

The Charter of Fundamental Rights of the European Union in the light of the principle of unity in diversity (Part I)

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Introduction

The principal of unity in diversity in the European Union (EU) was proclaimed *expressis verbis* at the European Parliament (EP) on 4 May 2000 and adopted as the official motto of the integrated Europe. In such a formula it still functions in official EU documents, even though it lacked the legal sanction for several years due to the rejection of the Treaty establishing a Constitution for Europe (TCE) in 2005, which stated that “The motto of the Union shall be: «United in diversity»” (Article I-8). As a part of the so-called “deconstitutionalization” of the Treaty of Lisbon (TL) not only the flag, the hymn or the term “constitution” was abandoned, but also the preamble of TCE, which declared that

“«united in diversity», Europe offers them [the European nations – ŁK] the best chance of pursuing [...] the great venture, which makes of it a special area of human hope”.

In result, the fundamental meaning of unity in diversity for the success of the integration project might have become more vague, however by virtue of the declaration of sixteen member states on EU symbols attached to the TL, it has been recognized as a symbol “expressing the sense of community of the people in the European Union and their allegiance to it”¹. Nevertheless, it is difficult to consider the adoption of such a motto as a “new chapter” in the protection of EU’s cultural diversity, because the TL has not provided substantial changes to regulations concerning the protection of cultural variety, rather repeating or subtly modifying the provisions of the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC) in this field².

In the primary law of the EU, direct reference to the principle of unity in diversity is not included, but treaty regulations, including the Charter of Fundamental Rights of the European Union (CFR), provide guarantees for cultural, linguistic and religious pluralism of the member states, both at national level, as well as in relations with EU institutions³. Importantly, however, in the treaties the relationship between cultural diversity and national identity is not explicitly specified, as TUE declares only that the Union “respects its rich cultural and linguistic diversity, and ensures that Europe’s cultural heritage is safeguarded and enhanced” (Article 3[3] TUE-Lisbon⁴). The CFR provisions are much more general, specifying that “The Union respects cultural, religious and linguistic diversity” (Article 22), therefore they can be interpreted as a factor supporting minority cultures, regional identities or even immigrant communities. In consequence, the requested cultural pluralism in the Old Continent might concern the diversity within, not amongst, EU member states⁵. Nevertheless, the fundamental role of national cultures in defining the priorities of coordinated cultural

¹ Declaration (Nr 52) by the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Lithuania, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Slovenia and the Slovak Republic on the symbols of the European Union, [on-line] <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E/AFI/DCL/52&from=EN> [access: 4.07.2019].

² M. Gierycz, *Chrześcijaństwo i Unia Europejska. Rola religii w procesie integracji europejskiej*, Kraków-Warszawa 2008, p. 271.

³ Ibidem, p. 262.

⁴ Consolidated version of TEU by virtue of the TL.

⁵ M. Gierycz, *Chrześcijaństwo i Unia Europejska. Rola religii...*, op. cit., p. 257.

activities at the EU level, abstracting from “scaring the member states with some kind of vision of a multicultural Union”⁶, can be supported by the interpretation of the aforementioned Article 22 of the CFR in the context of the preamble of the Charter, in which the EU declares, *inter alia*, that

“it contributes to the preservation and to the development of common values while respecting the diversity of cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels”.

The perception of the European principle of unity in diversity in the light of priority meaning of national identification is also supported by a detailed interpretation of Article 167 of the Treaty on the functioning of the European Union (TFEU), which indicates, that the protection of local cultural identities makes up a part of the EU’s strategy to contribute to “the flowering of the cultures of the Member States” and is justified provided these identities constitute an important element of a national culture⁷.

Determining the final shape of CFR as the first strictly axiological document adopted in 2000 at the European level was a kind of “experimental plot” in implementing the principle of unity in diversity. The Charter was conceived as a coherent catalogue of fundamental rights and freedoms, indispensable to give new dynamics to the integration in the Old Continent, as the human rights should constitute the

⁶ G.N. Toggenburg, „United in diversity”: *Some thoughts on the new motto of the enlarged Union*, II Mercator International Symposium *Europe 2004: A new framework for all languages?*, Tarragona-Catalunya, 27-28 February 2004 [on-line], www.academia.edu/2498276/_United_in_diversity_Some_thoughts_on_the_new_motto_of_the_enlarged_Union, p. 5 [access: 22.07.2019].

