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## HUMAN RIGHTS AND DEMOCRACY IN THE CENTRE OF THE EUROPEAN UNION'S EXTERNAL ACTIONS LEGAL AND POLITICAL DILEMMAS

Topics related to fundamental rights protection<sup>1</sup> in the European Union in general, and in particular to the EU's accession to the European Convention on Human Rights<sup>2</sup> (ECHR) and the role of the Charter of Fundamental Rights<sup>3</sup> (the Charter, CFR), are the subject of earnest discussions. Analyses focus, especially in Polish sources, on the influence of the Union's fundamental rights on the legal orders of the member states.<sup>4</sup> However, it should be borne in mind that those rights are also an important component of the EU's external actions. This is demonstrated, for instance, by the fact that on 12 October 2012 the Nobel Peace Prize was awarded to the EU as it has "for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe."<sup>5</sup> The subject matter analysed in this article is predominantly studied from a political science perspective,<sup>6</sup> which does not mean, however,

<sup>1</sup> The view that prevails in the doctrine is that "human rights" and "fundamental rights" mean the same thing. See: F. Jasiński, *Karta Praw Podstawowych Unii Europejskiej*, Warsaw 2003, pp. 17-28, B. Banaszczyk, A. Bisztyga, K. Complak, M. Jabłoński, R. Wieruszewski, K. Wójtowicz, *System ochrony praw człowieka*, Kraków 2003, p. 199.

<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, amended by Protocols Nos. 3, 5 and 8, and supplemented by Protocol No. 2, O.J. 1993 No. 61, item 284.

<sup>3</sup> Charter of Fundamental Rights, Official Journal of the EU (O.J.) C 326 of 2012, p. 395.

<sup>4</sup> See: R. Grzeszczak, A. Szmigielski, *Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych*, Europejski Przegląd Sądowy, 2015, No. 10, pp. 11-19.

<sup>5</sup> Press release of the European Commission of 12 October 2010, *Unia Europejska laureatem Pokojowej Nagrody Nobla*, [www.ec.europa.eu/news/eu\\_explained/121012\\_pl.htm](http://www.ec.europa.eu/news/eu_explained/121012_pl.htm) (accessed 30 October 2012) [English version: <http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20121012STO53551/eu-wins-2012-nobel-peace-prize-this-prize-is-for-all-eu-citizens> (accessed 30 July 2017)]; see also: J. Manners, P. Murray, *The End of a Noble Narrative? European Integration Narratives after the Nobel Peace Prize*, *Journal of Common Market Studies*, 2016, No. 1, pp. 185-202.

<sup>6</sup> The deficit in this area refers predominantly to Polish sources, as in English sources the legal aspects of the EU's human rights policy have been analysed in depth; see for example L. Verdonck, *Coherence in the EU's External Human Rights Policy: The Case of the Democratic Republic of the Congo*, *European Foreign Affairs Review*, 2015, No. 3, pp. 379-397; R. Balfour, *Human Rights and Democracy in EU*

that it does not give rise to problems of a legal nature. On the contrary, the nature of those actions, whether the EU has the competence to promote fundamental rights in relations with third countries and what legal instruments it uses, are only some of the many questions that may arise.

The objective of the article is to present and analyse selected legal problems which affect the promotion of fundamental rights by the EU in its external relations. Due to the fact that the area of research is inseparably linked with the sphere of the EU's and the member states' political choices, analyses from the realm of political science will be presented alongside strictly legal matters. This pertains in particular to the effectiveness of the EU's actions and the interest of the member states in enforcing the laws and political declarations concerning support for human rights protection.

In line with its objectives, the article is structured in three parts. First of all, the legal basis and the political documents relating to the area of research will be analysed. In the second part, the analysis will focus on the EU's instruments and the problem of whether its competences are sufficient to take up the issue of human rights protection in relation to third countries. The third part will be devoted to matters connected with the actual enforcement of human rights protection on the international scene, including the consequences and effectiveness of the EU's actions in the light of rejections of the universality of human rights and the member states' divergent interests.

#### LEGAL BASIS OF THE EU'S HUMAN RIGHTS PROTECTION POLICY

The term "fundamental rights" is widely used in EU law. The development of those rights took place in the 1960s and 70s, when the Court of Justice (the Court, the ECJ) introduced them into the legal order of the EU.<sup>7</sup> Specifically, they were recognised as a general rule of EU law,<sup>8</sup> arising from the constitutional tradition of the member states<sup>9</sup> and international agreements, especially the ECHR.<sup>10</sup> Advances in the protection of those rights in ECJ rulings were an inspiration to gradually introduce appropriate changes into the Treaties. The key changes in human rights protection in the EU came with the Treaty of Lisbon,<sup>11</sup> which gave the CFR the same legal value as the

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*Foreign Policy. The Cases of Ukraine and Egypt*, Abingdon 2012; the studies made under the FRAME international project, <http://www.fp7-frame.eu/> (accessed 10 February 2016).

<sup>7</sup> In the 1950s, however, the Court of Justice refused to protect fundamental rights and claimed that it was the responsibility of national courts to protect them; see: Judgment of the Court of 4 February 1959 in the case No. 1/58 *Friedrich Stork & Cie v High Authority*, ECR 1959, p. 17.

<sup>8</sup> Judgment of the Court of 12 November 1969 in the case No. 29/69 *Stauder v City of Ulm*, ECR 1969, p. 425

<sup>9</sup> Judgment of the Court of 17 December 1970 in the case No. 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR 1970, p. 1125.

