

## ANTHROPOLOGICAL SHIFT?

*EU Human Rights' Anthropology in View of Life and Family*

*¿Cambio antropológico?*

*La antropología de los derechos humanos de la UE con vistas a la vida y la familia.*

*Cambiamento antropologico?*

*L'antropologia dei diritti umani dell'UE in vista della vita e della famiglia*

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DOI: 10.46553/prudentia.89.2020.p49-86

Recibido: 31 de enero de 2020  
Aprobado: 29 de febrero de 2020

**Abstract:** The article reveals and explains the change in the way of proclaiming the protection of human life and right to marry/found a family in the Charter of Fundamental Rights of the EU compared to the Universal Declaration of Human Rights and the European Convention on Human Rights. The author verifies the thesis according to which that change is, at its roots, connected with an anthropological shift.

**Keywords:** Anthropology; Human Rights; Marriage; Family; Life protection; CFR; UDHR.

**Resumen:** El artículo revela el cambio en la forma de proclamar la protección de la vida humana y el derecho a casarse y fundar una familia en la Carta de los Derechos Fundamentales de la UE en comparación con la Declaración Universal de Derechos Humanos y el Convenio Europeo de Derechos Humanos. El autor verifica la tesis según la cual ese cambio está, en sus raíces, conectado con un cambio antropológico.

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**Palabras clave:** antropología; Derechos humanos; Matrimonio; Familia; Protección de la vida; CFR; DUDH.

**Sommario:** L'articolo rivela e spiega il cambiamento nel modo di proclamare la protezione della vita umana e il diritto di sposarsi e fondare una famiglia nella Carta dei diritti fondamentali dell'UE rispetto alla Dichiarazione universale dei diritti dell'uomo e alla Convenzione europea dei diritti dell'uomo. L'autore verifica la tesi secondo la quale quel cambiamento è, alle sue radici, collegato a uno spostamento antropologico.

**Parole chiave:** Antropologia; Diritti umani; Matrimonio; Famiglia; Protezione della vita; CFR; DUDU.

Para citar este artículo:

Gierycz, M. (2020). "Anthropological shift? EU Human Rights' Anthropology in View of Life and Family". *Prudentia Iuris*, N. 89, pp. 49-86.

## Introduction

If we were to make a list of the issues that arouse the greatest emotions in the European Union policy, ethical issues, related to human rights, especially those concerning life protection and marriage/family would undoubtedly occupy top positions of such a list. One could mention here reactions to the interpretation of the concept of a marriage in the EU in the EU Court of Justice decision concerning the Coman case<sup>2</sup>, the European Commission's decision on financing research on embryo stem cells<sup>3</sup>; or the

2 The Court of Justice of the European Union, *The Judgment of the Court (Grand Chamber) of 5<sup>th</sup> June 2016 in the case C-673/16 (Relu Adrian Coman et al. versus Inspectoratul General pentru Imigrări i Ministerul Afacerilor Interne)*. <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130dce423eea3d0614a8caca6f1dae647abe0.e34KaxiLc3eQc40LaxqMbN4Pb3yRe0?text=&docid=202542&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=347573> [10-9-2018] stating that the refusal to give the derivative right to stay by Romanian state to a citizen of a non-European Union country as a result of refusing to deem as the marriage his relationship concluded legally as a marriage with a European Union citizen of the same sex in another member state is an obstacle to the execution of the rights of a EU citizen to move freely and stay in the territory of the member states.

3 Compare European Commission, *Commission Statement*, [http://ec.europa.eu/research/participants/data/ref/h2020/legal\\_basis/fp/h2020-eu-decl-fp\\_pl.pdf](http://ec.europa.eu/research/participants/data/ref/h2020/legal_basis/fp/h2020-eu-decl-fp_pl.pdf) [10-9-2018], claiming that the only research that is forbidden concerns: cloning humans for reproduction purposes; hereditary change of human genetic inheritance; creating human embryos exclusively for research purposes. All other research procedures (for example research on embryo cells, the so-called therapeutic cloning or making human-animal hybrids) can be financed from the EU budget.

resolutions adopted by the European Parliament on reproduction rights and the right to abortion<sup>4</sup>. Those and many other “ethically sensitive” decisions taken by the European Union are considered by vast parts of European societies as actions, which violate human dignity and human rights. Others however, including a significant number of the European Union decision-makers, consider them as an execution of the human rights and perceive themselves as defenders of human dignity. The aim of this text is to analyze the causes of the above situation. The main thesis discussed here claims that the intensive political dispute, which we are witnessing stems from an anthropological dispute. To put it more precisely: it seems that within the human rights area we have recently observed a significant shift in the way a human being is presented, which ultimately affects the interpretation of human rights and fundamental values.

The text is divided into four parts. In the first one I shortly outline anthropological theory of Western political thought, which helps to understand the sources of current debate and provides a prism for further analysis. Second part is devoted to the analysis of selected provisions of the Universal Declaration of Human Rights (UDHR), which constitutes a legal foundation of human rights, and the European Convention on Human Rights (ECHR), which serves as a tool for implementing the rights included in the UDHR in Europe. The aim of the first section is to reveal the relationship between anthropological notions and human rights as well as to demonstrate the consequences of anthropology adopted in the UDHR for the structure of human rights and the interpretation of the right to life and the right to marriage/family in the international law. In the third part my paper analyzes in a similar way provisions of the EU’s Charter of Fundamental Rights and the Treaty on the European Union. The aim of that section is to reveal the anthropological concept expressed in the EU’s primary law documents, as well as its consequences for the structure and understanding of human rights. The fourth part is devoted to the interpretation of the right to life and the right to marriage/family in the EU and shows the significance of the EU’s anthropological approach for understanding of those rights within European Union. In the conclusion there are discussed briefly some political consequences of EU’s anthropological approach, as well one question asked to be further reflected.

4 Compare, for example, the European Parliament, Report on the progress on equality between women and men in the European Union in 2013, 28-1-2015, A8-0015/2015, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0015+0+DOC+PDF+V0//PL> [10-9-2018].

## 1. Two political visions

When looking into the dispute around modern politics, researchers such as Thomas Sowell<sup>5</sup> or Jacob Talmon<sup>6</sup> point to the fact that concurrently with the emergence of a liberal type of democracy in the 18<sup>th</sup> century, from the same premises a different democracy type emerged as well, which Talmon calls totalitarian<sup>7</sup>. He stresses that “[t]he tension between them has constituted an important chapter in modern history, and has now become the most vital issue of our time”<sup>8</sup>. An incarnation, so to say, of these two models of politics was the experience of the American and the French Revolutions. The former resulted in the establishment of a constrained government, which respected the presence of religion in the public sphere, while the latter organized state terror in the name of democracy combined with an open war against Christianity<sup>9</sup>. Where does this difference come from? According to Sowell, it stems from two diametrically different meta-political visions, understood as ideal types in Weber’s sense: a constrained and an unconstrained one<sup>10</sup>. In functional terms, the difference consists in a different understanding of the key criteria: the source of decisions (*locus of discretion*), and the way they are implemented (*mode of discretion*)<sup>11</sup>.

### 1.1. *Constrained vs. unconstrained politics*

Advocates of the unconstrained logic, inspired by the optimism of the Enlightenment, see politics as an instrument of continuous progress; in a

5 Sowell, T. (2007). *A Conflict of Visions. Ideological Origins of Political Struggles*. New York. Basic Books.

6 Talmon, J. (1960). *The Origins of Totalitarian Democracy*. New York. Frederick A. Praeger.

7 Talmon, *ibid.*, 1.

8 Talmon, *ibid.*, 1.

9 In the words of Robespierre: “Terror is nothing more than speedy, severe and inflexible justice; it is thus an emanation of virtue; it is less a principle in itself, than a consequence of the general principle of democracy, applied to the most pressing needs of the *patrie*”. M. Robespierre, M. “On the Principles of Political Morality”, February 1794, Fordham University Internet Modern History Sourcebook, <https://sourcebooks.fordham.edu/mod/1794robespierre.asp> [taken from M. Robespierre, M. (1794). *Report upon the Principles of Political Morality Which Are to Form the Basis of the Administration of the Interior Concerns of the Republic*. Philadelphia].