⁷ Direct references in the treaties to the guarantees for intra-EU diversity concern the rules of the protection of animal rights as “sentient beings” which is implemented “[...] while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage” (Article 13 TFEU). The idea of intra-EU pluralism is also mooted in the context of selection process of persons for the offices of the President of the European Council, President of the European Commission (EC) and High Representative of the Union for Foreign Affairs and Security Policy, which should be conducted with due account taken to respect the geographical and demographic diversity of the Union and its member states. *Declaration (Nr 6) on Article 15(5) and (6), Article 17(6) and (7) and Article 18 of the Treaty on European Union* [on-line], <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT> [access: 12.07.2019].

specific “plasma” of European legal order, without which the cooperation of nations of Europe for the common good is hardly imaginable⁸. The attempt to set up common standards in the field of fundamental rights in Europe by generalizing the unalienable rights included in national regulations and international obligations of the EU made simultaneously a considerable contribution to the discussion on the philosophical and religious roots of European culture, which is particularly expressed in the concept of human rights.

In the article the Author analyses the impact of the guarantees resulting from the EU’s motto in favour of legal and cultural diversity in the EU member states on the application of the CFR, as well as on the ideological background of the axiological system accepted in the Charter. Although the possibility of limiting the impact of the Charter on national legislation by the unilateral declarations and protocols included in the treaties seems to subordinate its provisions to the requirements of the cultural pluralism paradigm, there is no lack of opinions that the so constructed opt-out clause in relation to the controversial CFR regulations is not able to effectively exclude national legal systems from the Charter regime.

1. The Charter as the culmination of the process of fundamental rights unification in the EU

The lack of direct references to the axiological sphere and human rights issues in the founding treaties of the European Communities⁹ resulted, on the one hand, from the tendency to avoid the controversy stemmed from the differences in the interpretation of basic European values¹⁰, and on the other – from including relevant issues in the competence of the Council of Europe (founded in May 1949), concerned with shaping the European system of human rights and the development of legal and ethical solutions to problems arising from

⁸ A. Wyrozumska, *Umocnienie ochrony praw podstawowych*, [in:] J. Barcz et al. (ed.), *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, Warszawa 2008, p. 214.

⁹ The Treaty on the Establishment of the European Coal and Steel Community of 18 April 1951 and the so-called Rome treaties of 25 March 1957 (the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community).

¹⁰ Referring to common values, the preamble of the TEC states that the Treaty’s signatory states aim to “strengthen the safeguards of peace and liberty”.

the development of science and technology¹¹. Hence, the European Communities, without direct engagement in socio-political issues, could focus on the problems concerning the economic integration of the member states. In practical terms, due to the lack of a single legal act regulating the principles of the human rights protection system within the Communities and a clear declaration of the European Court of Justice (ECJ, now the Court of Justice of the EU – CJEU), that fundamental rights (beyond relationships connected with four freedoms relevant to the common market¹²) were not the part of European law¹³, the conformity of European Communities institutions' activities with the human rights regulations in the member states was examined by national constitutional courts¹⁴. Since the constitutional courts had been checking compliance with these rights, they abandoned this function only after the adoption of the Single European Act in 1986, indicating in a preamble that fundamental rights were one of the pillars of the European democracy¹⁵.

The gap in human rights guarantees in the European Communities was sought to be complemented by the proposal to access the European Convention for the Protection of Human Rights and Fundamental Freedoms on 4 November 1950 (ECHR) as the basic regulation on the protection of human rights in member states of the Council of Europe. This idea appeared in the late 70s of the last century, although it was not accepted by the European Council, as a result of which the report of

¹¹ R. Grzeszczak, *The European Union as a Multilevel System of Protection of Human Rights (The Process of Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms)*, [in:] M. Kenig-Witkowska, R. Grzeszczak (eds.), *The Treaty of Lisbon: Selected Issues*, Warszawa 2012, p. 77.

¹² *The Letter of Janusz Kochanowski, the Polish Ombudsman, to the Prime Minister Donald Tusk*, 20 November 2007 [on-line], www.rpo.gov.pl/pliki/1195653208.pdf, p. 1 [access: 19.07.2019].