<sup>10</sup> Judgment of the Court of 14 May 1974 in the case No. 4/73 *J. Nold, Kohlen- und Baustoffgross-handlung v Commission*, ECR 1974, p. 491.

<sup>11</sup> The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, O.J. C 306 of 2007, p. 1.



Treaties (Article 6.1 of TEU<sup>12</sup>). In this way, a consistent catalogue of fundamental rights appeared in the EU's legal order, making those rights more conspicuous. In addition, the Treaty of Lisbon announced the EU's accession to the ECHR (Article 6.2 of TEU).<sup>13</sup> However, the fact that the Charter now has legal value does not mean that the EU has become a "human rights organisation"<sup>14</sup> or that the European Court of Justice has become a second European Court of Human Rights.<sup>15</sup> The EU's actions are based on the principle of conferral, and only within the limits entrusted to it by the member states can it apply the catalogue of fundamental rights which is of the nature of primary legislation.<sup>16</sup>

Article 47 of TEU states that the EU shall have legal personality, and Article 1 explains that "the Union shall replace and succeed the European Community." This means that the EU has become a uniform international organisation of supranational type, without the pillar structure it had before the Treaty of Lisbon. This is important insofar that, firstly, an international organisation is a subject of international law, and secondly, it ends the dispute on the Union's nature.<sup>17</sup> The EU's legal and international subjectivity (i.e. jointly the legal capacity and the capacity to perform acts in law) manifests itself in particular in the right to enter into international agreements (*ius tractatum*), the right of legation (*ius legationis*), i.e. the right to send and receive diplomatic representatives to and from third countries (Article 221 of TFEU<sup>18</sup>), the right to accede to international organisations, and the capacity to be party to court proceedings.<sup>19</sup>

Article 3.5 of TEU explicitly states that in its external relations, the Union shall contribute to the protection of human rights, Article 21.1 lays down that the Union's actions on the international scene should be based on the principles of universality and indivisibility of human rights, while Article 21.2b) lists consolidation of human rights as an objective of the Union on the international scene. The aforementioned Article 3 of TEU, including the programme objective of human rights protection in the EU's external relations, was formulated after the Treaty of Lisbon. What is important is that the Union's objectives are presented in an exhaustive and non-alternative manner. In a broader interpretation, they can cover a practically unlimited range of detailed

<sup>12</sup> The Treaty on European Union, O.J. EU C 326 of 2012, p. 13.

<sup>13</sup> See: the opinion of the Court of Justice 2/13 of 18 December 2014, *Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454.

<sup>14</sup> A. Von Bogdandy, *The European Union as a human rights organization? Human rights and the core of the European Union*, Common Market Law Review No. 37, 2000, pp. 1307-1338.

<sup>15</sup> K. Lenaerts, *Trybunał Sprawiedliwości a ochrona praw podstawowych*, Europejski Przegląd Sądowy, 2013, No. 1, p. 5.

<sup>16</sup> R. Grzeszczak, A. Szmigielski, *op.cit.*, p. 13.

<sup>17</sup> J. Barcz, *Struktura Unii Europejskiej*, in: J. Barcz (ed.), *Zasady ustrojowe Unii Europejskiej*, Warsaw 2010, pp. 23-26.

<sup>18</sup> The Treaty on the Functioning of the European Union, O.J. C 326 of 2012, p. 47.

<sup>19</sup> J. Barcz, *op.cit.*, pp. 23-26.

goals; none of them, however, can be pursued at the expense or in contravention of another.<sup>20</sup> This means that human rights protection or support for democracy in third countries may not be mitigated, for instance, by competitive commercial interests or energy security.

This is a reference point for conditionality, also known as the “carrot and stick” policy, which is closely related to the current approach “more for more, less for less”.<sup>21</sup> On the one hand, conditionality may be interpreted in positive terms – increasing help and deepening integration with third countries which meet the Union’s cooperation criteria related to strengthening democratic standards and human rights protection. There is also the negative side – limiting cooperation with and applying sanctions to those countries which flagrantly breach democratic values and human rights. The acceptance of these assumptions results in a differentiation of what is on offer, to the benefit of those countries which agree to comply with the values professed by the EU and introduce political reforms, following the EU’s recommendations. Those rules are applied based on Article 21.1 of TEU, stating that the EU seeks to develop relations and build partnership with third countries which believe in the principles referred to in subparagraph 1 (such as democracy, rule of law, universality and indivisibility of human rights).

In practice, the key issues concerning human rights protection in the Union’s external relations are defined in political documents. In 2001, the European Commission published a communication which for the first time took up the issue of the EU’s role in promoting human rights and democracy in third countries across a broad spectrum.<sup>22</sup> It pointed out the need for a more consistent approach on the EU’s part to human rights promotion with regard to third countries. The events connected with the Arab Spring brought important changes. Another communication<sup>23</sup> was adopted then, pinpointing that nearly 10 years had passed since the Commission’s last document, and that the events in North Africa and the Middle East revealed the need to revise the current human rights policy. It reviewed the EU’s instruments concerning that matter and pointed out actions that needed to be taken in the future.

<sup>20</sup> C. Mik, W. Czapliński, *Traktat o Unii Europejskiej. Komentarz*, Warsaw 2005, p. 119.

