view law is secondary in character, while natural rights are primary. This view, focusing on an individual, does not take into consideration the fact that the law and the state are indispensable for the development of an individual and implementation of his or her natural rights. Therefore, some proponents of legal-natural concepts maintain that these do not deny the need to protect inherent rights of an individual by positive law, as exemplified by the following view of H. Waśkiewicz: «positive law plays the same role for natural rights as executory provisions do for a statute».

Legal-natural concepts frequently influence the interpretation of significance of individual rights in international and national scales, which does not necessarily have to result in legal nihilism and negation of the letter of positive law, although undoubtedly one of the functions of natural law – especially from the point of view of American natural law jurisprudence – is countering legal positivism.

It is interesting that after considerable restriction of the role of legal-natural concepts in the 19th century, they enjoyed a considerable revival after World War II.

b/ Liberal concept

19th century constitutional regulations of individual rights emerged under an overwhelming influence of liberalism (e.g. the constitution of Belgium from 1831). They no longer emphasised a legal-natural character of individual rights but interpreted them «as an expression of the will of the state, which is totally independent in their establishing». The state was to be a mere instrument providing social order and internal security, concurrently protecting the society and creating conditions for its development as well as the development of individuals constituting it. The status of an individual in a state and the scope of his or her rights depended on the positive law existing in a

given state or the common law which the state accepted. A rule was adopted that individual rights are guaranteed solely for the citizens of a given state and only in exceptional circumstances for non-citizens. Constitutional provisions provided grounds for normative regulation of civic rights but due to their general character had to be elaborated and specified in statutes, owing to which they could be adapted to the changing social reality as the process of resolving statutes or their amendment is easier than amending the constitution.

The grounds for the liberal catalogue of individual rights were constituted by the notions of personal freedom and freedom of business, protection of property and ownership, religious tolerance and restriction of Church's influence, freedom of assembly and freedom of speech. These freedoms were to protect an individual against interference from the state, while at the same time liberalism perceived the state as a guarantor and protector against anti-liberal tendencies and threats.

The liberal concept perceived an individual as an isolated entity. The concept's basic premise was the idea of a self-regulating, free society, which was more or less directly expressed in the works by G. Hegel, J. Bentham, A. Smith. It assumed that a society consists of equal, free individuals who encounter resistance from other individuals when attempting to implement their needs and interests. Various individual interests work in different directions and therefore it is eventually possible to establish a solution benefiting the whole society. Individuals tend to compromise and are by themselves able to evaluate legal, political and economic problems rationally. Common interests are stronger than what divides people.

The liberal concept perceived individual rights as an expression of division of competences between an individual (a society) and a state, which resulted in juxtaposing a state and a society, a state and an individual.

c/ Concept typical of the so-called social state ruled by law

The purpose of such state, in contrast to the liberal state, is to direct the processes of social development and to ensure impartial distribution of its fruits. In order to achieve its goals, it may apply not only the traditional means (i.e. commands and prohibitions) but also a wide spectrum of other measures designed to direct one's personal conduct (e.g. through taxation or subsidies). The state and society are not treated as mutually opposing forces, although they are not identical with each other. The social state ruled by law is separated from society, which guarantees freedom of the individual, but is also closely connected with it, thereby guaranteeing progress and social justice. This corresponds with the departure from regarding an individual as an isolated subject whose links with society are recognized. On the one hand, this makes it possible to emphasize individual responsibility for deciding the fate of the community and leads to re-evaluation of duties consigned to him/her, which, having received a wider social context, become instruments for implementing new tasks of the state. On the other hand, the state has been obliged to care for the subsistence of an individual and ensure the provision of opportunities for an individual development as guaranteed in the constitution. This leads to a change in the character of individual rights that begin to function as an aim of the state's activities. Formal guarantees do not suffice, and the state is compelled to undertake political, environmental, social and other activities in order to carry out the programme formulated in provisions of the constitution relating to them. Rights and freedoms do not protect only the individual sphere of liberty of the person, but also play some social functions and, therefore, an enjoyment thereof should be socially oriented, i.e. when protecting interests of an individual they also serve the common good.