10 Other arguments are cited in this debate as well. Hannah Arendt, for example, points to the absence of the “social question” in America, and to the fact that the revolution generally reinstates the pre-revolutionary regime. The British constrained government is followed by a constrained government, and the French absolute monarchy by absolutism.

11 Sowell, T. *A Conflict of Visions. Ideological Origins of Political Struggles*, 106.

Promethean blast of enthusiasm, they want to build a paradise on earth. It is rather characteristic that the Enlightenment –so critical of all superstition– introduced into common thought both a cult of reason and a myth of endless, unlimited progress. Thanks to the accumulation of man’s achievements and the “invisible hand of nature”, people are elements of a teleological process which, by harmonizing “enlightened” self-interests, inevitably leads to the welfare of mankind<sup>12</sup>. Progress is not achieved by man’s moral effort, but almost involuntarily, with the discovery of new forms of social and political organization. The goal of politics, therefore, is to find the final solution to social problems, which requires –in accordance with this concept of progress– a thorough reconstruction of social and political institutions. It does not, however, require the virtue of individual people<sup>13</sup>. The belief that every social problem may be rationally solved if only reason and virtue triumph over ignorance and vice<sup>14</sup> is found here at the roots of putting the right to decide in the hands of the “avant-garde” (social elite). Its members are guaranteed –though it is not clear how– a privileged access to reserves of virtue and reason. They act as a social “surrogate”, leading the society to “ever-higher levels of understanding and practice [...] pending the eventual progress of mankind to the point where all can make social decisions”<sup>15</sup>. In order to achieve socially desirable ends, the avant-garde may, if necessary, temporarily resort to violence<sup>16</sup>. Nevertheless, also the

12 Cf. Arendt, H. (1982). *Lectures on Kant’s Political Philosophy*. Chicago. University of Chicago Press, 18. According to Fabrice Hadjadj, the “invisible hand” which harmonizes “enlightened” self-interests and makes the sum total of man’s vices –the cause of condemnation in the next world– bring about a result in this world which is no worse than if all of man’s actions were inspired by virtue, appears already in Jansenists such as Pierre Nicole or Blaise Pascal. It is the reverse of the ancient belief expressed in the saying: *Senatores boni viri, senatus autem mala bestia*. The new idea says that it is bad people who make good institutions. *Chaque partie étant pleine de vice, le tout était cependant un paradis* –writes Bernard de Mandeville in *La Fable des abeilles*. [Cf. Hadjadj, F. (2011). *Le paradis a la porte. Essai sur une joie qui derange*. Edition du Seuil, 59-62; Laval, C. (2007). *L’Homme économique: essai sur les racine du néolibéralisme*. Paris, Chapter III].

13 On the lexical level, frequently used words include: eradication, weeding out, liquidation, final solution.

14 See Berlin, I. (1969). *Four Essays on Liberty*. Oxford University Press.

15 Sowell, T. *A Conflict of Visions. Ideological Origins of Political Struggles*, 110.

16 This description seems to coincide with an observation made by John Paul II in *Centesimus Annus*: “When people think they possess the secret of a perfect social organization which makes evil impossible, they also think that they can use any means, including violence and deceit, in order to bring that organization into being. Politics then becomes a ‘secular religion’ which operates under the illusion of creating paradise in this world”. John Paul II, *Centesimus Annus*, 25; Rémi Brague points to the essence of a “revolutionary” approach to morality. For a revolutionary, evangelical advice becomes mandatory, while the commandments become facultative, subordinated to the tactics of combat. He should therefore live in chastity, poverty

law, seen as a plastic construct which requires constant, active reinterpretation by the judiciary, is perceived as one of the essential elements of social change. It should be interpreted by competent judges who not so much know the letter of law as understand its spirit; who know what the “proper interpretation” is, drawing nearer to the achievement of socially desirable ends<sup>17</sup>. “Sociological” salvation is available by means of efficiently operating institutions<sup>18</sup>.

In the constrained vision, politics reduces its maximalist ambitions to a search for solutions which are merely satisfactory, introducing reforms only if necessary and always with great caution. It is seen rather as daily, humble efforts to save the world from a catastrophe. This is well reflected in Robert Spaemann’s words: “Postponing the end is the basic structure of all human politics. [...] Politics is the vigilant keeping in check of tendencies which are conducive to an explosion of the ‘original chaos’”<sup>19</sup>. It assumes that systemic rationality (encoded in communal memory) is more reliable than individual rationality (the enlightened elite). It not only furthers the idea of constrained government and democratic procedures, but also makes the cautious reformer respect people’s well-established customs and pre-judgments, while not disdaining to improve things which do not function well<sup>20</sup>. A key category in the constrained vision is that of a trade-off developed within the framework of systemic processes<sup>21</sup>. Imperfection is understood as a socially perfect solution. As Edmund Burke said: “[...] I must bear with infirmities until they fester into crimes”<sup>22</sup>.

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and obedience, but at the same time has the right to kill, steal and lie in order to advance “the cause” [cf. Brague, R. (2005). *La loi de Dieu. Histoire philosophique d'une Alliance*. Gallimard, 281-282].

17 Kelly, J. M. (2001). *A Short History of Western Legal Theory*. New York. Oxford University Press, 281; to the same current belongs also the contemporary tendency of democracy to transform into juristocracy –the rule of the political, economic and judicial elite [cf. Hirschl, R. (2007). *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*. Harvard University Press].

18 “What the steam engine does with matter, the printing press is to do with mind; it is to act mechanically, and the population is to be passively, almost unconsciously enlightened, by the mere multiplication and dissemination of volumes” [Newman, J. H. (2016). *The Idea of a University*. CreateSpace Independent Publishing Platform, 127].

19 Spaemann, R. *Kroki poza siebie*, 275.

20 Sowell, T. A *Conflict of Visions. Ideological Origins of Political Struggles*, 27.

21 *Ibid.*, 11-15.

22 *Ibid.*, 39.

## 1.2. *Constrained anthropology*

Sowell is aware that the functional criteria he refers to (the locus and mode of discretion), while explaining the different consequences caused by each of the two visions of political processes, are in need of an explanation themselves. When looking for the sources of today's ideological struggles, he considers the anthropological question to be of central importance. In his analysis –referring to Adam Smith– he finds the basic constraint to be the “moral limitations of man in general, and his egocentricity in particular”<sup>23</sup>. A different approach to this problem is found in John Paul II. While it may be argued that he agrees with Sowell, saying that the doctrine of original sin “has great hermeneutical value insofar as it helps one to understand human reality”, and “[t]he social order will be all the more stable, the more it takes this fact into account”<sup>24</sup>, he also emphasizes another problem: “[...] how can we fail to see that the question about God is at the heart of this problem? Either man considers himself created by God, from whom he receives the freedom that opens up immense possibilities but also places specific duties on him; or he promotes himself to the absolute, endowed with a freedom which is subject to no laws and which, abandoning him to all sorts of impulses, confines him to hedonism and narcissism”<sup>25</sup>.

It appears that, in principle, a constrained anthropology should take into account man's twofold limitation. The first is –so to say– a consequence of the original sin. Whatever man endeavors is corrupted by imperfection. Sin, which has “impaired” man's intellect and will, results in the effects of his work always being at odds, to some extent, with his original intentions. Instead of “plants of the field” which were “good for food”, the earth produces “thorns and thistles” (*Genesis* 3:17-18). Awareness of the consequences of original sin present in social life leads to the establishment of mechanisms which control the government to prevent abuse (through a check and balance system). The need for such mechanisms of control is clearly reflected in the words of James Madison: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary”<sup>26</sup>.

The second limitation is much more fundamental. It does not result from the “corruption” of human nature, but from the fact of man's being a

23 Sowell, 12.

24 John Paul II. *Centesimus Annus*, 25.

25 John Paul II. *Address to representatives of the world of science and culture at the Cathedral of Maribor; Christianity's Dialogue with Culture*, 19 May 1996.