<sup>21</sup> However, conditionality and the more-for-more concept are two different approaches – conditionality has been applied since the 1990s, while the more-for-more approach was initiated in the direct aftermath of the Arab Spring. For more see: K. Raik, *Between conditionality and engagement: Revisiting the EU’s democracy promotion in the Eastern neighbourhood*, Briefing Paper 2011, No. 80, <http://www.fiia.fi/assets/publications/bp80.pdf> (accessed 1 June 2012); J. C. Völkel, *More for More, Less for Less – More or Less: A Critique of the EU’s Arab Spring Response à la Cinderella*, *European Foreign Affairs Review*, 2014, No. 2, pp. 263-281.

<sup>22</sup> Communication from the Commission to the Council and the European Parliament of 8 May 2001, *The European Union’s role in promoting human rights and democratisation in third countries*, COM/2001/0252 final.

<sup>23</sup> Joint communication from the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and to the Council of 12 December 2011, *Human rights and democracy at the heart of EU external action – towards a more effective approach*, COM (2011) 886 final.



This prompted the Council of the European Union to adopt, on 25 June 2012, a package of programme documents (strategic framework)<sup>24</sup> aiming to improve the external human rights and democracy policy. It includes a definition of the foundations of the Union's policy in this area, an action plan, and the appointment of an EU Special Representative for Human Rights. The statutes of the European Endowment for Democracy<sup>25</sup> were also agreed. It was the first such uniform strategic document on the promotion of fundamental rights in the Union's external relations to be agreed not only by the EU institutions, but also by the member states. Its most significant effect was that human rights became the foundation for external actions of a political and economic nature.<sup>26</sup> The action plan introduced an obligation to assess the potential impact of legislative and non-legislative proposals and trade agreements on fundamental rights. It included 97 action proposals, grouped under 36 issues, which were implemented up to the end of 2014. On 20 July 2015, the Council adopted a new action plan (for the years 2015–2019) which provided for further implementation of the Strategic Framework.<sup>27</sup>

By virtue of a Council decision of 2012<sup>28</sup> an EU Special Representative for Human Rights was appointed (Stavros Lambrinidis holds the post up to 2017). He reports directly to the High Representative for External Affairs and Security Policy, and his goal is to increase the Union's effectiveness in this area. His responsibilities involve close cooperation with the European External Action Service (EEAS) as well as coordination of actions with the EU institutions, member states, the Union's field offices, heads of mission of Common Security and Defence Policy, and the activities of other special representatives. The Special Representative is obliged to submit regular reports to the Political and Security Committee and the Council's relevant working groups, in particular the Human Rights Working Group (COHOM).<sup>29</sup>

The nature of fundamental rights in the Union's legal system is diverse. On the one hand, they constitute a written catalogue in the form of the CFR, which has the nature of primary legislation. On the other hand, they are a general principle and value constituting the axiological foundation of the legal system. The protection of fundamental rights is also a significant objective of external action, whose implementation is detailed in political documents and plans.

<sup>24</sup> EU Strategic Framework on Human Rights and Democracy 11855/12 of 25 June 2012.

<sup>25</sup> Council of the European Union, *Council conclusions on the European Endowment for Democracy*, 13130th Foreign Affairs Council meeting, Brussels 2012.

<sup>26</sup> G. Pearson, *Przełomowy przegląd polityki Unii Europejskiej w zakresie praw człowieka i demokracji 2012*, [http://www.europapraw.org/files/2012/07/Przełomowy-przegląd-polityki-Unii-Europejskiej-w-zakresie-praw-człowieka-i-demokracji-2012\\_Pearson.pdf](http://www.europapraw.org/files/2012/07/Przełomowy-przegląd-polityki-Unii-Europejskiej-w-zakresie-praw-człowieka-i-demokracji-2012_Pearson.pdf) (accessed 24 March 2015).

<sup>27</sup> Joint Communication to the European Parliament and the Council of 28 April 2015, *Action Plan on Human Rights and Democracy (2015–2019) – Keeping human rights at the heart of the EU agenda*, JOIN(2015) 16 final.

<sup>28</sup> Council Decision 2012/440/CFSP of 25 July 2012 *appointing the European Union Special Representative for Human Rights*, O.J. of 2012, p. 21.

<sup>29</sup> A. Szmigielski, *Instrumenty ochrony praw człowieka w stosunkach zewnętrznych Unii Europejskiej*, Unia Europejska. Perspektywy Społeczno-Ekonomiczne, 2013, No. 1, pp. 25-35.

HUMAN RIGHTS INSTRUMENTS IN THE EU'S EXTERNAL RELATIONS  
THE PROBLEM OF LEGAL COMPETENCE

The Union has developed many instruments to promote its values – from numerous statements, démarches, and agreements containing political clauses, to restrictive measures and funds supporting democratic endeavours in third countries. The policy which enables the EU to function on the international scene is the Common Foreign and Security Policy (CFSP), covering all areas of foreign policy and all matters related to the Union's security. Despite the fact that the Union no longer has a pillar structure, the policy is still subject to special rules and procedures, because, as a rule, it is defined by the European Council and the Council deciding unanimously, and implemented by the High Representative of the EU for External Affairs and Security Policy and the member states (Article 24 TEU). Thus, it is not a component of the Union, i.e. an area regulated at the supranational level, but a strictly governmental matter. As a result, the taking of any actions to protect human rights within the CFSP is dependent on the political will of the member states. The instruments of the CFSP are diverse and have different levels of effectiveness.<sup>30</sup> In practice, decisions in the form of common positions (restrictive measures) and actions (missions) adopted by the Council of the European Union have the greatest significance for the promotion of fundamental rights.<sup>31</sup>