The concept of human rights and liberties typical of the so-called social state ruled by

law underlines political rights of citizens. They play an important role in the functioning of the democratic state. They not only stimulate democratic modifications of political institutions, but allow the growth of sense of law in society as well. They influence a wider range of realization of other rights and freedoms.

Confirming the significance of social rights, the social state ruled by law treats them in a different way from political or personal rights[1]. They do not found any claims by an individual for a particular behaviour on the part of the state or any concrete performance, but are rather an imposition on the state of an obligation to undertake activity for their accomplishment. The social state ruled by law, as compared to the liberal state, reverses the principles concerning the substantial scope of rights, freedoms and duties contained in the constitution. While under the liberal conception they relate, above all, to citizens, and only in exceptional situations — to non-citizens, under the concept of the social state ruled by law, it is assumed that provisions of the constitution specifying the status of an individual are addressed to all persons staying in the territory of a given state, except for the rights, freedoms and duties explicitly reserved for citizens.

3. LACK OF COMMON CONCEPT OF HUMAN RIGHTS IN THE INITIAL PERIOD OF FORMING EEC AND EU

Attitude to human rights in the EEC and subsequently in the UE underwent an interesting evolution. Their regulation was deliberately omitted in the treaties constituting European Communities as the issue was on the one hand regulated by member states' internal laws (mainly the constitutions) and on the other – by both universal and regional public international law. The creators of European integration did not want to duplicate both the standards of protection and the catalogues of human rights.

Initially the European Tribunal of Justice restrictively interpreted the treaty provisions and rejected the concept of existence of fundamental rights of an individual in the community law. It changed its position in the mid–1970s acknowledging that these rights are part of unwritten community law. The Tribunal began drawing its own catalogue of fundamental rights closely linked with four freedoms rooted in the treaties and vital for uniform European market. The rights were protected solely within the scope essential for the functioning of the community law.

In this situation, when the system of fundamental rights was based on the principles proposed by the Tribunal, the EU lacks legal acts concerned with fundamental rights, which legally bind EU bodies and member states as well as coherent procedures serving the purpose of their protection. The problem could be resolved in two ways – either by implementing a new treaty which would offer complex regulation of fundamental rights within the EU law or by the EU joining the Convention on the Protection of Human Rights and Liberties. Over fifty years of experience in the implementation of the Convention would enable to avoid numerous inconveniences resulting from introducing new legislation.

4. CHARTER OF FUNDAMENTAL RIGHTS

Initially, a third way was adopted. The Charter of Fundamental Rights (CFR) adopted by the European Parliament, Council and Commission at the summit in Nice on 7 December 2000 was an agreement between institutions and was by no means a legally binding act. The situation changed after ratification of the Treaty of Lisbon.

[1] Cf. BANASZAK, B. *Constitutionalisation of Social Human Rights – necessity or luxory?*, Persona y Derecho 1-2/2012, pp. 17-20.

Thanks to the Charter the EU for the first time has adopted a complex attitude to the issue of the protection of the rights of an individual. The protection comprises all the categories of rights – apart from personal and political – also widely understood social, cultural and economic rights. In view of para. 5 of the Charter's preamble, the catalogue of protected rights comprises «the rights resulting especially from constitutional traditions and international agreements adopted by all the member states […] as well as the judicature of the Tribunal of Justice of European Communities and the European Tribunal of Human Rights». A new attitude towards all the rights – including the traditional ones, universally included in the catalogue of protected rights – may be observed, aiming at regulating possibly all contemporary issues resulting from their implementation. This attitude enables not only to account for the threats resulting from the development of civilisation but also to reformulate some of the rights. Thus the Charter comprises new potential in the application of the rights and includes the regulation stimulating changes in their understanding and protection.

Within its subjective scope the Charter aims at protecting not only EU citizens, but also everyone staying in the EU territory, which conforms with the tendency in the EU legislation, which determines that by definition the EEC and the EU legal acts concerned with rights of an individual extend their subjective scope onto everyone present in the area where the EU law is in effect.