26 Madison, J. “The Federalist Papers”, no. 51, *Independent Journal*, Wednesday, February 6, 1788 (<https://www.constitution.org/fed/federa51.htm>).

creation; from the fact that man is not almighty God; that he has his own, human nature, involving rationality, sexuality, freedom, and an exceptional dignity. The specific property of his nature is man's need to refer to the Creator, or, to use Remi Brague's expression, "that which is Higher", and to make his decisions in this particular context. It is a specifically human ability, therefore, to discover universal moral norms which do not come from man, as well as free will in obeying them. For Christians, it is obvious that the source of moral values and man's dignity is God, who created him in his image and likeness. But, as Remi Brague points out, already in the Greek and Roman philosophical tradition, to validate that which is human a reference was necessary to "that which is Higher". It was then understood as a reference to nature<sup>27</sup>. It entailed a constraint, since it meant that man is not a product of man and his life with others in the polis<sup>28</sup>. On the contrary, it was life in the polis that had to take into account the requirements of *orthos logos* (*recta ratio*): "[...] the principle of rationality attributed to the polis reveals its power to humanize and bring peace in that [...] it is open to what has not been established by it"<sup>29</sup>. To put this in theological terms, the reference to "that which is Higher" forced man to acknowledge that he is a creation and not the creator, even if the true Creator was not known yet. Alain Besançon very accurately called this Greek approach to reality a "natural orthodoxy". Let us stress this: even if the ancient giants of the intellect did not know the true God, and even if they did not embrace the polytheism of their times, they acted and thought as if God existed, *veluti si Deus daretur*. The classic expression of this logic was the ancient idea of the law of nature, developed and expanded in Christian thought.

Recognition of the twofold limitation of human existence in the area of politics means recognition that there are inviolable anthropological limits to the exercise of political power and law making. There are political acts which are inherently wrong (*intrinsece malum*), which "poison human society" while doing "more harm to those who practice them than those who suffer from the injury"<sup>30</sup>, and which must never be done by any government. In response to a proposal made by Cardinal Ratzinger that the postulate of the Enlightenment be reversed and the political sphere be organized "as if God existed" (*veluti si Deus daretur*), Marcelo Pera, an agnostic, says: "This proposal should be accepted, this challenge welcomed, for one basic reason: because the one outside the Church who acts *veluti si Deus daretur* becomes

27 See Brague, R. (2017). *The Legitimacy of the Human*. Chicago. St. Augustine's Press.

28 Ibid.

29 Spaemann, R. (2006). *Granice*. Warszawa. Oficyna Naukowa, 93 (original title: *Grenzen*, Klett-Cotta, Stuttgart 2000).

30 Vatican II. *Gaudium et spes*, 27; Cf. John Paul II. *Veritatis splendor*, 79-81.

*more responsible in moral terms.* He will no longer say that an embryo is a ‘thing’ or a ‘lump of cells’ or ‘genetic material’. He will no longer say that the elimination of an embryo or a fetus does not infringe any rights. He will no longer say that a desire that can be satisfied by some technical means is automatically a right that should be claimed and granted. He will no longer say that all scientific and technological progress is per se a liberation or a moral advance. He will no longer say that the only rationality and the only form of life outside the Church are scientific rationality and an existence bereft of values. [...] he will no longer think that a democracy consisting of the mere counting of numbers is an adequate substitute for wisdom. [...] We act in liberty and equality as if we were all sons of God”<sup>31</sup>.

### **1.3. Unconstrained anthropology**

On the opposite pole we have unconstrained anthropology in which a human being is morally and epistemically perfect. Rousseau was the best known thinker to claim that there are no constraints intrinsic to human nature<sup>32</sup>. On the one hand, this is a –rather typical for the luminaries of the Enlightenment– negation of the idea of original sin. Even Voltaire, whose view of man was not characterized by Rousseau’s explicitness, radically opposed Pascal’s claims, arguing that –in the emphasis he placed on corruption with sin– “he is determined to depict us all as evil and unhappy. [...] He attributes to the essence of our nature what applies only to certain men”<sup>33</sup>.

Nevertheless, the anthropology of the Enlightenment is not just about doing away with the idea of corruption. It is characteristic, though rarely emphasized, that Rousseau –otherwise often polemicizing with another father of modernity, Thomas Hobbes– generally agreed with him as regards the anthropological question. As is well known, the author of *Leviathan* believed that in a state of nature “an individual has not only an actual, but also a legitimate possibility [...] to do all things necessary to satisfy the requirements of the instinct of self-preservation, and may act only in accordance with the rules he defines himself, using his mind only when called to do so by the instinct or the emotions it stirs up, and not in order to recog-

31 Pera, M. “Introduction: A proposal That Should Be Accepted”. In Ratzinger, J. (2006). *Europe in the Crisis of Cultures*. San Francisco. Ignatius Press.

32 See more in: Gierycz, M. *Europejski spór o człowieka...*, 217-227.

33 F. M. A. de Voltaire. (2005). *Letters on England*. Trans. Leonard Tancock. London. Penguin, 120.

nize universal norms, for instance”<sup>34</sup>. This fundamental assumption made by Hobbes, which lies at the bottom of his depiction of the state of nature as a state of war, is in fact fully shared by Rousseau. The only objection he makes is against Hobbes’s inconsistency. He argues that since in a state of nature people had “no moral relations or determinate obligations one with another”, they “could not be either good or bad, virtuous or vicious”<sup>35</sup>. Consequently, contrary to the popular image of a “good savage”, Rousseau believes that man in a state of nature is not good. And neither is he bad. In moral terms, his status is similar to that of an amoeba: morality is simply irrelevant.

The attitude to morality outlined above is one of the key assertions of unconstrained anthropology which is shared with Rousseau not only by Hobbes, but by practically all luminaries of the Age of Lights and their heirs, revealing the relativity and historicity of moral convictions. Suffice it to cite d’Alembert’s introduction to the *Encyclopaedia* in which he derives the idea of good and evil from a revolt against oppression<sup>36</sup>, or the arguments of Newton and Voltaire<sup>37</sup> who derive it from biological instincts. Its persistence in the logic of unconstraint is documented by claims made by J.S. Mill who argued that moral dispositions are not innate<sup>38</sup> but “susceptible, by a sufficient use of the external sanctions and of the force of early impressions, of being cultivated in almost any direction: so that there is hardly anything so absurd or so mischievous that it may not, by means of these influences, be made to act on the human mind”<sup>39</sup>. Naturally, like most other advocates of unconstraint, J.S. Mill would not have wished for man’s moral degradation. On the contrary, at the very beginning of his ethical treatise, he complains about “the little progress which has been made in the decision of the controversy respecting the criterion of right and wrong”<sup>40</sup>, which he wanted to remedy with utilitarian ethics<sup>41</sup>. Of key importance here, however, is the

34 Bogdan Szlachta. (2006). *Indywidualizm*. In: id. [ed.]. *Słownik społeczny*. Kraków. WAM, 413.

35 Rousseau, J. J. *Discourse on Inequality*. Translated by G. D. H. Cole, <https://www.aub.edu.lb/fas/cvsp/Documents/DiscourseonInequality.pdf879500092.pdf>, 18. Rousseau claims that “savages are not bad merely because they do not know what it is to be good: for it is neither the development of the understanding nor the restraint of law that hinders them from doing ill; but the peacefulness of their passions, and their ignorance of vice” (p. 19).

36 Voegelin, E. (1975). *From Enlightenment to Oppression*. Durham. Duke University Press, 77.

37 *Ibid.*, 24-25.

38 See John Stuart Mill (2001). *Utilitarianism*. Kitchener. Batoche Books, 31.

39 *Ibid.* As a side remark, this was one of Mill’s arguments for the possibility of impressing on man the principle of utility.

40 *Ibid.*, 5.

41 Cf. par. 6.3.

assumption that there is no morality intrinsically linked to being human; that good and bad are relative categories, and consequently that morality may “be flexibly adjusted”<sup>42</sup>.

An individual outside the sphere of good and evil, not related necessarily to any other being, does not – in a stark contrast to the Biblical image – resemble a social being endowed with special dignity, reason, conscience, and free will, ontologically superior to all other creatures, integrating in himself the spiritual and the corporeal element. This observation, by the way, was made by Rousseau himself when he stressed that human life in a state of nature is “the life of an animal limited at first to mere sensations, and hardly profiting by the gifts nature bestowed on him, much less capable of entertaining a thought of forcing anything from her”<sup>43</sup>. Still, it would be impossible to defend a thesis that *homme naturel* is simply an animal. This is best illustrated by his role in the development of the state of first societies, which Rousseau believes should last forever. In the *Discourse*, *homme naturel* in fact acts as the Creator: he leads himself, on his own, out of animal into human life, in its ethical and social dimension. He creates himself as a person<sup>44</sup>. Consequently, we can see in Rousseau’s view of man a harbinger of “exclusive humanism”, in its peak form developed by Comte, where man as such is the highest being who will not suffer anyone above himself<sup>45</sup>.