¹³ M. Jabłoński et al., *Znaczenie protokołu nr 7 do Traktatu z Lizbony dla procesów integracyjnych w Unii Europejskiej*, „Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji”, nr 86/2011, p. 67.

¹⁴ For example, the Federal Constitutional Court of Germany in the Solange I ruling of 29 May 1974 decided that it would exercise control in the sphere of human rights protection until the EP adopted the European catalogue of fundamental human rights. The constitutional tribunals of other member states had accepted similar solutions. T. Astramowicz-Leyk, *Geneza Karty Praw Podstawowych i jej znaczenie dla wspólnotowego porządku prawnego*, [in:] W. Waclawczyk (eds.), *Karta Praw Podstawowych UE. Nowa szansa dla praw człowieka*, Warszawa 2010, p. 10-11.

¹⁵ *Ibidem*, p. 9-10.

the European Commission of 4 April 1979 on this issue was rejected¹⁶. Admittedly, the problem was addressed once again in October 1993, when the EC, supported by the EP, presented a legal analysis regarding the possibility of signing the ECHR by the EU, but it was vetoed one more, this time on the basis of the ECJ opinion of 28 March 1996, which resolved that this would require changes in the EU primary (treaty) law¹⁷. The ECJ's decision was issued despite the report prepared in 1995 by a Carlos Westendorp's reflection group (so-called the Westendorp Report), which indicated that the European Communities should have considered joining the ECHR and strengthening the sanctions for human rights violations by member states. Nevertheless, it is noticeable that the decision on the admission of Russia to the Council of Europe in February 1996 was not without significance for sceptical opinions regarding the accession the European Communities to the ECHR, having contributed to the belief that the Council of Europe was no longer able to provide adequate standards in the field of human rights protection¹⁸.

The TEU was the first legally binding European act that referred to shared values and human rights, not only in the preamble, but also in its provisions (Article 6). Generally defined fundamental rights guaranteed in the EU had not met the expectations of creating a coherent axiological system at the European level, capable of overcoming the dominance of economic factors in the integration process in the Old Continent. As a consequence, the question of whether the European Communities institutions should be subject to ECHR provisions, which was supported by the EC and some member states, had remained open until the discussion (on Germany's initiative¹⁹) on the introduction of

¹⁶ R. Grzeszczak, *The European Union as a Multilevel System...*, art. cit., p. 83.

¹⁷ J. Barcz, *Traktat z Lizbony. Wybrane aspekty prawne działań implementacyjnych*, Warszawa 2012, p. 329.

¹⁸ The controversial repeal (25 June 2019) of the decision on suspending the right to vote of the Russian delegation in the Parliamentary Assembly of the Council of Europe after the annexation of Crimea and armed activities in Ukraine is interpreted as a sign of the far-reaching politicization of the Council of Europe's activities. *Rosja odzyskała pełnię praw w Radzie Europy*, 25 June 2019 [on-line], www.tvn24.pl/wiadomosci-ze-swiata,2/rosja-odzyskala-pelne-prawo-glosu-w-zgromadzeniu-parlamentarnym-rady-europy,947372.html [access: 12.07.2019].

¹⁹ In April 1999, a meeting "Towards a new Charter of Fundamental Rights" was organized under the auspices of the Ministry of Justice of the Federal Republic of Germany and the EC Delegation in Cologne, expressing the need to consolidate human rights as the basic principles of EU legislation. The originator of the inclusion of the CFR into the TCE was the German politician of the Social Democratic Party of Germany (SPD), Jürgen Meyer. T. Astramowicz-Leyk,

a comprehensive fundamental rights solution in the form of the TCE, of which the CFR would have become an immanent part, was initiated.

The support for the idea of developing a new regulation in the sphere of human rights expressed at the European Council meeting in Cologne (3-4 June 1999) is thought to be the "cornerstone" of the Charter. The document was meant to be a uniform set of axiological norms for regulations introduced at the European level, constituting a set of citizens' rights, originated from the legal systems of the member states and the *acquis communautaire*²⁰. As a result, at the meeting of the European Council in Tampere (15-16 October 1999), the European Convention under the leadership of the former German President Roman Herzog was established as a special body responsible for the content of the CFR. The Convention was created by representatives of the member states and of the European institutions²¹. To increase the level of social and political legitimacy of the Charter, representatives of the EU Ombudsman, the Economic and Social Committee, the Committee of Regions, various social groups and non-governmental organizations (trade unions, entrepreneurs, women's rights defenders and minorities, ecologists), as well as churches and religious associations²² were entitled to participate in the document preparation. It is worth noting that in addition to extensive public consultations, the principle of openness was consistently applied during the preparation of the Charter by providing the public with the opportunity to listen to the proceedings and to access to working documents²³.