Even though the Charter does not recognise *expressis verbis* the implementation of its provisions in the case of legal persons, this «does not denote that in singular cases legal persons could not cite the Charter's provisions if it they are applicable in their situation».[2]

The complex character of the Charter is favoured by the manner of regulation of particular rights.

«While some rights and liberties are formulated in such a way that they may be directly implemented, there are numerous ones which offer guidelines as to the policy of community bodies […]. This method […], avoiding difficulties resulting from finding a formula enabling implementation of the rights by courts, confirms that all the rights and liberties are binding. This denotes that everyone may demand their implementation, even though not in each case their implementation can be vindicated in legal proceedings».[3]

Multiplicity of sources concerned with the rights of an individual implies existence of diversified terminology, which, in turn, due to interpretation of concrete notions, is of practical significance for implementation of particular rights on the basis of a normative act applied in a given situation. In the case of international and supranational law, all this is affected by problems resulting from translating legal notions into national languages of the countries where they are implemented.

Realising this, the creators of the Charter did not want it to be yet another element in the kaleidoscope of acts concerned with the rights of an individual. In its very title they aimed at referring to the notion of fundamental rights developed in the judicature of the European Tribunal of Justice from the late 1960s. Simultaneously, striving to ensure the Charter's compatibility with the European Convention on Human Rights, they formulated the principle in art. 53, para 3 of the Charter stating that «Within the scope in which this Charter includes the rights corresponding to the rights guaranteed by the Convention on the Protection of Human Rights and Liberties, their interpretation and scope are congruent with the those conferred by the Convention».

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[2] *Stanowisko Rady Doradczej do spraw Praw Człowieka przy Ministrze Spraw Zagranicznych*,
[w:] *Karta Praw Podstawowych Unii Europejskiej,* Ministerstwo Spraw Zagranicznych Warszawa 2001, p. 62.

[3] *Ibid.,* p. 57

In the legal sciences for some authors the relation between the Charter and European Convention of Human Rights is not clear. The good example is the opinion of Polish scholar A. Bisztyga:

«European Convention for the Protection of Human Rights and Fundamental Freedoms enjoys good opinion of the constitutional act orders European legal space of human rights. The pearl in the Convention crown is European Court of Human Rights, which case-law creates European standards of human rights in contemporary way. Being obligatory, Lisbon Treaty and Charter of Fundamental Rights of European Union change the previous situation. Instrumentarium of the human rights protection in Europe has been enriched. However a number of questions about the relation between Convention and Charter arise and the relation between European Court of Human Rights and Court of Justice of European Union as well as the case-law of both European courts. Are the relations going to be complementary or use confrontation? »[4].

It should be underlined that the notions used by the Charter also refer to the terms employed by the constitutions of most EU member states, which legal sciences are well acquainted with even in the countries which do not employ appropriate terms in their legislation (e.g. human dignity).

All these measures enable to create not only a complex catalogue of fundamental rights, but also to interpret them in a largely uniform way both in widely understood European law (EU and Council of Europe) and in the EU member states' internal law. According to the Charter, the European Tribunal of Justice has a significant role to play in the process of interpretation of the Charter's provisions. In this context it is interesting to quote the following stance of the Polish Constitutional Tribunal:

«Interpretation of the EU law by the European Tribunal of Justice should fall within the scope of functions and competences delegated to the Communities by the member states. It should also correlate with the principle of subsidiarity determining the activity of the Community and EU institutions. The interpretation should be also based on the assumption of mutual loyalty between the Community and EU institutions and member states. This assumption obliges the European Tribunal of Justice to support local legal systems, while the member states are obliged to apply the highest standards of respecting community norms […]. Member states retain the right to evaluate whether EU legislative bodies acted within the delegated competences and whether they exercised their authority in congruence with the principle of subsidiarity while issuing a legal act (legal provision). The principle of priority of the community law is not applicable in the case of the acts (provisions) issued in excess of the above restrictions. ».[5]

The Charter does not refer to the category of the rights of an individual already present in international law and internal law of many countries, i.e. their division into rights and liberties and further division into two groups: personal and political as well as economic, social and cultural. This typology frequently caused controversy in the legal doctrine, but it has been universally accepted, which is substantiated by two UNO Human Rights Pacts constituting the basis for the system of protection of human rights adopted by the UN and the presence of European Social Charter together with the European Convention on Human Rights in the regional European system of their protection.