Depending on the perspective we adopt, the life of the *homme naturel*, being an archetype of the modern man, may approximate either animal or divine life<sup>46</sup>. This has far-reaching anthropological and political consequences. Ultimately, as Delsol points out, “the boundary line of respect, subjective, and therefore changeable, will henceforth depend on historical, ideological, scientific criteria. It no longer necessarily runs between man and animal; it may run between various groups of human beings, so that some are treated as subhumans, or even as animals”<sup>47</sup>. This is where we run up against the

42 Małek, M. (2010). *Liberalizm etyczny Johna Stuarta Milla. Współczesne ujęcia u Johna Graya i Petera Singera*. Wrocław. FNP, 170.

43 Rousseau, J. J. *Discourse...*, 24.

44 This approach to man echoes Descartes’ description of the “self”, which he presents “as though it was God”. More on this topic, see: Mazurkiewicz, P. *Europeizacja Europy...*, 322.

45 See Brague, R. (2017). *The Legitimacy of the Human*. Chicago. St. Augustine’s Press.

46 And therefore – even though for reasons somewhat different than in Hobbes – deplorable rather than desirable. As Rousseau says in *Emile*, “[b]orn in the depths of a forest he would have lived in greater happiness and freedom; but being able to follow his inclinations without a struggle, there would have been no merit”. Rousseau (2007). *Emile: or On Education*. NuVision Publications, 453.

47 Delsol, Ch. (2016). *Nienawiść do świata. Totalitaryzmy i ponowoczesność*. Trans. Marek Chojnacki. Warsaw. PAX, 72. Delsol stresses further on that it is the terrible consequences of this obliteration of boundaries that make us consider them sacred, inviolable: in answer to the question: “Who is man, not everything is possible” (p. 19). One more comment should

contradiction inherent to the radical current of the Enlightenment philosophy which founds its elitist tendencies. Ethical and cognitive perfection is only found in the ideal man, while real men are usually narrow-minded and may be enlightened, in time, only with the leadership and efforts undertaken by the elite.

The last issue worth noting in the context of the anthropological dispute is the approach to man's rationality. In a world in which the overriding principle is *etsi Deus non daretur*, reason is an accidental product of irrationality<sup>48</sup>. If, however, in the beginning was not the Word (John 1:1), but only a Great Thunder, then Nietzsche is right when he claims that there is no truth, and that all of us "moderns have inherited millennia of consciencevivisection and animal-torture inflicted on ourselves [...]"<sup>49</sup>. Nietzsche draws one more important conclusion from this fact, namely that there is also no science, but merely the cunning of clever animals which use words to impose their will on others<sup>50</sup>.

## 2. The anthropology of human rights in the UDHR and the ECHR

The first, well-known, article of the Universal Declaration of Human Rights states that: "All human beings are born free and equal in dignity

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be added to this apt observation by Delsol, namely that the "liquid boundary of humankind" may also operate in the opposite direction, expanding the category of "personhood" to include animals. This issue is being explicitly articulated already now. As Peter Singer explains, the awkwardness of calling an animal a person is only apparent and "may be no more than a symptom of our habit of keeping our own species sharply separated from others". In fact, we should really be asking whether "animals are rational and self-conscious beings, aware of themselves as distinct entities with a past and a future". [Singer, P. (2011). *Practical Ethics*. New York. Cambridge University Press, 94]. Thus, the belief, characteristic of a constrained anthropology, in the existence of a special dignity as an intrinsic attribute of every human being may be qualified in the heirs of atomist thinking as a symptom of the chauvinism of our species.

48 The Enlightenment, as Joël-Benoit d'Onorio points out, has obscured the fundamental truth about man as a being created by a rational Being and rational precisely for this very reason. d'Onorio, J. B. (1994). *Le Vatican et la politique européenne*. Paris, 25.

49 Nietzsche, F. (2006). *On the Genealogy of Morality*. Translated by C. Diethe. Cambridge. Cambridge University Press, 66.

50 "But what I have in view will now be understood", Nietzsche writes, "namely, that it is always a *metaphysical belief* on which our belief in science rests, and that even we knowing ones of to-day, the godless and anti-metaphysical, still take *our* fire from the conflagration kindled by a belief a millennium old, the Christian belief, which was also the belief of Plato, that God is truth, that the truth is divine". Nietzsche, F. (1924). *Joyful Wisdom (The Complete Works of Friedrich Nietzsche, Volume Ten)*. Translated by T. Common. New York. The Macmillan Company, 278.

and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”<sup>51</sup>. It leaves no doubts to the fact that the foundation of human rights rests on the particular anthropology. The presentation of how a human being is understood before specific rights are indicated in the first article (not in the preamble!) of the Declaration of Human Rights is undoubtedly an unusual and unique solution. It shows how the authors of the UDHR were aware of the necessity to guarantee the respect for the *explicit* expressed pre-judgment on who is a human being for the success of the very idea of human rights<sup>52</sup>. If “being a human, which is a certain fact, is the basis for the rights, regardless of the statutory rights or other normative structures”<sup>53</sup>, and thus “the relation to the human interest as a whole is an integral element of each law and cannot be omitted when determining the content of the formulated postulates”<sup>54</sup>, human rights –defending fundamental human goods– must stem from the pre-analytical conviction concerning who a human being is.

## ***2.1. Anthropology and the sense and nature of human rights***

The Declaration shows, in its first article, a human being as a social being endowed with reason and conscience, equal in their dignity and freedom to other people. The first article, thanks to its unusual form and substance, brings then not rules to obey, but anthropological foundations of the rights. Presented there anthropology seems to recall constraint vision of a man, which –as it was shown above– is rooted in the idea of human (moral) nature and a dignity of a man. Moreover, if one takes into account the context of proclamation of UNHR or even its preamble, one discovers also full awareness of their writers of the second anthropological constraint: human

51 United Nations General Assembly, *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, A (General Assembly resolution 217 A), available at: <https://www.un.org/en/universal-declaration-human-rights/> [accessed 26 August 2019] Universal Declaration of Human Rights values a subject with a specific ontology along with action. before dzieci potrafią.

52 As one of its authors, Rene Cassin observed when defending this shape of article 1: “In the past decade millions of people lost their lives only because these principles were ruthlessly derided”, in: Lindholm, T. “Article 1”, in: *The Universal Declaration of Human Rights: A Commentary*, 44, quoted after: Piechowiak, M. (1999). *Filozofia praw człowieka*. Lublin. TN KUL, 78.

53 Piechowiak, M. *Filozofia praw człowieka*, 78.

54 Ídem, 78. As a result, the ultimate reference point for the statutory legal order protecting or respecting human rights are not the rights themselves but a human being.

moral limitations. Rene Cassin, underlying the importance recalling vision of a man in UDHR's first article (and not in the preamble) said it was crucial, because war has shown, what are the effects of disregard of those values<sup>55</sup>. It is then worthy, even in a nutshell, to indicate the anthropological significance of each of these attributes to the concept of human rights.

The key anthropological category included in the UDHR is the inherent human dignity, the respect for which, along with the respect for its related rights, is presented as "the foundation of freedom, justice and peace in the world". This approach is of paradigmatic nature. The Convention on Human Rights, proclaimed nearly 20 years later, states that human rights "result" from the inherent human dignity<sup>56</sup>. Dignity as the basic legal principle is included in most of other, significant acts of international law and in constitutions of particular countries<sup>57</sup>.