Restrictive measures, commonly known as EU sanctions, are used only in aggravated cases, such as gross breach of human rights and the democratic rule of law, peace and international security. Article 215 of TFEU states that those measures may be directed not only towards a state, but also towards natural or legal persons as well as groups and non-state entities, and may include such measures as an embargo on specific goods, entry bans for representatives of third countries (the so-called visa sanctions), or freezing of the assets of natural and legal persons.<sup>32</sup>

In addition to positions, the Council may also decide on the taking of actions. Actions supporting peace and democratic processes in third countries, known as European Union missions, are of fundamental importance for the protection of human rights in external relations. In the light of international law, the legal basis for the implementation of the EU's missions has always been an official invitation of the government of the accepting country or the consent of the interested parties. Additionally, the missions have always had at least the official support of the UN Security Council or its direct mandate.<sup>33</sup>

<sup>30</sup> A. Wyrozumska, *Wybrane regulacje w dziedzinie Wspólnej Polityki Zagranicznej i Bezpieczeństwa*, in: J. Barcz (ed.), *Prawo Unii Europejskiej. Prawo materialne i polityki*, Warsaw 2005, pp. 779-793.

<sup>31</sup> For more see: A. Szmigielski, *op.cit.*, pp. 25-35.

<sup>32</sup> See: C. Eckes, *EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorism to Third Country Sanctions*, *Common Market Law Review*, 2014, No. 3, pp. 869-905; P. Kobza, *Środki restrykcyjne jako instrument WPZiB UE*, *Studia Europejskie*, 2003, No. 3, pp. 9-31.

<sup>33</sup> J. Starzyk-Sulejewska, *Interwencje zewnętrzne Unii Europejskiej*, in: S. Parzymies (ed.), *Dyplomacja czy siła? Unia Europejska w stosunkach międzynarodowych*, Warsaw 2009, p. 90.



On the other hand, the instruments used in economic actions, detailed in part V of TFEU, are of a completely different nature. In contrast to the CFSP, they do not have an intergovernmental character, but are based on the so-called Union method (formerly the community method), which places them on the supranational level. This means that decision-making is based on the functioning of the EU institutions, representing the supranational interest,<sup>34</sup> and in principle the decisions are taken by a qualified majority vote. The human rights protection instruments in this area include, among others, bans on trade in torture instruments, agreements with a human rights clause, and funds, in particular the European Instrument for Democracy and Human Rights (EIDHR).<sup>35</sup>

The ban on trade in torture instruments is governed by a Council regulation of 27 June 2005.<sup>36</sup> Pursuant to this regulation, it is prohibited to export and import goods which have no other practical application than to execute capital punishment, torture and other cruel, inhuman or degrading treatment or punishment. In addition, it is necessary to obtain a permit for importing goods which may be used for torture or other cruel, inhuman or degrading treatment or punishment, regardless of the origin of such instruments. Another important instrument is the human rights clause included in the EU's agreements concluded with third countries. The human rights clause is a regulation in an agreement which is the basis for cooperation in the area of human rights and their promotion, and applies to all areas covered by the contract. It is also the legal basis for taking measures should such rights be violated. The measures may include the suspension of meetings and technical cooperation programmes with a given country.<sup>37</sup>

Its economic character enables the EU to use positive stimuli such as financial and aid instruments, that is various funds earmarked for the implementation of the EU policies and trade preferences, in the promotion of human rights. The abovementioned EIDHR,<sup>38</sup> one of the tools for financing cooperation for development, is unique in this

<sup>34</sup> This means, in principle, the European Commission's exclusive, direct right of legislative initiative, the equal role of the European Parliament (representing the EU's interest) and the Council of the European Union (representing the member states' interests) when adopting secondary law acts with the normal legislative procedure, and the general competence of the European Court of Justice to interpret those acts and examine their validity.

<sup>35</sup> A. Szmigielski, *op. cit.*, p. 31.

<sup>36</sup> Council Regulation No. 1236/2005 of 27 June 2005 concerning *trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*, O.J. L 200 of 30 July 2005, p. 1.

<sup>37</sup> Joint communication from the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and to the Council of 12 December 2011, *Human rights and democracy at the heart of EU external action – towards a more effective approach*, COM (2011) 886 final. For more see: L. Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford 2005; N. Hachez, *Essential element clauses in EU Trade Agreements: making trade work in a way that helps Human Rights?*, Working Paper, 2015, No. 158, Leuven Centre for Global Governance Studies.