Geneza Karty Praw Podstawowych..., art. cit., p. 13.

²⁰ K. Białas-Zielińska, *Polscy przeciwnicy Karty Praw Podstawowych Unii Europejskiej*, „*Studia Erasmiana Wratislaviensia*”, vol. 4, 2010, p. 426.

²¹ The Convention consisted of 15 delegates (heads of state and government), 30 members of national parliaments, 16 deputies of the EP and one representative of the EC. Two Council of Europe's delegates and one ECJ representative participated in the Convention works as observers. Representatives of the candidate countries accessed to the Union in 2004 were also invited to participate in the work on the document. According to T. Astramowicz-Leyk, not only experts but also people without proper preparation for legal acts were included in the Convention members, which resulted in politicization of the process of creating the CFR. The Convention ended its work in October 2000. T. Astramowicz-Leyk, *Geneza Karty Praw Podstawowych...*, art. cit., p. 13-15.

²² In constitutional law, the term "churches" is used to designate Christian religious communities, while non-Christian communities are referred to as "religious associations" and "religious groups". K. Orzeszyna, *Podstawy relacji między państwem a kościołami w konstytucjach państw członkowskich i traktatach Unii Europejskiej*, Lublin 2007, p. 5.

²³ T. Astramowicz-Leyk, *Geneza Karty Praw Podstawowych...*, art. cit., p. 18.

The text of the CFR, after the EP's approval in November 2000 and signing at the European Council meeting in Nice (7 December 2000), was proclaimed a few days later by the representatives of three main EU institutions²⁴ and then published in the Official Journal of the European Communities. Due to the position of the United Kingdom, the Charter was attached to the Treaty of Nice as a non-binding political declaration, but the above mentioned forms of the document's official approval can be held as an expression of the desire to grant the document legal effect²⁵. Therefore, the CFR could not have direct legal effects or be treated as an independent basis for pursuing claims before courts or other institutions²⁶. The document became an integral part of the TEC²⁷, but it did not come into force after the negative results of the referenda in the Netherlands and France in June 2005. Finally, the Charter was attached to the TL²⁸ after its adaptation and re-promulgation by the key European institutions at the EP's seat in Strasbourg (13 December 2007)²⁹, formally in force from 1 December 2009, i.e. from the date of ratification of the TL by all member states³⁰. In consequence, the rights and freedoms set out in the Charter have the same legal force

²⁴ The European Council was represented by the French President Jacques Chirac (France held the presidency in the EU in the second half of 2000), the EC – by the President Romano Prodi, and the EP – by the President Nicole Fontaine.

²⁵ A. Florczak, *Krytyka Karty Praw Podstawowych w Polsce*, [in:] W. Waclawczyk (ed.), *Karta Praw Podstawowych UE...*, op. cit., p. 68. In order to strengthen the impact of the Charter on the activities of EU institutions, the EC sent on 13 May 2001 a message to all the auxiliary and consultative bodies of the Commission with a recommendation to strictly apply the provisions of the CFR in their activities and to analyse the prepared legal acts in terms of their compliance with the Charter. T. Astramowicz-Leyk, *Geneza Karty Praw Podstawowych...*, art. cit., p. 18.

²⁶ J. Arcimowicz, *Karta Praw Podstawowych w opiniach i poglądach Polaków. Analiza badań sondażowych*, [in:] W. Waclawczyk (ed.), *Karta Praw Podstawowych UE...*, op. cit., p. 52.

²⁷ T. Astramowicz-Leyk, *Geneza Karty Praw Podstawowych...*, art. cit., p. 12-13.

²⁸ The treaty was signed on 13 December 2007 at the Lisbon Hieronymit Monastery.