It is worth considering why the category of dignity has been given the central position and what it really expresses. Though there is no unambiguous legal definition of this concept<sup>58</sup>, its significance seems clear. It determines, using Spaemann's language, the difference between somebody and something, simultaneously ensuring "the openness of the normative system to complements and regular contact with the specific interest of particular persons"<sup>59</sup>. The category of dignity thus indicates that "human animality is from the very beginning the medium through which a person is realized. Therefore, the close and distant relations in which a human being is located, have personal and thus ethical significance". Consequently, humanity "is not, as animality, only an abstract concept to determine a certain kind, but it is also the name for a specific community of persons to which we belong not on the basis of possessing some features, but on the basis of the relationship with the human family"<sup>60</sup>. If we rejected this legally axiomatic thesis on the inherent human dignity, human rights would be nothing but a manifestation of the species chauvinism (as claimed in present times by Peter Singer). What is more, the claim that people are equal would be utopian. In the light of the Declaration, people are born "equal in dignity". That claim expresses, so to say, their ontologically equal-

55 Piechowiak. *Filozofia praw człowieka*, s. 77.

56 Preamble to Covenant on Human Rights from 1966, quoted after: Zajadło, J. (1989). *Godność jednostki w aktach międzynarodowej ochrony praw człowieka*. RPEiS, 5, z. 2, 104.

57 Krukowski, J. (1997). "Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki", [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*. Edited by L. Wiśniewski, Wydawnictwo Sejmowe, Warszawa, 44.

58 Piechowiak, M. *Filozofia praw człowieka*, 79.

59 *Ibid.*, 88.

60 Spaemann, R. *Osoby...*

ity, which –obviously– does not mean that they are equal in their talents, possibilities or competencies.

In view of the above comments, it comes as no surprise that the key characteristics of dignity is inherence. It describes the fact of the inseparableness of being a human and being a person in international law, indicating that personal dignity is *inherent* property of every human being<sup>61</sup>. As a result, dignity also has universal nature (as the unity of human nature), is non-transferable (as it belongs inseparably to every human being and only to human being), thus justifying inherence and non-transferability of rights.

Reason and conscience are quoted as the next anthropological categories. It should be emphasized that without the assumption that the human reason is able to discern the objective truth of what is good and bad for humans, it would be impossible to formulate human rights. It is because of their objective, related to goods of every human being, nature, that human rights are universal, regardless of the political or cultural regime<sup>62</sup>. As the Polish philosopher of law Marek Piechowiak proofs in his studies, the concept of conscience in the Universal Declaration has got not emotive but cognitive nature: it is about the knowledge of the goodness associating the decisions made by reason<sup>63</sup>. The foundation of human rights therefore rests on “acknowledging a human being as an existence moral by nature, which in its free and reasonable conduct is subordinated to cognizable, independent normative criteria of conduct”<sup>64</sup>. A human being is not perceived here as a creator of values: a man does not create the rights attributed to him, rather discovers them through his conscience.

In this context it is worth noticing that although the anthropology of the Declaration is explicitly agnostic –it does not refer to the existence or non-existence of God– it is friendly agnosticism, accepting the possibility of the existence of what Remi Braque calls “that, what is Higher”. As a result, the order of human rights is the order of *veluti si Deus daretur*. The concept of conscience adopted in the Declaration assumes implicitly the existence of the higher instance: nature or God, whose existence –in line with the best humanistic traditions– allows to “legitimize what is humane”<sup>65</sup>, though, admittedly, it also brings some limitations. A human being is not pure freedom here. The reference to reason and conscience thus means that human freedom quoted in the Declaration has its own objective, inscribed in hu-

61 Piechowiak, M. *Filozofia praw człowieka...*, 80.

62 *Ibid.*, 78.

63 Piechowiak, M. *Filozofia...*, 96-98.

64 *Ibid.*, 98.

65 Brague, R. (2013/2014). *Prawomocność tego, co ludzkie*, tł. K. Marulewska, “Teologia polityczna”, No 7, 195.

man nature constrains. What is more, the very fact of the existence of those constrains allows us to talk reasonably about the human nature: thanks to those constrains we can differentiate between human and inhumane actions of the human beings.

Such an approach to human beings is deeply rooted in the classical anthropological thought which, through defining constraints, provided a description of specifically human traits of existence. One of these constraints has “always” been the social nature of human beings. In his *Politics*, Aristotle noticed that “who cannot live in community or does not need one at all, being self-sufficient [...] is either an animal or god”<sup>66</sup>. It comes as no surprise then that the social nature of human life was quoted in the Universal Declaration of Human Rights as another anthropological feature. It should be emphasized that the category of brotherhood was used to express it. Even without referring to, on the one hand Christian, on the other French, inspirations for using that term in the Declaration<sup>67</sup>, it should be noted that the concept of brotherhood does not make any sense outside the category of family and thus community which we do not choose but to which we belong by nature. The reference to brotherhood thus allows us to discern and acknowledge the necessity of various communities in human life, beginning with natural communities, thus avoiding reducing a human being to an individual.

It is worth emphasizing that the sketched anthropological assumptions are vital for the existence of human rights which are universal, inviolable and non-transferrable. Note that the rejection of the axiom of dignity and the assumption concerning the reason’s ability of moral cognition would undermine the foundations of the idea of universalism and non-transferability of rights. On the other hand, if we rejected the conviction that human beings are not autonomous individuals, but social beings, we would question the inherent right to conclude marriage and to start the family as well as to social rights in general. In this sense, so to say, material or content elements of the anthropology of the UDHR (dignity, reason, conscience, brotherhood) seem to be more significant anthropologically than the usually quoted freedom and equality. Those two features of the human existence quoted in the Declaration, when analyzed from the theoretical

66 Arystoteles. *Polityka*, 1253a, translated by L. Piotrowicz, PWN, Warszawa 2008, 28.

67 As observed by Tomasz Gałkowski CP, “[...] such formulation was greatly influenced by strong ties of the chief editor of the Declaration with the then papal nuncio in France, G. Roncalli, who then became Pope John XXIII and who, as Cassin writes, greatly inspired the content of the Declaration”. The same author (2008). *Obowiązki człowieka w “Powszechnej Deklaracji Praw Człowieka” oraz w społecznym nauczaniu Kościoła*, “Seminare” 25, 146.

point, just seem to be a function of the content assumptions, especially of the inherent human dignity.

Summarizing, one can say that anthropology of human rights can be perceived, in accordance to what was discussed in the first part, as a constrained anthropology. Understanding the rights as an effect of the recognition of what belongs to human goodness is connected with the knowledge of human nature and connected with clear definitions of borders, which shape the space of what belongs to human dignity and what does not. An analogous conviction can be found in the Universal Declaration of Human Rights, which defines the moral (related to goodness) borders of human sovereignty and, in consequence, also sovereignty (arbitrariness) of the political power.

## ***2.2. Anthropology and the structure of human rights***

Due to the nature of dignity covering the whole human existence and the dynamism of this category, it is vital not only for the essence but also for the systematic order or structure of human rights. As Wiktor Osiatyński observed, “it is the relationship with dignity that gives deeper sense to the classification of rights, in which every category of rights serves dignity in a different way”<sup>68</sup>, and also justifies the indivisibility “of all human rights simply because the elimination of any one of them would constitute a threat to human dignity”<sup>69</sup>.

### ***2.2.1. The right to life***

Although inherent dignity, according to international human rights provisions, is the source of each human right, it is possible to distinguish some rights that are particularly strongly or directly connected with the idea of human dignity. Those rights are called fundamental or basic rights<sup>70</sup>, “the use of which is of fundamental significance to using all other rights”<sup>71</sup>.

68 Osiatyński, W. *Prawa człowieka i ich granice*, 295. According to the quoted author “civil freedoms protect the autonomy of an individual and forbid the state to interfere in the area of his/her individual freedom [...] political rights provide insight into community matters and allow to participate in taking joint decisions [...] economic and social rights provide an individual with the minimum economic security [...] clear the path to dignity and more favorable conditions for an individual’s development, allowed by civil freedoms” (Ibid., 295-298).

69 Ibid., 298.

70 See for example Kuźniar, R. (2004). *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*. Warszawa. Scholar.

71 Freeman, M. *Prawa człowieka...*, 87. This idea is a certain proposal for solving the

They become particularly visible when we try to understand the special status of the right to life, placed “at the top of the catalogue of an individual’s rights –both in international legal acts and in constitutions of particular countries–”<sup>72</sup>. If, as it is emphasized in literature, the right to life is a special right<sup>73</sup>, it is due not only to “pragmatic” reasons, namely “its observation is the first and the basic condition for the existence of other laws and freedoms”<sup>74</sup>, but also because it expresses one of the main values of democratic societies<sup>75</sup>: the conviction that a human being has such dignity that makes his life unique, irreplaceable and non-exchangeable value<sup>76</sup>. The rejection of the human dignity logic undermines the sense of protecting the life of every person<sup>77</sup>.