<sup>38</sup> Regulation (EC) No. 1889/2006 of the European Parliament and of the Council of 20 December 2006 on *establishing a financing instrument for the promotion of democracy and human rights worldwide*, O.J. L 386, p. 1.

respect. It is connected with the European Consensus,<sup>39</sup> reached in 2005, which aimed to eradicate poverty. Its underlying assumptions included respect for human rights and fundamental freedoms, and progress in this area is treated as the foundation of poverty reduction and sustainable development. The legal basis of the EIDHR is the regulations referring to development policy and economic cooperation with third countries. This instrument provides funding, for instance, for the EU observation missions and aid offered to non-governmental organisations from third countries.<sup>40</sup> In 2012, the statutes of the European Endowment for Democracy<sup>41</sup>, which is a separate organisation with its own budget and seat in Belgium, were adopted. The Endowment's bodies are the Board of Directors – including representatives of all member states, the European Commission, the High Representative and the European Parliament – and the Executive Committee chaired by the Executive Director. The primary objective of the Endowment is to strengthen democratic standards, including respect for fundamental rights in third countries.<sup>42</sup>

Therefore, the Union has many instruments allowing it to protect and promote human rights. In spite of this, the founding Treaties do not include explicit and general competence provisions in this area, thus allowing the EU to enter into international agreements concerning only and solely this matter. Significantly, however, the competence to enter into such agreements may arise not only from explicit provisions of the Treaties, but may also be implied. If EU law gives the EU institutions competence to act within the Union in order to achieve a particular goal, the Union may also execute an agreement to achieve it.<sup>43</sup> As a case in point, pursuant to the existing Article 19 of TEU, the Council has adopted a resolution on the Union's accession to the United Nations Convention on the Rights of Persons with Disabilities.<sup>44</sup>

In the case of external actions of an economic nature, human rights are regulated within the framework of other measures – common trade policy, developmental policy and humanitarian aid, economic cooperation and technical aid. It is with regard to those areas that the question of the Union's competence to promote human rights has arisen. It was disputed whether a general mention of an objective to protect human

<sup>39</sup> The European Consensus, O.J. 2006, C 46, p.1.

<sup>40</sup> Communication from the Commission to the Council and the European Parliament – *The European Union's role in promoting human rights and democratisation in third countries*, COM (2001) 252 final. See also: K. Marciniak, *Ochrona praw podstawowych w stosunkach zewnętrznych Unii Europejskiej*, in: C. Mik, K. Gałka (eds.), *Prawa podstawowe w prawie i praktyce Unii Europejskiej*, Warsaw 2009, p. 557.

<sup>41</sup> The official website of European Endowment for Democracy, <http://democracyendowment.eu/> (accessed 1 March 2014).

<sup>42</sup> EU Strategic Framework on Human Rights and Democracy, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131169.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131169.pdf) (accessed 1 March 2013).

<sup>43</sup> Opinion of the Court of Justice 2/94 of 28 March 1996, *Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECR 1996, p. I-1759, points 25-26.

<sup>44</sup> Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 2010/48/EC, O.J. of 2010 L 23/35, p. 11.



rights suffices to include such subject matter in international agreements with third countries on economic matters. The ECJ considered this matter in the case of *Portuguese Republic v Council*.<sup>45</sup> Portugal demanded that an agreement with India which included provisions about human rights (a human rights clause) be considered void, because, in Portugal's opinion, the legal basis on which the Council acted was wrong. In the opinion of the Portuguese government, in addition to the current Article 208 of TFEU concerning cooperation for development, it should have also been based on the current Article 352 of TFEU, that is the so-called flexibility clause.<sup>46</sup> However, the Court concurred with the Council and indicated that issues of respect for democratic principles and human rights were among the agreement's important elements under the current Article 205 of TFEU, which states in general terms that external actions shall be based on the principle of respect for human rights.

Although the EU has instruments and a general legal basis mentioning the objective of human rights protection in external relations, the founding Treaties do not set forth any explicit competences in this matter. This is a paradox of sorts, since the Union, which remains a primarily economic organisation, aspires to promote its values without having appropriate authority granted to it by the member states. Therefore, the implementation of the human rights and democracy protection policy is not uniform. It is implemented within the Union's other policies, which differ in having an intergovernmental or supranational character.

#### PROBLEMS OF THE FUNCTIONING AND EXECUTION OF THE EU'S HUMAN RIGHTS PROTECTION POLICY

As has been noted, although the Union is equipped with provisions referring to human rights protection as well as instruments serving that purpose, it is necessary to consider separately their actual implementation in particular cases. The question arises to what extent this is dependent on the political will of the member states, in particular their solidarity, and to what extent it is required by law. First of all, however, one should focus on the limitations resulting from the promotion of human rights protection and democracy in international relations in general. These limitations are a consequence of the nature of international political relations, in particular regarded in terms of *Realpolitik*, as well as ethical assumptions and barriers in international public law.

The issue of morality in politics, and hence morality in international political relations, is the subject of a broad discussion. On the one hand, there is the concept of

<sup>45</sup> Judgment of the Court of 3 December 1996 in Case C-268/94 *Portuguese Republic v Council of the European Union*, p. I-6177.

<sup>46</sup> If the Union's action proves indispensable to achieve one of the objectives referred to in the Treaties within the policies stipulated in the Treaties and the Treaties do not provide any authority to implement the action required for that objective, the Council adopts the relevant provisions, acting unanimously at the request of the Commission and having received the consent of the European Parliament.