²⁹ The signatories of the document were: the Portuguese Prime Minister, José Socrates, who was the President of the European Council (Portugal held the EU Presidency in the second half of 2007), the President of the EC José Barroso and the President of the EP Hans-Gert Pötering.

³⁰ The treaty entered into force on the first day of the month following the deposit of the document of ratification by the last signatory state, i.e. the Czech Republic (President V. Klaus signed the TL on 3 November 2009). The document was signed by the then President of Poland L. Kaczyński less than a month earlier, one week after the announcement of a positive result of the referendum on the ratification of the TL in Ireland.

as the treaty regulations (Article 6(1) TEU-Lisbon), introducing uniform standards for the protection of fundamental rights and freedoms at the national and European level³¹.

2. The scope of the Charter and its limitations in the light of the principle of unity in diversity

The provisions of the CFR, which result from the inter-institutional nature of this document, concern mostly all activities of the Union institutions, bodies, offices and agencies (namely, the authorities established under the treaties or EU's secondary legislation). The scope of the Charter covers also EU member states (in particular central, regional, local authorities and public organizations³²), but only when they are implementing EU law (Article 52[5]) and therefore does not include the implementation of human rights regulations adopted at national level independently from Union law³³. The real contribution of the Charter to increasing the transparency of the catalogue of fundamental rights in the EU, however, might be relatively weak due to the unclear limits of the human rights protection set out in the document and the opaque relationship between the Charter and the ECHR³⁴. The EU, already an international organization with legal personality, capable of concluding international agreements (Article 47 TEU), declared in the TL accession to the ECHR, although the human rights guaranteed in the Council of Europe's Convention were incorporated into the *acquis communautaire* in the form of general principles of the EU law (Article 6[2-3] TEU), while preserving the specificity of EU legislation and ensuring a "regular dialogue" between the CJEU and the European Court of Human Rights³⁵. The dual nature of the European

³¹ A. Florczak, *Krytyka Karty...*, art. cit., p. 68.

³² *Explanations relating to the Charter of Fundamental Rights* [on-line], [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007X1214\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007X1214(01)&from=EN) [access: 2.06.2019]. These explanations are of an official nature, i.e. they have been drawn up to provide guidance in the interpretation of CFR by the courts of the Union and of the member states (Article 52[7]).

³³ *Declaration (Nr 53) by the Czech Republic on the Charter of Fundamental Rights of the European Union* [on-line], <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT> [access: 22.07.2019].

³⁴ A. Wyrozumska, *Umocnienie ochrony...*, art. cit., p. 183.

³⁵ *Declaration (Nr 2) on Article 6(2) of the Treaty on European Union* [on-line], <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN> [access: 18.07.2019]. In December 2014, the CJEU decided that the accession of the Union to the ECHR would be incompatible with EU law, threat-

human rights protection system based simultaneously on the EU law and ECHR provisions can, however, give rise to serious difficulties in delimiting the competences of these tribunals in the interpretation of fundamental rights, reducing the possibility of seeking the rights by individuals in practice³⁶.

Any limitations of fundamental rights and freedoms by state authorities can be justified only in the face of a conflict within the axiological system adopted in society, which makes it impossible to simultaneously follow various values³⁷. Specifying this general principle, the Charter stipulates that any restrictions on the human rights can be made (while respecting the principle of proportionality) only on a statutory basis, if necessary and subordinated to the Union's general interest or protection of the rights and freedoms of others (Article 52[1]). It is noteworthy that the provision of restrictions on these rights and freedoms cannot mean not only taking them to a greater extent than envisaged in the CFR, but also their practical abolition (Article 54), which, for example, occurs when authorities entitled to modify the rights introduce regulations limiting their exercise in practice or make the implementation of the rights subject to an arbitrary decision of the authorities³⁸. In addition, the Charter states that its provisions cannot be interpreted as restricting or violating human rights and fundamental freedoms arising from other internal acts or international agreements of the Union and the member states (Article 53). Even if the restrictions do not violate the substance of the fundamental rights, they must comply with the principle of proportionality, which provides an additional guarantee for the Charter's main objective, namely strengthening the individual's rights in the EU³⁹.

ening "both the division of national and EU competences, and also of the powers of the EU institutions, including the competences of the CJEU". *Trybunał UE: przystąpienie UE do EKPC byłoby niezgodne z prawem*, 18 December 2014 [on-line], <https://prawo.gazetaprawna.pl/artykuly/842830,trybunal-ue-przystapienie-ue-do-ekpc-byloby-niezgodne-z-prawem.html> [access: 11.07.2019].