Instead of adopting the already existing typology, the Charter creates six categories corresponding to its first six chapters, which is intended by the Convent elaborating the

[4] BISZTYGA, A.: *Europejska Konwencja Praw Człowieka a Karta Praw Podstawowych Unii Europejskiej – stan kompatybilności czy konkurencyjności?*, Przegląd Prawa Konstytucyjnego 7/2009, p. 188. Cf. Also LENAERTS, K.: *Fundamental Rights in the European Union*, «European Law Review» No. 25, 2000, p. 579.

[5] OTK ZU No 5/A/2005, pos. 49.

Charter to provide it with its complex character and enable to extend the protection over new areas exceeding the traditional scope of regulation, universally adopted in international and internal law. The headings of the chapters – groups of rights – are linked with values–ideas[6] especially important for the EU. In this way «the Chart seems to break with historically formed division and by rejecting the hierarchy of fundamental rights, based on the division mentioned above, [the Chart – B. B.] creates a new concept of fundamental rights».[7] The concept is not rooted in the traditional science of law. It is not yet fully mature, while the accompanying axiology has not been universally adopted. It emerged under the strong, predominating influence of social democratic thought[8] and only in a very limited degree does it take into consideration other philosophical trends. Despite that, it lacks coherence, which is substantiated by the need to prepare explanations to the Chart's provisions after it was adopted. On the initiative of the Great Britain the Presidium of the Convent elaborated explanations, which by virtue of para. 7 art. 52 of the Chart serve the purpose of its interpretation and should be taken into consideration by the courts of the EU and member states.

As a result it would be difficult to assume that the Chart creates new standards and one concept of human rights or provides a more or less uniform interpretation of individual rights both within the scope of widely understood European law (EU and Council of Europe) and internal law of EU member states.

The proponents of the Chart, supporting such a wide catalogue of rights guaranteed by it, perceive it as a virtue and a testimony of a complex character of its regulations. However, they admit that «the Chart's wide catalogue has been designed for future, extended EU competences».[9] They indicate possible restriction in the scope of rights regulated in the internal law of the member states, which is exemplified by possible opposition of the Union to the introduction of death penalty in the countries tightly co–operating with the USA in combating terrorism.[10]

EU seems to lack acceptance of one, universally adopted concept of human rights, which substantially hinders further integration and protection of human rights. As an example I may quote the contentious issue of including the regulation concerning social rights in the Charter of Fundamental Rights. The comparison of the catalogue of constitutional human rights common for all the EU member states shows that its core is formed by traditional (classic) personal liberties and political rights. Social, cultural and economic rights (with the exception of property rights) are to a varying degree present in individual constitutions and in their case no elements common for them all can be determined. This is caused by the controversy in the science of law and among various political movements concerning the need of and extent of constitutional regulation of social rights and the whole social sphere.

Opponents of subjecting social rights to constitutional regulation maintain that since the degree of their implementation always depends on current and constantly changing economic situation, the matter should thus be subject to statutory legislation. In their view the regulation's place in the legal hierarchy should not determine the extent of social effects of state's effort. They also emphasise that social rights have a postulatory character. In their case a state

[6] Cf. MIK, C.: *Rola Europejskiej Konwencji Praw Człowieka w procesie integracji europejskiej*, in: ks. W. Chrostowski (ed.), *Czynić sprawiedliwość w miłości*, Warszawa 2001, p. 304.

[7] D. Capitant, *Die Charts…*, p. 13.

[8] This is the opinion of other scientists analysing the text of the Charter of Fundamental rights – cf. HOGAN, G.: *Der einfluss der Europäischen Grundrechte–Charta auf die irische Verfassung* in: P. J. Tettinger, K. Stern (ed.), *Kölner…*, p. 65.