separating morality from politics, asserting that politics is to be, above all, effective (Machiavellianism) – for instance, it is claimed that the ethic of politics is the ethic of effectiveness.<sup>47</sup> On the other hand, the interrelations between countries are too significant for the above situation to be fully practicable. According to Roman Kuźniar: “Co-dependence creates a kind of a deterrent feedback – deterrent from unethical behaviour which no longer pays in the condition of co-dependence.”<sup>48</sup> So why has the EU, which according to its initial objectives was supposed to be a strictly economic organisation, become engaged in the promotion of fundamental rights in its international relations? The notions of a civil superpower which does not use its military potential (the so-called soft power) and a normative superpower which impacts on others by disseminating given norms<sup>49</sup> are used to describe this phenomenon. It is often connected with the fact that an accepted paradigm in Europe is that human rights and democracy are a *sine qua non* condition for peace and economic development. It is permeated by Euro-centrism, as it is thought that humankind has not come up with anything better.<sup>50</sup> In spite of appearances, this approach also includes an element of *Realpolitik*. Many problems which are gaining intensity in the Union’s immediate neighbourhood are of a cross-border nature. It is claimed that the lack of preventive actions in the form of human rights protection and support for democratic standards in the closest neighbourhood can increase negative trends and lead to, for instance, an influx of migrants or the development of extremist aspirations.<sup>51</sup> Moreover, such actions are viewed as legitimate by EU citizens. Already before the enlargement in 2004, it was estimated that 81% of citizens felt that the Union should promote human rights abroad.<sup>52</sup> EU citizens believe that human rights (39%), peace (38%) and democracy (37%) are the values which best represent the Union.<sup>53</sup> The economic crisis did not change this. Statistics show that in 2010, 84% of EU citizens supported the idea of providing aid to developing countries based on European values, i.e. good governments, democratic standards and human rights. The acceptance of those values by developing countries is a *sine qua non* condition for receiving strictly economic aid.<sup>54</sup>

However, the decision to promote and protect fundamental rights in international relations raises many doubts. Firstly, the rules arising from the Charter of the United

<sup>47</sup> T. Dunne, B. C. Schmidt, *Realism*, in: J. Baylis, S. Smith (eds.), *The Globalization of World Politics. Introduction to International Relations*, Oxford 2001, pp. 141-161.

<sup>48</sup> R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, Warsaw 2000, p. 269.

<sup>49</sup> D. Milczarek, *Pozycje i rola Unii Europejskiej w stosunkach międzynarodowych. Wybrane aspekty teoretyczne*, Warsaw 2003, p. 186.

<sup>50</sup> Cf.: L. Kołakowski, *Po co nam prawa człowieka*, *Gazeta Wyborcza*, 25 October 2003.

<sup>51</sup> Communication from the European Commission of 11 March 2003, *Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final.

<sup>52</sup> J. Gras, *The European Union and Human Rights Monitoring*, Helsinki 2000, p. 1.

<sup>53</sup> Surveys of OBOP, [http://www.obop.pl/uploads/3563/inf\\_pras\\_TNS\\_OBOP\\_wartosci\\_UE.doc](http://www.obop.pl/uploads/3563/inf_pras_TNS_OBOP_wartosci_UE.doc) (accessed 1 June 2012).

<sup>54</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 13 October 2011, *Increasing the Impact of EU Development Policy: an Agenda for Change*, COM (2011) 637 final.



Nations<sup>55</sup>, such as sovereign equality and non-intervention in a state's internal affairs, limit *prima facie* the possibility of promoting those rights in third countries. Secondly, there is a broad dispute as to whether today we can even speak about values which have a universal and indivisible character. Europe, in trying to impose its system of values and way of thinking, may be accused of "cultural imperialism". John Rawls, in *The Law of Peoples*, argued for the need to be tolerant towards non-liberal peoples.<sup>56</sup> But what are the limits of this tolerance? In the view of postmodernists, we live in a world which has no permanent values. Postmodernists represent an axiological relativism which questions the universality of fundamental rights. At present, fundamental freedoms are being limited in the name of economic development, and human rights violated in connection with the running of business. This escalates the present-day post-industrial crisis, which disturbs the axiological order. The incessant transformation of the world around us, manifested in technological development, globalisation and the mass culture, poses questions about the present-day system of values and the place of man in the world.<sup>57</sup>

A line of distinction should be drawn between limitations of an ethical nature and those resulting from public international law, and the problems arising from the Union's law and the political will of the member states. As we have noted, the EU's actions as regards human rights protection on the international scene are based on two pillars: the CFSP, which is an intergovernmental component; and economic actions, based on the Union method. Already this shows that the Union is unable to promote its values in a uniform and consistent manner, having different competences in particular areas and regulating fundamental rights incidentally with respect to its other policies. This is linked with the problem of the structural limitations of international organisations, that is their excessive bureaucratisation, a sluggish decision-making process, and no uniformity in the actions taken by the member states, which often represent divergent interests.<sup>58</sup>

The interrelations between different interests, objectives and problems in the actions taken in the international arena lead to conflicts and tensions, and the human rights policy is inconsistent.<sup>59</sup> This applies in particular to the CFSP, based on classic international law, that is the intergovernmental cooperation of the member states. It is enough for one state to refuse to adopt some decision for the decision to be effectively blocked. The principle of priority does not apply to the solidarity principle within the CFSP.<sup>60</sup> In addition, the upholding of this principle is overseen by the Council and High Representative rather than the Commission, as is the case in intra-Union rela-

<sup>55</sup> Charter of the United Nations, *Judicial Yearbook* 1974, No. 3, item 20.

<sup>56</sup> J. Rawls, *The Law of Peoples*, *Critical Inquiry*, Vol. 20, No. 1. (Autumn, 1993), pp. 36–68.

<sup>57</sup> See: Z. Bauman, *Postmodern Ethics*, Cambridge 1993.