³⁶ R. Ostrihansky, *Issues regarding anticipated accession of the EU to the European Convention of Human Rights*, [in:] M. Kenig-Witkowska, R. Grzeszczak (eds.), *The Treaty of Lisbon...*, op. cit., p. 91.

³⁷ P. Domagała, *Granice praw podstawowych w Unii Europejskiej*, [in:] W. Waclawczyk (ed.), *Karta Praw Podstawowych UE...*, op. cit., p. 132-133.

³⁸ *Ibidem*, p. 128-129.

³⁹ The justification for the introduction of restrictions on human rights must include specific principles referring to the principle of proportionality, which include: the principle of suitability (the means must be capable of effectively achieving the objective), the principle of necessity (preference for the least onerous measures for the

There may arise however interpretative doubts concerning the category of “general interest recognized by the EU” (mentioned in the Charter), that should be identified not so much with the joint interests of the member states or the direct interest of EU institutions, but the values and objectives specified in the Union’s treaty [Articles 2-3 TEU]), which, despite the “economic profile” of the Union, go far beyond economic and social issues. The situation is further complicated by the fact that in the case of rights that are equivalent to similar powers in the ECHR⁴⁰, the general interest should be indicated in accordance with the so-called the limit clauses set out in the Convention⁴¹. The ambiguous nature of the Union’s objectives means that it is difficult to resolve the problem of permissible “margins of tolerance” that the CJEU can apply in assessing the legitimacy of limiting the rights resulting from the CFR by state authorities. Hence a broad consent of the CJEU to the application of measures restricting the fundamental rights of EU citizens without indicating a specific social emergence cannot be excluded, especially when it can serve the Union’s general interest defined as the deepening of the integration⁴².

In response to numerous controversies concerning the scope and principles in the Charter, as an expression of respect of the member states’ axiological diversity regarding the values contained in the CFR, it is possible to modify the “impact” of the document on the legislation of member states through declarations and protocols that have been attached to TL, what can be interpreted as a signal for the EU institutions calling for caution when taking action in the sphere of values and human rights. Among the documents of this type, declarations and protocols of member states concerning the impact of the Charter on their human rights system and those which confirm certain provisions of the CFR are of paramount importance⁴³.

entities the measures are used to) and the principle of proportionality *sensu stricto* (the damage to the protected individual rights should be in a proper proportion to the value of the purpose of the actions taken). *Ibidem*, p. 131.

⁴⁰ At the same time, the CFR does not rule out the possibility of adopting within the EU higher standards of protection of these fundamental rights than in the ECHR (Article 52[3]).

⁴¹ According to Article 8(2) of the ECHR, the right to respect for private and family life might be limited only in accordance with the law, when necessary to ensure national security, public safety and the economic well-being, to protect public order and prevent crimes, as well as to protect the health or rights and freedoms of others.

⁴² P. Domagała, *Granice praw podstawowych...*, art. cit., p. 134-135.

⁴³ *Declaration (Nr 1) concerning the Charter of Fundamental Rights of the European*

In order to maintain independent, national legislation in the so-called “sensitive areas”, at the request of Poland a declaration on the CFR was adopted, stated that the Charter did not violate the competences of member states to legislate in the sphere of public morality, family law, protection of human dignity and respect for the physical and moral integrity of a man⁴⁴. It is noteworthy that the fears of extending the interpretation of the absolute prohibition of discrimination in the EU, including discrimination on the grounds of sexual orientation, were yet expressed in the Polish declaration concerning public morality (added as an annex to the Accession Treaty of 2003), in which there was indicated that

“nothing in the provisions of the Treaty on European Union, the Treaties establishing the European Communities and the provisions of treaties amending or supplementing these treaties prevents the Polish State in regulating questions of moral significance, as well as those related to the protection of human life”⁴⁵.