[9] E.g. C. Castello and V. Browne – cf. ibidem, p. 68.

[10] E.g. C. Castello and V. Browne – cf. ibidem, p. 68.

must first elaborate and then implement complete social programmes[11]. If, apart form the norms of postulatory character, the constitution included social rights enabling an individual to claim benefits from the state, to meet these it might have to take over the control of economy, which would contradict the provisions of property rights and economic freedom[12]. In this context it is the essence of the constitution that is important, the role it is to play in the state. This is referred to by W. Martens, who writes: «Where […] the guarantee of freedom is interpreted as the guarantee of existence, a constitution devoted to the principle of liberty contradicts itself»[13]. From this perspective including social rights in the constitution is prevented by fear of undermining the effectiveness of political rights and civil liberties in a situation where the same catalogue would protect an individual against the state and would simultaneously authorise him or her to demand benefits from it. Because of this «the constitution […] is transformed from the act which determines the limits of authority into the act which determines the sphere of the authority's obligations. Consequently, this transforms the constitution into a peculiar charter of social life»[14]. Additionally, the state is not obliged to guarantee social rights and to provide actual conditions enabling individuals and social groups to benefit from their constitutionally guaranteed rights. This aims at preventing the use of other rights included in the constitution to satisfy social claims.

The viewpoint that social rights should not be included in a constitution has many proponents in the doctrine of constitutional and European law in several developed democracies. It is held that such rights have a programmatic nature and that in this respect the state must implement whole social programmes. Personal and political rights and freedoms require that the state and EU creates adequate institutional guarantees or only refrains from interfering with the legally protected autonomy of the individual. They may be accomplished more easily and quickly, and EU or state activity is in this respect determined to a smaller degree by economic factors.

At this point, it might be said that «even in most advanced democratic systems of government, there have been observed permanent or occasional departures from the proclaimed principles. This mostly relates to social and cultural rights whose extent, and, particularly, level of realisation is very often determined by the stage of the business cycle, depending on place and time. Any instances of international or domestic recession result in trends towards the reduction of social benefits»[15].

Proponents of regulation of social rights in EU law advocate the need of departing from the treatment of fundamental rights and liberties as the means of merely protecting individuals against the interference on the part of the state. The guarantee of civil liberties and political rights thus requires taking into account economic, social and cultural conditions, i.e. introducing social rights into the constitution. According to P. Häberle, in the contemporary state «a complex tool develops, which includes the following elements: guarantee of fundamental rights as widely-understood social rights, as the aim of the constitution, as the subjective entitlement to benefits and as the

[11] Cf. MÜLLER, J.P.: *Soziale Grundrechte in der Verfassung ?*, Basel – Frankfurt am Main 1981, pp. 41-44, 203.

[12] Cf. HORNER, F. *Die sozialen Grundrechte*, Salzburg, München, 1974, p. 225.

[13] MARTENS, W.; and HÄBERLE, P.: *Grundrechte im Leistungsstaat*, Veröffentlichungen der Vereinigung des Deutschen Staatsrechtslehrer, z. 30, 1972, p. 33.

[14] CIEMNIEWSKI, J. *Konstytucja państwa socjalnego czy konstytucja państwa liberalnego ?*, w: *Prawo w okresie przemian ustrojowych w Polsce. Z badań Instytutu Nauk Prawnych PAN*, Warszawa 1995, pp. 68-69.

[15] ZWIERZCHOWSKI, E. *Wprowadzenie do nauki prawa kanstytucyjnego państw demokratycznych [An introduction to the teaching of constitutional law of democratic states],* Katowice 1992, p. *22*.

interpretation guidelines for the judiciary»[16]. He also notes that «absence of or modest presentation of social matter in the constitution does not prevent the state from the possibility of conducting broad social policy transforming it into a welfare state. Presence of precise and elaborate social matter in the constitution determines this direction. Therefore, from the point of view of the majority of citizens who will benefit from social rights […] it is desirable that […] the constitution includes elaborate and precise regulations of the social matter»[17].