<sup>58</sup> Cf. A. Domagała, *Prawa człowieka w polityce zagranicznej państw*, in: A. Florczak, B. Bolechow (eds.), *Prawa człowieka a stosunki międzynarodowe*, Toruń 2006, pp. 264–265.

<sup>59</sup> R. Kuźniar, *op.cit.*, p. 327.

<sup>60</sup> C. Mik, *op.cit.*, p. 125.

tions. But with no supervisory instruments at their disposal, their actions can only be of a diplomatic nature (Article 24.3 of TEU).

Thus, it is not surprising that the EU has on numerous occasions been accused of inconsistency and double standards. Authors opting for a realistic approach towards international relations stress that the Union gives priority to its economic interest and security over the values it promotes. In this context, the human rights policy is considered mere rhetoric.<sup>61</sup> This is also linked to the nature of the Union's regulations on human rights protection on the international scene. They are programme objectives and rules which may be fulfilled to a greater or smaller extent. In contrast to Dworkinian rules, they are not directly effective, and do not create clear and unconditional laws which can be enforced by individuals. The Arab Spring also exposed the evident deficiencies in this respect. The Union's previous pragmatic policy towards the Arab world – based on maintaining the status quo and supporting authoritarian regimes – did not bring stability and security in that region. In return for cooperation in controlling illegal migration, supplies of energy fuels and a guarantee of stability, the member states gave up the promotion of human rights, giving their silent approval to the pseudo-democracies in North Africa and the Middle East.<sup>62</sup> This is clearly proven by the fact that in 2010, at the EU–Africa summit in Tripoli, a declaration was signed with the then dictator Gaddafi in which the year 2010 was referred to as the year of “peace and security”, announcing further cooperation based on shared values – human rights, democracy, the rule of law – and even extending thanks to the leaders of Libya for their care, hospitality and engagement in this cooperation.<sup>63</sup>

One can also point to the non-uniform practice in concluding agreements containing a human rights clause, despite the fact that this matter has been transferred to the Union level, and so, unlike the CFSP, it does not have an intergovernmental character. Human rights clauses fail to appear mainly in agreements with highly developed countries.<sup>64</sup> In some cases, this stems from the fact that those agreements had been negotiated before the said clauses started to be included, an example being a bilateral economic agreement with China dating from 1985.<sup>65</sup> Instances when an agreement failed to be executed at all due to lack of consent for the clause constitute another case. The starkest example is the severing of negotiations of cooperation agreements with Australia and New Zealand due to the fact that those countries categorically opposed the provisions regulating human rights issues.<sup>66</sup>

<sup>61</sup> See e.g.: O. Gorm, *Promotion of democracy as a foreign policy instrument of 'Europe': Limits to international idealism*, Democratization, 2000, No. 7, pp. 142-167.

<sup>62</sup> See: B. Wojna, *Unia Europejska wobec arabskiej wiosny: problemy i dylematy nowego partnerstwa*, Sprawy Międzynarodowe, No. 3, 2011, pp. 7-20; A. Dandashly, *The EU Response to Regime Change in the Wake of the Arab Revolt: Differential Implementation*, Journal of European Integration, 2015, No. 1, p. 43.

<sup>63</sup> *Ibidem*.

<sup>64</sup> D. Cronin, *EU 'ignoring' its human rights clause*, European Voice, 18 March 2004.

<sup>65</sup> EEC–China agreement 1985, O.J. L 250/2.

<sup>66</sup> K. Marciniak, *op.cit.*, p. 552. Including such a clause in the trade agreement with Canada in 2013 was equally problematic.



The use of restrictive measures, especially directed at private entities, is equally problematic. In the case of this instrument the conflict between the promotion of human rights protection and the fight against international terrorism has become evident. In the well-known judgment in the case of *Kadi*,<sup>67</sup> the ECJ determined that fundamental rights, in particular the right to effective judicial protection and rights of ownership, may not be violated when imposing restrictive measures. The view was consolidated in the judgment in the case of *Pye Phyo Tay Za*,<sup>68</sup> who was listed as a supporter of the Burmese regime only because he was the son of an entrepreneur who supported it. The circumstance that the challenged provisions have the aim of counteracting international terrorism should not prevent the Court from fulfilling its duties to ensure that the rule of law is upheld. By doing so, the Court does not enter the sphere of politics, but rather affirms the boundaries set by the law with respect to specific political decisions.<sup>69</sup>

Thus, although human rights are meant to be a silver thread running through all of the EU's external actions, due to their non-economic nature, there are tensions with other objectives and inconsistencies within the EU's various practices. However, the legislative deficiencies, in particular the Union's limited competences as regards human rights protection, their programmatic nature and the intergovernmental character of the CFSP, should be distinguished from the issue of the political will to use the available instruments. Finally, it needs to be pointed out that the Union's instruments often prove ineffective because third countries are not interested in introducing reforms. They often adopt an attitude whereby they demand specific economic benefits without introducing political and legal changes. Therefore, the Union's conditions are not an instrument that might transform authoritarian states and dictatorships into democratic republics. The Union may be most successful with respect to those third countries which are actually interested in close European integration and wish to accede to the Union's structures, and are thus required to meet the Copenhagen criteria.<sup>70</sup> They may then improve their human rights standards and take advantage of the EU's experience and funds.<sup>71</sup> It is therefore aptly noted

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<sup>67</sup> Judgment of the Court of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, O.J. C 285, pp. 2-3.