In the European context, only the paradigm of dignity allows us to understand why there is article 2° of the ECHR, stating that “the right to life of *every human being* is protected by the act of law” and why it translates in to a very wide range of obligations on the state side. As observed by Marek Nowicki, based on the judgments of the European Court of Human Rights which specify the minimal scope of protecting this law in Europe, this article formulates a huge positive obligation to “take appropriate steps to protect life”<sup>78</sup>. And thus, *inter alia*, protection against acts of violence from other persons or oneself (in case of suicides), taking preventive opera-

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situations of the human rights conflict. According to this idea “in order to protect fundamental rights, some other rights can be violated, if it is necessary, but fundamental rights cannot be violated to protect other rights” (Ibid.).

72 Szymaniak, A. “Podstawowe prawa jednostki i mechanizmy ich ochrony”, in: L. Koba, W. Waclawczyk, *Prawa człowieka*, 172.

73 See for example Nowicki, M. *Wokół Konwencji Europejskiej*, 155.

74 Nowicki, M. *Wokół Konwencji Europejskiej*, 155.

75 Ibid.

76 For example, following Peter Singer’s works, it would only belong to self-aware persons. The protection of human life only because they are human, without reference to dignity, becomes in this approach a morally reprehensible deed, recalling racist tendencies. As pointed out by Singer, who generally objects the paradigm of human dignity, even though “the view that human life has exceptional value is deeply rooted in our society and sealed by the law” [the same author (2003). *Etyka praktyczna*. Translated by Agata Sagan. Warszawa. KiW, 90], it is totally unjustified. That is because “giving preferences to the life of a being only because this being is a representative of our species, would put us in a position of racists, who give preferences to those who represent their race”, *ibid.*, 93.

77 According to Singer, who in his writing expresses the nihilistic wish to reevaluate values, “giving preferences to the life of a being only because this being is a representative of our species, would put us in a position of racists, who give preferences to those who represent their race”, *ibid.*, 93.

78 It should be noted that it thus exceeds the minimum standard stipulated in the UN system (Covenants), within which generally negative obligations are formulated. See Szymaniak, A. *Podstawowe prawa...*, 172-173.

tional measures to protect the life of a person whose life is in danger, access to information on threats to life (for example in industrial work) or conducting court investigation in case of every death, etc.<sup>79</sup>. Consequently, one can appeal to the Court “due to the fact that the authorities did not fulfill their obligation to protect life, that they knew or should have known was in the real and direct risk and did not take action within their prerogatives, which could have been reasonably expected from them”<sup>80</sup>. Human life, as the only being in the world endowed with special, inherent dignity, requires absolute and multidimensional protection.

Since the issue of protecting human life is the subject of a fundamental dispute these days, it is worth explaining how it should be perceived in the light of human rights. Since at the time of writing the Declaration the issue of abortion was not a social subject yet, we do not have an explicit answer in UDHR as to the moment from which human life must be protected. There are no doubts, however, as to the negative answer, and therefore, since the Declaration “does not consider the child’s birth to be the dividing line marking the beginning of a human being”<sup>81</sup>, it does not thus exclude protecting life in the prenatal stage. In order to grasp the approach typical for the tradition of human rights we need to go beyond the strict legal context and grasp, as Zbigniew Stawrowski defines it, its spirit<sup>82</sup>. Taking into account the context in which the Declaration was written, as its Preamble, created by Rene Cassin, was a specific “combination of the Declaration from 1789 and the lesson of the Holocaust”<sup>83</sup>, there cannot be any doubts as to the fact that the aim of its authors was to secure human dignity in every possible dimension. It seems that at the beginning of the 1950s the issue of human life in the prenatal stage was clearly unambiguous. We should note that also ECHR, written in 1950, does not specify this issue, whereas the Declaration of the Rights of the Child from 1959 considers it obvious that the child “needs special safeguards and care, including appropriate legal protection, before as well as after the birth”<sup>84</sup>. This logic seems to be confirmed by the American Convention on Human Rights, also referring to the UDHR, but written at the dawn of the 1970s, which clearly states that

79 Nowicki, M. *Wokół Konwencji*, 156-176.

80 *Ibid.*, 158.

81 Piechowiak, M. *Filozofia praw człowieka*, 84. The author explains it earlier, see 82-83.

82 Zbigniew Stawrowski, *Z. Aksjologia i duch Konstytucji III Rzeczypospolitej*, “Nowa Konfederacja”, No 37/2014, <http://www.nowakonfederacja.pl/stawrowski-aksjologia-i-duch-konstytucji-iii-rzeczypospolitej/> [12-9-2014].

83 Davidson, A. *The Immutable*, 462.

84 UN General Assembly, *Declaration of Rights of the Child*, 20. November 1959, A/RES.1386(XIV), available at: <https://www.refworld.org/docid/3ae6b38e3.html> [accessed 26 August 2019].

the right to life “shall be protected by law and, in general, from the moment of conception”<sup>85</sup>.

Also the context of the discussion held in the 1980s on the UN forum on performing death penalty, within which “there were no objections as to the postulate of refraining from performing death penalties on pregnant women, due to the obvious reason –the interest of the unborn child–”<sup>86</sup>, and the Convention on the Rights of the Child, adopted at the beginning of the 1990s, quoting the above sentence from the Declaration of the Rights of the Child, obliging us to acknowledge that “although acts of international law do not specify explicitly that we should identify a human being with every human being from the beginning of their existence, but taking into account the adopted fundamental solutions concerning dignity, it is difficult to adopt other possibilities without facing the risk of being inconsistent”<sup>87</sup>.

### 2.2.2. *The right to marriage and family*

While the right to life is at the foundation of all other individual rights, social and community rights in the Universal Declaration of Human Rights are based on the right to marriage and family<sup>88</sup>. In the UDHR structure it is reflected by the fact that a series of articles on social rights opens with article 16 devoted to marriage and family. We can read in it:

“1. Men and women of full age, without any limitations due to race, nationality or religion, have the right to marry and to found a family [...].

3. The family is the natural and the fundamental group unit of the society and is entitled to protection by society and the State”<sup>89</sup>.

85 *American Convention On Human Rights*, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, available at: <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> [accessed 26 August 2019]. Universal Declaration of Human Rights f values.ned a subject with a specific onthology along withction. before dzieci potrafią

86 Szymaniak, A. *Podstawowe prawa...*, 174.

87 Piechowiak, M. *Filozofia...*, 84.

88 As observed by Wiktor Osiatyński, the Universal Declaration of Human Rights (UDHR) shows “a strong community feature” (*Prawa człowieka i ich granice...*, 264). komentatorów uznającychchoralnegodkreślają komentatorzy, logii.ówni w swoich talentach, możliwościach czy kompetencjach.wokół )

89 United Nations General Assembly, *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, A (General Assembly resolution 217 A), available at: <https://www.un.org/en/universal-declaration-human-rights/> [accessed 26 August 2019] Universal Declaration of Human Rights f values.ned a subject with a specific onthology along withction. before dzieci potrafią.

In the light of article 16, which is reflected in the European Convention on Human Rights<sup>90</sup> and many other international law and constitution documents, it is obvious that the whole concept of a person as a social being (and the idea of community laws), expressed as early as in article 1<sup>o</sup> of the UDHR is anchored in the recognition of the fundamental role of a monogamy marriage and a family built on its basis as the first community. Only in the family context one can understand the sense of the brotherhood quoted in article 1<sup>o</sup>. It reflects the conviction that a human being is not, by their nature, “a lonely island”, to use Merton’s famous phrase. The concept of brotherhood does not make any sense outside the category of a family –the community one doesn’t choose, to which belongs by nature.