For the proponents of social rights in the states lacking constitutional regulation of the matter or where this regulation is limited, the Charter of Fundamental Rights has a great significance for two reasons. Firstly, the Charter includes the statements distinctly indicating the existence of social rights, thanks to which they, interpreted as fundamental, would be indirectly introduced into the legal systems of these states. Secondly, the charter enables to grant a social function to the rights already included in the constitution which are not treated as social. Then «classic fundamental civic rights are mixed with fundamental social rights which may be appealed from as being directly applicable and as subjective constitutional law»[18]. Pursuant to these citizens could demand the state to provide certain benefits, both of material character and as means enabling them to take advantage of the regulations created by the state aiming at providing social conditions for their implementation.

Another example is provided by the Chart's regulations concerned with marriage and family. Art 51, para. 2 of the Chart seems to state in a way excluding any doubts that «the Chart does not extend the scope of implementation of the EU law beyond the Union's competences, it does not introduce new competences or tasks for the UE». On the other hand certain formulations of the Chart's provisions may indicate a different tendency or are devoid of legal significance. An Irish scientist G. Hogan, who analysed them, states: «elementary rights, which the Charter will protect, are *de facto* not designed to be applied by the Union of precisely restricted competences but by a federal state or even a centralised or unitarian state. For example, art. 9 of the Chart states that ‘ the right to marry and establish a family are guaranteed in accordance with member state statutes regulating the implementation of these rights'. Yet, what is missing – at least now – is any EU competence concerning the right to marry. Therefore a question arises why the right is to be protected at the level of the new European constitution. […] In other words, in what circumstances could a member state statute concerned with the right to marry contravene art. 9 of the Charter of Fundamental rights? If the answer is that it is impossible, as the right to marry is regulated solely by the member state law, then we return to the basic question, why an attempt has been made to include [in the Charter] the right to marry and establish a family as well as its protection if it is protected at the state level by the constitutions and by art. 12 of the European Convention on Human Rights? The same concerns the majority of rights included in the Charter, such as the provisions concerned with the rights of children, the right for just legal proceedings or the right for the health protection».[19]

It should be underlined that EU includes the countries with restrictive regulation concerning divorce (Malta) and the countries which accept homosexual marriage (e.g.

[16] MARTENS,W.; and HÄBERLE, P. :*Grundrechte im Leistungsstaat*, Veröffentlichungen der Vereinigung des Deutschen Staatsrechtslehrer, z. 30, 1972, p. 73.

[17] ZAWADZKA, B.: *Prawa ekonomiczne, socjalne i kulturalne*, Warszawa 1996, p. 94.

[18] MÜLLER, J. P.: *Katalog i zakres obowiązywania praw podstawowych*, w: CZESZEJKO-SOCHACKI Z. (ed.), *Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 r. i Konstytucja Rzeczypospolitej Polskiej z 1997 r.*, Białystok 2001, p. 78.

[19] HOGAN, G.: *Der Einfluss der Europäischen Grundrechte–Charta auf die irische Verfassung*, pp. 67–68.

Spain, France). At the forum of EU institutions and in many individual member states this dispute about the role of family and marriage has become a dispute about the role of freedom of speech and religion.

People inspired by Christianity or Islam find it difficult to accept a departure from a traditional notion of a family. Therefore, those who view this notion differently frequently attack mainstream Churches and religions in Europe and treat them as hypocrites, which the Catholic Church brings to attention. In his document *The Family and Human Procreation* published in 2011 cardinal A. Lopez Trujillo, the head of the Pontifical Council for the Family, points out at the tendency to «overshadow God» in contemporary culture.

This act of dissociating form the values shaping European culture for two millennia, which is best exemplified by absence of reference to God in the proposed EU constitution, distorts the past. As M. Pera wrote in his book *Deprived of Roots* «People (and nations) who forget about their roots are neither free nor serious».