The expression of critical assessment of the Charter’s legal status is also the protocol on the application of KPP, attached to the TL. The so-called British or Polish-British Protocol was reported by the United Kingdom and Poland⁴⁶ and is compulsory only in these countries⁴⁷. The document confirmed that the Charter could not create new

Union [on-line], <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016L/AFI/DCL/01&from=EN> [access: 7.07.2019] or the aforementioned *Declaration (Nr 53) by the Czech Republic*, op. cit.

⁴⁴ *Declaration (Nr 61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union* [on-line], <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016L/AFI/DCL/61&from=EN> [access: 11.07.2019].

⁴⁵ *Declaration (Nr 39) by the Government of Poland concerning public morality* [on-line], <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12003T/AFI/DCL/39:EN:HTML> [access: 1.08.2019].

⁴⁶ The decision on Poland’s accession to the Protocol was made by Prime Minister Jarosław Kaczyński in October 2007.

⁴⁷ *Protocol (Nr 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom* [on-line], <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/30&from=EN> [access: 22.07.2019]. As the Czech MEP and a former TL negotiator J. Zahradil explained, the Czech declaration was similar to this Protocol, and the idea of its creation appeared when it was “too late to join the Protocol”. T. Myslek, *Karta Praw Podstawowych, euro i inne, „Najwyższy Czas”*, 5 December 2007 [on-line], <http://nczas.com/numer-biezacy/karta-praw-podstawowych-w-stro>

rights and freedoms in relation to those explicitly specified in it, limiting the possibility for national and EU judicial institutions (in particular the CJEU) to recognize that the legislation in force in the countries concerned was inconsistent with the basic rights, freedoms and principles reaffirmed in the Charter. The restrictive positions of both signatory states resulted from the willingness to protect themselves against such interpretations of the CFR's provisions, which might lead to excessive extension of the rights and obligations listed in the Charter.

Although in Article 1(2) of the Protocol it was decided that the rights contained in the Charter in the title "Solidarity" do not apply to Poland and the United Kingdom, if they had not been introduced in their national legislation, the application of this article has been reduced in the unilateral declaration of Poland concerning the Protocol. In the declaration, Poland, with regard to the developed legislation on labour and trade union rights, resulting from the tradition of social movement "Solidarity", stressed that it "fully respects social and labour rights, as established by European Union law"⁴⁸, in particular those confirmed in the Title IV of the CFR.

The assessment of the legitimacy of the Protocol and the Polish declaration is rather ambiguous, indicating, on the one hand, the justified attempts to protect public morality against the liberal-leftist worldview prevailing at the European level, and on the other the low effectiveness of the protocol in the exclusion of the CFR validity in Poland and Great Britain, which makes it a strictly declarative document⁴⁹. Among the

ne-socjalizmu/ [access: 4.04.2019]. The rumours about the desire expressed by Ireland to join the Protocol were finally denied, because Ireland demanded not an opt-out clause in relation to its own legislation, but the possibility of conducting additional legal analyses before the approval of the CFR. As a result of the misinterpretation of this request, Ireland was granted the right to sign the British Protocol, but did not take advantage of it by accepting the Charter on general terms. A. Florczak, *Krytyka Karty...*, art. cit., p. 69.

⁴⁸ Declaration (Nr 62) by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016L/AFI/DCL/62&from=EN> [access: 13.07.2019].

⁴⁹ This opinion can be denied by the reaction of leftist circles (political parties, non-governmental organizations, representatives of the world of science) in Poland to this report, according to which the acceptance of the Protocol caused that "due to phobia and superstitions violation of the provisions of the Charter would not be complained to the CJEU" and the "rejection of the Charter excludes Polish women and Poles from the key area of EU activity, namely the area of human rights, because the CFR protects citizens against political turmoil in their countries and the authoritarian intentions of governments".

implementation difficulties with regard to the Protocol, one indicates the fact that not all areas mentioned in the document fall within the European competence, and whatever the intentions of the signatories of the protocol, EU moral standards will affect national legislation, in particular without excluding the right to equality and prohibition of discrimination in these countries⁵⁰. As a result, the Protocol will affect not so much the resolution of disputable issues in court proceedings, but can be considered as one of the elements taken into account in the interpretation processes of the EU regulations⁵¹.