According to the above-quoted article, marriage and family, understood as the fundamental group unit of the society, is a natural environment in which humans live. On one hand it is the key determinant of personal development. The contemporary sociology distinguishes several functions of the family: material-economic, caring-protecting, procreation, sexual, legalizing-controlling, socializing, stratifying, cultural, religious, recreational-social, emotional-expressive<sup>91</sup>. Their number and character point at the fundamental significance of marriage and family for the integral development of human beings. On the other hand, it should be noted that marriage and family in human rights are perceived as a natural stage in human life<sup>92</sup>. Being a natural and fundamental group unit of the society, it is not just “one of life options”, but a form of life stemming from human nature, fundamental and therefore guaranteed by laws. This concerns both the rights of children<sup>93</sup>, and the rights of adults, who “having become of age, are entitled to marry”<sup>94</sup>.

It should be added that it is no coincidence that the Declaration presents the monogamy marriage as the foundation of the family. The complementariness of the sexes is, according to the Universal Declaration and the European Convention, an objective condition to be fulfilled by the marriage relationship. In the concept of a human being presented here, the sex

90 ECHR in article 12 confirms the inherent right to marry, saying that: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”, and supplements it with the guarantees of respecting family life in article 8<sup>o</sup>.

91 See Tyszka, Z. (1997). “Struktura i funkcja rodziny oraz świadomość rodzinna”. In: Tyszka, Z; Wachowiak, A. *Podstawowe pojęcia i zagadnienia socjologii rodziny*. Poznań.

92 See Balicki, J. “Rodzina”. In: Szlachta, B. *Słownik społeczny...*, 1119.

93 For example, the Polish family law does not allow to adjudge divorce “if as a result of it the well-being of minor children of the spouses suffered” (article 10 of the Family and Guardianship Code).

94 Article 16, *Universal Declaration...*

is not something constructed, but inborn and anthropologically significant. Consequently, the natural sexual desire to a person of an opposite sex (a man to a woman and a woman to a man) is not, according to the Declaration, an act of preference or orientation, but constitutes an anthropological fact which has its own moral (and thus related to the objective well-being of a human being) and social significance, which requires positive legal protection.

Neither the Universal Declaration of Human Rights nor the European Convention protect sexuality itself or the possibility of its expression or exercise<sup>95</sup>, but they do protect the marriage of a man and a woman. The logic behind this solution is based on the conviction that the spiritual and the bodily dimensions of a human being cannot be separated<sup>96</sup>. Marriage, as the spiritual and bodily relationship, is perceived here as the necessary goodness for the development of a man and a woman in their humanity, as well as for the development of their children (family). Being the key element guaranteeing life conditions suitable for human dignity, marriage and family remains protected. The society –just as the natural community– appears only as “an extension” of marriage and family, which is deemed to be the fundamental group unit of the society. Consequently, the harmony of sexes is perceived here as the foundation of the harmony of the society.

### **3. The anthropology of the fundamental rights of the European Union**

In order to discover the anthropological vision lying at the foundations of the EU axiology one needs to start with three provisions of the primary law referring to the issue of values and grasp their meta-axiological foundations. In case of international and domestic protection of human rights –as indicated above– inherent dignity is the key meta-axiological category, sending us ultimately to the constrained anthropological vision. The central issue is whether the EU, when defining the catalogue of its values at the beginning of the 21<sup>st</sup> century, when tensions concerning fundamental values were very advanced, adopts this classic position or tries to go its own way. And, if the second option is chosen, where will this road lead the EU?

<sup>95</sup> Therefore, for example, prostitution is not the human right.

<sup>96</sup> See Wojtyła, K. K. (1978). *Antropologia encykliki Humanae vitae*, “Analecta Cracoviensa”, X, 16.

### 3.1. *The anthropology of the Charter of Fundamental Rights*

The fundamental values of the European Union, lying at the foundations on which the European political structure rests, were first determined *expressis verbis* in the second motive in the preamble to the Charter of Fundamental Rights. It claims: “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law”. The fact that these are fundamental values for the axiological system of the Union is emphasized by the fact the rights declared in the Charter are tied in the document structure with subsequent values<sup>97</sup>. It also demonstrates the awareness of how the above values are anthropologically rooted.

As some commentators emphasize, in the presentation of the values in the Charter one can find elements analogous to those from article 1° of the Universal Declaration of Human Rights from 1948, which is an undisputable cornerstone of the post-war concept of human rights. This is true inasmuch as the categories of equality, freedom and dignity explicitly appear both in the Declaration and in the Chart, whereas the declaration of brotherhood is reflected in the category of solidarity<sup>98</sup>. The key categories of reason and conscience cause more problems, though.

It can be claimed that the recognition of the role of conscience can be read from the awareness of moral heritage<sup>99</sup>. The reference to morality here would be –analogically, as in case of solidarity and brotherhood– another form of expressing the same content. The above position, however, is open to criticism. As mentioned above, the category of conscience may evoke various phenomena: ranging from the emotional and subjective human senses to reasonable judgment, related to cognition and relating the act to objective truth. In the text of the Universal Declaration of Human Rights it is possible to discover the legally adopted meaning of conscience thanks to the analysis of the original versions in different languages<sup>100</sup>. This approach, unfortunately, does not work in case of the “moral heritage” of the Charter. This heritage may cover both morality of Rousseau and saint Thomas and it is impossible to find out what the author really meant. In addition, Christian heritage –which could be some sort of a key to the core pool of values–

97 The next chapters of the Chart are titled: I – Dignity, II – Freedoms, III – Equality, IV – Solidarity, V- Citizens’ Rights, VI – Justice.

98 Piechowiak, M. *Aksjologiczne podstawy...*, 16.

99 *Ibid.*

100 Piechowiak, M. *Filozofia praw...*, 98.

was only mentioned as religious heritage<sup>101</sup>, and only in the German version of the Charter<sup>102</sup>. In this context a more justified position seems to be the one adopted by commentators who claim that particular language versions constitute different solutions to the same problem and convey significantly different content<sup>103</sup>. This approach seems justified, especially when we take into account the origins of the solution adopted in the Charter. The starting point (the initial proposal) was the reference to God and to Christian heritage. The direction in which the document evolved, ending with the reference to “spiritual heritage”, clearly indicates the intentions of the document authors who wanted to minimize the presence of the religious dimension and thus to minimize the reference point for understanding values in the Charter<sup>104</sup>.

The issue of conscience is not the only unclear issue in the Charter. Dignity also poses a certain problem. In the Charter “dignity is not defined as inherent as it is in other documents of international law and others”<sup>105</sup>. In Explanations relating to the Charter, inherence appears only in the quotation from the UDHR. However, the Explanations do not prove that this position is shared by the authors of the Charter. It is rather a reference to a historically significant text: the first declaration on the superiority of human dignity; the narration on dignity of that time. In the EU narration the inherence of dignity disappears. This is troublesome since –as discussed in detail above– it is this “inherence that indicates the independence of dignity (and resulting rights) from any features or actions, whether taken by other people or the subject of dignity himself/herself, it points at non-transferability of dignity”<sup>106</sup>.

One can obviously ignore this disappearance of the inherence of human dignity. Quoted above scientist, Marek Piechowiak, claims that “we can assume that the recognition of universal dignity and thus recognition

101 The initiator of the reference to God and Christian tradition in the Convent was Ingo Friedrich, the then deputy chairman of the European Parliament, representing the European People’s Party (Christian Democrats). Finally, “the wordings proposed in the working group were rejected and a ‘weaker’ formula, including reference to ‘religious heritage’, was adopted”. Piechowiak, M. *Aksjologiczne podstawy...*, 14.

102 It is particularly important as the German version of the text stands out from other language versions, even though during the negotiations between Roman Herzog and Jacques Chirac it was agreed that the French *spirituel* reflects the content of the German *geistig-religiös*. Ultimately, however, there are no doubts that it was *spirituel* that became the reference category for most language versions of the Charter. See Piechowiak, M. *Aksjologiczne podstawy...*, 14.