<sup>68</sup> Judgment of the Court of 19 May 2010 in Case T-181/08 *Pye Phyo Tay Za v Council of the European Union*, O.J. C 133, p. 6-7.

<sup>69</sup> Opinion of Mr Advocate General Poiares Maduro delivered on 23 January 2008 in joined cases C-402/05 P and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Court Reports of 2008, p. 1-6351, point 45.

<sup>70</sup> The political and legal conditions which a third country has to meet in order to accede to the Union. The criteria were adopted by the European Council at the summit in Copenhagen in June 1993. The political criteria include respect for human rights and the rule of law as well as having institutional structures ensuring stable democracy. See: European Council conclusions from Copenhagen of 21-22 June 1993, SN 180/1/93, REV 1, p. 13

<sup>71</sup> The EU mission supporting the government in Georgia in 2004 (EUJUST THEMIS) may serve as an example. It was carried out at the initiative of the prime minister, who submitted an official request to

that the pre-accession period and political changes in a country aiming to meet the Copenhagen criteria are the most powerful and direct tools for exerting an influence on that country's legislation.<sup>72</sup>

## CONCLUSIONS

Although the position of the EU as an actor in international relations is being constantly questioned owing to its low effectiveness,<sup>73</sup> among other things, the EU continues to define its role in promoting fundamental rights in third countries. The analysis presented here shows that there is not only a legal basis, but also instruments which serve the protection of human rights in the Union's external relations. Moreover, the Union is not a human rights organisation strictly speaking, i.e. it does not have general competence in that regard. Thus, human rights constitute a background for its "typical" actions of an economic nature, through their inclusion in trade agreements or the creation of financial instruments earmarked for supporting democratic transformations in third countries.

A Union which makes such strong declarations about human rights protection cannot afford to be inconsistent or non-uniform in its actions, as this undermines its prestige and genuineness. In this context, the attempts to coordinate the Union's instruments by adopting the strategic framework and appointing the Special Representative need to be acknowledged. Nevertheless, these are not revolutionary changes. The effectiveness of the Union's actions will depend on the practical implementation of its principles and the further development of the EEAS.<sup>74</sup> On the other hand, the establishment of new funds, such as the European Endowment for Democracy, is evaluated negatively; in accordance with the principle of Occam's razor, the number of entities should not be increased excessively, and it would have been sufficient to use the existing instrument of the EIDHR with a broader scope. New structures in this area only increase costs and make it more difficult for beneficiaries to obtain funds.<sup>75</sup> Notwithstanding, the changes in the EU's institutional structure – creating bodies responsible for human rights, such as the European Union Special Representative for Human Rights, who reports directly to the High Representative<sup>76</sup> – deserve

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the EU in the matter. It covered, for instance, providing guidance on the new reform strategy in the justice system and support for planned legislation, such as the code of criminal proceedings.

<sup>72</sup> See: W. Sadurski, *Central & Eastern Europe After Transition*, Ashgate 2010, p. 17; L. Conant, *Compelling criteria? Human rights in the European Union*, *Journal of European Public Policy*, 2014, No. 5, pp. 713-729.

<sup>73</sup> Cf. J. Zajączkowski, *Unia Europejska w stosunkach międzynarodowych*, Warsaw 2006, p. 233.

<sup>74</sup> Mouvement mondial des droits humains, <http://www.fidh.org/the-eu-s-strategic-framework-and-action-plan-on-human-rights-and-democracy-13545> (accessed 1 June 2013).

<sup>75</sup> Cf. E. Kaca, *Pomoc dla Białorusi – kłopot dla Unii*, *Gazeta Wyborcza*, 18 February 2011.

<sup>76</sup> This stems from the fact that the wide scope of the High Commissioner's responsibilities makes it difficult to act effectively in the area of human rights protection, for example to participate in all relevant international meetings. Cf. European Parliament Resolution of 18 April 2012 on *the Annual Report on Human Rights and Democracy in the World and the European Union's policy on the matter, including the influence on the EU's strategic policy in the area of human rights*, 2011/2185 (INI), temporary version, unpublished.



to be evaluated in positive terms. They prove not only that the Union is increasingly engaged in human rights protection, but that it can also realistically increase the effectiveness of its actions in that area.

As has been pointed out, the problems arising from legal limitations should be distinguished from the issue of the political will to use the mechanisms. The problem lies in the fragmentary nature of the Union's human rights policy, i.e. the fact that it is taut between the CFSP and economic actions, and in the absence of clear competences in this area, despite the Treaty provisions setting forth the objective of human rights protection. The main political problems include, in turn, inconsistency and the prioritising of economic interests over promoting values of a non-economic nature.

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#### ABSTRACT

*The article analyses the issue of respect for human rights as a general objective of the EU's external action. It does so from a legal and political perspective, starting with a brief overview of the legal framework which firmly places human rights at the centre of the EU's external relations. The EU's main policy framework and main external instruments are then described. The concluding section contains some critical remarks on the EU's aspiration to establish itself as a global promoter of values, in particular the need to improve the coherence and effectiveness of its external human rights policy. This need stems from, among other things, a fragmentation of the EU's competences between supranational economic actions and the intergovernmental CFSP, as well as the absence of clear and strong EU powers in the area of human rights. The present situation involves a paradox, because on the one hand there is a lack of Treaty provisions stating clearly that respect for human rights is a general and cross-cutting component of internal EU policies, whereas on the other hand, under these provisions the protection of human rights is seen as an important objective of the EU's external actions.*