After the declaration presented in the expose of Prime Minister Donald Tusk on 23 November 2007, the CFR was signed with the British Protocol a month later, because "it would be difficult to ratify the Lisbon Treaty in Poland" rejecting the objections set out in the protocol, although Donald Tusk remarked that "if circumstances change and some doubts concerning the Charter will be clarified"⁵², the document could be fully incorporated into Polish legislation. The Sejm resolution of 20 December 2007 stated, that the possibility of withdrawal from the Protocol should not be ruled out taking into account the evolution of jurisprudence and doctrine developed on the basis of the Charter⁵³.

Conclusion

The main intention of the CFR authors, introduced into EU legislation as a "declaration of European morality", was to increase the coherence of the system of protection of fundamental rights and freedoms in the EU, which would ensure effective subordination of public institutions to the good of the individual and society as a whole. Both the

A. Florczak, *Krytyka Karty...*, art. cit., p. 70.

⁵⁰ A. Wyrozumska, *Umocnienie ochrony...*, art. cit., p. 197. J. Arcimowicz emphasized that the only tangible effect of accepting such documents would be the increase of uncertainty as to the scope of protection of fundamental rights in member countries as well as the unnecessary complication already complex legal issues related to the use of the CFR. J. Arcimowicz, *Karta Praw Podstawowych...*, art. cit., p. 56.

⁵¹ A. Wyrozumska, *Umocnienie ochrony...*, art. cit., p. 194.

⁵² A. Słojewska, E.K. Czaczkowska, *Tusk: do Karty wrócimy*, 5 December 2007 [on-line], www.rp.pl/artukul/74265-Tusk--do-Karty-wrocimy.html [access: 12.07.2019].

⁵³ *Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 20 grudnia 2007 r. w sprawie traktatu reformującego UE podpisanego w Lizbonie 13 grudnia 2007 r.* [on-line], http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WMP2007100108_3/O/M20071083.pdf [access: 12.07.2019].

discussion around the axiological foundations of the human rights in the Charter in the context of a significant differentiation in the interpretation of guaranteed values at the level of the EU member states, as well as concerns about the uncontrolled increase of EU competences in the area of human rights protection have resulted in the establishment of numerous restrictions on the Charter's impact on national legal systems, among others in the form of declarations and protocols incorporated into primary law at the request of certain member states, including Poland. Despite doubts (mainly of a legal nature) as to the effectiveness of such constructed forms of protection of national traditions against harmonization in the spirit of left-wing liberalism, the solutions adopted in this respect can be interpreted as an expression of consensus arising from the desire to respect the principle of unity in diversity.

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ŁUKASZ KACZMARCZYK

**The Charter of Fundamental Rights of the European Union
in the light of the principle of unity in diversity (Part I)**

Abstract

Both the discussion around the axiological roots of human rights adopted in the Charter of Fundamental Rights of the European Union, as well as concerns about the uncontrolled increase of EU competences in the area of human rights protection have resulted in the establishment of restrictions on the Charter's impact on national legal systems, among others in the form of declarations and protocols incorporated into primary law at the request of certain member states, including Poland. Despite legal doubts concerning their effectiveness in protecting national traditions against harmonization in the spirit of left-wing liberalism, they express a consensus arising from the desire to respect the principle of unity in diversity.

Keywords: Charter of Fundamental Rights, European Union, unity in diversity, human rights, European values.

ŁUKASZ KACZMARCZYK

**Karta Praw Podstawowych Unii Europejskiej w świetle zasady
jedności w różnorodności (część I)****Streszczenie**

Zarówno dyskusja wokół aksjologicznych źródeł praw człowieka przyjętych w Karcie Praw Podstawowych UE, jak i obawy dotyczące niekontrolowanego wzrostu unijnych kompetencji w dziedzinie ochrony praw człowieka skutkowały ograniczeniem wpływu Karty na krajowe systemy prawne, m.in. poprzez deklaracje i protokoły przyjęte na wniosek niektórych państw członkowskich, w tym Polski. Pomimo wątpliwości prawnych dotyczących ich skuteczności w ochronie tradycji narodowych przed harmonizacją w duchu lewicowego liberalizmu, są one wyrazem konsensusu wynikającego z chęci poszanowania unijnej zasady jedności w różnorodności.

Słowa kluczowe: Karta Praw Podstawowych, Unia Europejska, jedność w różnorodności, prawa człowieka, wartości europejskie.