Criticism of views negating non-traditional values is sometimes treated as reprehensible and punishable hatred. This obviously affects the notion of freedom of speech and forces public authority to undertake inquisition activity – as in the case of the reverend Ake Green. Equalling a critical view, proposing different values, with attack results in suspension of freedom of speech and delegating to the state the power of decision as to what is permitted. R. Descartes said that he may disagree with someone's views but he is ready to sacrifice his life so that the view may be propagated. A. de Tocqueville warned that it is the whole of the citizens of a democratic country and not public authority who have the power of deciding whether someone's views are right or wrong. Once an attempt to restrict this power is made, there will be no end to further restrictions.

It should be remembered in this context that when a new Polish constitution was resolved in 1997, the text of its preamble caused a heated political and ideological dispute. Eventually a compromise formula was adopted referring to the ten centuries of the history of the state and the nation and indicating a significant role of Christian heritage. It was also emphasised that opening to Europe and the world does not contradict the sense of national identity and attachment to cultural roots.

In this context the following view of the Polish Constitutional Tribunal is worth quoting:

«The interpretation of EU law by the European Court of Justice should not exceed the functions and competences delegated by member states to EU. It should also correlate with the principle of subsidiarity determining the activity of the community-EU institutions. The interpretation should also be based on the assumption of mutual loyalty between the community-EU institutions and the member states. The assumption generates – on the Court's part – the obligation to favour national legal systems, while on the part of member states – the obligation to observe community norms to the highest achievable standards […] Member states reserve the right to evaluate whether the community (EU) legislative bodies resolving a given act (of law) observed delegated competences and whether they exercised their powers in accordance with the principles of subsidiarity and proportionality. Exceeding this framework results in the fact that the principle of the priority of the community law does not apply to the acts (provisions) resolved in excess of these limitations»[20].

The Polish Constitutional Tribunal emphasized that:

«Relative autonomy of legal systems, based on their own internal hierarchical principles, is not tantamount to absence of mutual influence. It also does not eliminate the possibility of collision between the regulations of the community law and the

[20] OTK ZU Nr 5/A/2005, poz . 49.

provisions of the Constitution. The latter would take place when there was irrevocable contradiction between a constitutional norm and the norm of the community law, a contradiction which could not be eliminated with the use of interpretation respecting relative autonomy of the European law and the national law. Such a situation cannot be ruled out but it may – due to […] common character of assumptions and values – appear only exceptionally»[21].

For the so-called new member states of EU, which include Poland, it is especially important that the disputes concerning values discussed above were, as emphasized by the Ioan Ganfalean, resolved respecting the principles of «solidarity, consensus and in the spirit of compromise»[22]. The values on which the whole EU legal system is based cannot be imposed on any country by another country, neither can they be imposed on a minority by a majority currently in power within individual states.

It must be remembered that common values and the EU law implementing them stimulate the identification of citizens of EU member states with the Union as a whole. This serves the purpose of increasing their interest in public life and their contribution to influencing the will of their own countries and the Union – e.g. by participating in the elections to the European Parliament. For the purpose of implementing this task it is important that European integration is in its form and content an expression of a broad social consensus, a result of compromise between various social groups and political powers. This multiplicity must form an integrated whole, which in its turn affects its ability to perform economic and political functions of a new entity. The EU law may constitute the basis of the social development of united Europe only when it is accepted by the citizens, when it protects their interests, ensures freedom and the possibility of the development of an individual, guarantees internal peace by creating mechanisms of solving social conflict, provides the citizens with the possibility of exercising authority not only in their own country but also in EU and supervising not only the national but also European institutions. From this perspective it may be observed that the Union strives to implement these objectives and that the proposals of differentiating the rate of integration within two-speed Europe or unjustified criticism of new EU members wishing to voice their views have become the thing of the past

The Treaty of Lisbon enables us to hope that new decision-making mechanisms will enable to reach a compromise in determining new values influencing the quality and form of integration.

21 OTK ZU Nr 5/A/2005, poz . 49.

22 GANFALEAN, I.: *The Implementation of European Law In Romania*, Annales Universitatis Apulensis, Series Jurisprudentia 11/2008, p. 123.