103 Hambura, S.; Muszyński, M. *W jakim języku o Bogu*, “Rzeczpospolita”, 5-4-2002.

104 This is also noticed by Marek Piechowiak. See *Aksjologiczne podstawy...*, 15.

105 Piechowiak, M. *Aksjologiczne...*, 20.

106 *Ibid.*

that is belongs to everyone, regardless of the features and circumstances of their lives, generally expresses the same truths as the recognition of inherence”<sup>107</sup>. This thesis, however, is far from being obvious. Universality may express various contents. The sense ascribed to universality in international law stems exactly from the primacy of inherence of dignity. By removing it we also remove the key to determining its proper interpretation. As noticed by Piotr Mazurkiewicz, in this situation universality can be understood differently: “[...] although the constitutions of the European states speak of absolute and unquestionable values, this is nothing more than just our own, European method of narration. The rights of a human being are ‘inviolable and non-transferable’, but only in our European ‘valley’. In the neighboring ‘valley’, on the other side of the hill, people had a different history and concluded a different ethical contract which is ‘for them’ as good as ours is ‘for us’”<sup>108</sup>. It is thus “our” universality, historically and culturally rooted, not universality in the strong sense of this word. If one adopted this interpretation, it seems justified to remove conscience and reason from the anthropological concept of the Charter. As mentioned above, it is those two elements which determine the possibility of identical reading and interpreting human rights all over the world. It is the community of nature, endowed with conscience and reason, that allows to talk about universal rights, independent from features of a particular person or historical and cultural context; it allows to discern inherent dignity and to specify its basic requirements. The Charter is, at least, inconsistent in acknowledging this nature.

Taking into account the above observations it seems justified to claim that the axiological foundations of the Charter leave its reader in a situation of anthropological confusion. Although the Charter refers to anthropological categories known from the UDHR, it does so selectively. Using the economic terminology, even if it may seem that the “majority share” remains the same, the missing elements are of key importance for the possibility of upholding the anthropological position known from international law and constitutions. In the Charter it is –as it seems– not identical with it, but rather similar to it.

### ***3.2. The Treaty on the European Union***

Another step in defining the EU axiology and anthropology was the Treaty on the European Union in its Lisbon version. There seem to be no

<sup>107</sup> *Ibíd.*

<sup>108</sup> Mazurkiewicz, P. *Wokół Karty...*, 29.

doubts that it strengthened the axiological anchoring of the Union from the Charter. As an inspiration to establish the Union, the TEU preamble recalls the heritage of Europe, connected with universal and thus fundamental values, which constitute “inviolable and non-transferable human rights”, as well as freedom, democracy, equality and the rule of law. These values, this time as principles (except for equality) are quoted nearly in full once again in the fourth section of the preamble, as particularly important for the EU structure and democracy is quoted once again in section seven, with reference to EU institutions. Thus the preamble to the TEU emphasizes fundamental and democratic values. Moreover, sections five and six bring numerous social values (social rights, solidarity), whereas section eight presents economic (economic coherence, progress) and ecological values (sustainable development). In addition, the quoted principle of subsidiarity may be seen as a reference to individual values.

The catalogue of the EU values is then found in article 2° of the TEU. We read there that “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. The values mentioned in the preamble are supplemented here by human dignity and –though in a form of a description of the society model– pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women. The axiological issue is then developed in article 3° of the TEU, which defines various economic (such as sustainable development, etc.), social (for example social progress, solidarity between generations), ecological (for example high level of protection and improvement of the quality of natural environment), cultural (for example safeguarding cultural heritage) and global values (sustainable development of the Earth).

Even the superficial sketch of the axiological landscape of the EU reveals a wide range of values in the EU legal solutions –from fundamental values, through democratic, social, individual, ecological to economic values. There are no doubts therefore as to the fact that the EU axiology is currently much more complex than in previous versions of the Treaties. It seems particularly strengthened in the space of fundamental (dignity, equality, freedom) and democratic values (pluralism, democracy, the rule of law). In this light the EU looks almost like a human rights organization, although –which is worth emphasizing– it is not such an organization<sup>109</sup>.

109 Jeżewski, M. (2009). “Karta Praw Podstawowych w Traktacie Reformującym Unii Europejskiej”. In: Mik, C.; Gałka, K. [editors], *Prawa podstawowe w prawie i praktyce Unii*

Acknowledging the legitimacy of the discussion on strengthening the axiological anchoring of the Union, one needs to point out that it is hard to find any internal logic in the set of the EU values. Analyzed globally, the Union axiology included in the TEU seems to lack coherence. It fully repeats the mistakes of the Treaty establishing a Constitution for Europe, within which the canon of the European values was “neither adequate nor complete”<sup>110</sup>.

The noticeable lack of a logical system of values may result from the changes in axiological foundations made in the Treaty much more clearly than in the Charter. The Charter of Fundamental Rights, as already mentioned, quotes “human dignity” as the fundamental value, basing on it the whole structure of values and related rights. Placing human dignity in the center of its axiological picture –remembering all the objections indicated above– establishes a relatively clear hierarchy of values and relations between them and human rights. One will not find it in the Treaty on the EU.

It seems meaningful that solidarity and justice were excluded from the catalogue of values (mentioned in article 2<sup>o</sup>) on which the Union is based. It is surprising as both these values are included in the analogous catalogue of the Charter of Fundamental Rights. As Anne-Laure Chavier explains, the idea was to have the values which were undisputable: “[...] the editors could not list as fundamental values those which, from the legal point of view, are controversial [...] This explains why such terms as ‘pluralism, tolerance, justice’, etc., were added to describe the model of the European society but they were not classified directly as ‘values’”<sup>111</sup>. The self-evident nature of the logic of compromise, within which “editors” determine the catalogue of European values seems overwhelming. Consequently, both justice and solidarity may be excluded from this catalogue if they arouse controversies. The fact that the exclusion of solidarity means breaking off with the current anthropological approach, is of no significance here.

It has no significance since the presentation of the values on which the Union “is based”, provided in article 2<sup>o</sup> of the TEU, does not have ontological nature. In the above-quoted Article, the Union is based on the values listed

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*Europejskiej*. Toruń, 22-23. The Union does not have competencies in protecting these rights. They constitute (only) a specific border and principle of activity of European institutions and the Member States in shaping and implementing the community law.

110 Juros, H. (2004). “Problem wartości w preambule Traktatu Konstytucyjnego Unii Europejskiej”. In: K. Karbowska, A. Wnukowska. *Ustrojowo-polityczny wymiar Traktatu Konstytucyjnego Unii Europejskiej*. Pułtusk. WSH, 40.

111 Chavier, A. L. *Les valeurs de l'Union dans la Constitution européenne*. Fondation Robert Schuman, Le supplement de la Lettre no 185, 25-10-2004 quoted after: Mazurkiewicz, P. (2005). “Wspólne wartości w Traktacie ustanawiających Konstytucję dla Europy”. In: Mazurkiewicz, P.; Sowiński, S. [editors]. *Religia-Tożsamość-Europa*. Wrocław. Ossolineum, 221.

there not because they are based on human nature and related universalism, but because they are shared by all Member States<sup>112</sup>. The values are not acknowledged due to human cognition, but because of the current social and cultural situation. Whereas the Charter could be treated as a document referring to the metaphysics of values, the Treaty clearly breaks off with such tradition of acknowledging values. Values do not stem from learning the truth about our existence, but from the cultural and historical context and arrangements made between people. The metaphysics of values is thus replaced by, so to speak, sociology of values – the criterion determining why a certain value is considered the Union value is not the human cognition, but the social and cultural situation and the will of the member States. In this logic the Treaty editors are indeed authorized to resign from certain values as too controversial ones.

An even clearer declaration in this area can be found in the second motive added to the preamble to the TEU. It states: “Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”. As observed by Marek Piechowiak, “from the perspective of metaphysical decisions, the analyzed section clearly acknowledges cultural relativism. According to the adopted formula, values *stem from* the cultural, religious and humanistic *heritage of Europe*. Since the values themselves, then also their universality is a feature acknowledged due to the development of culture”<sup>113</sup>. Piechowiak points out that “in this perspective the omission of dignity is consistent, as it is understood as a source of law which is inherent and independent from culture”<sup>114</sup>. We should bear in mind that the preamble to the TEU does not list dignity as the fundamental value – it is done only in article 2<sup>o</sup>, but in the context of the values accepted “by Member States”. It seems then that “the position adopted in the Treaty can be called consistent contextualism”<sup>115</sup>, no longer based on the conviction that a human being is able to recognize objective, and thus universal, requirements of human dignity.

If one interprets the solutions in the Charter in the light of the solutions adopted in the Treaty of Lisbon, one has to treat them as the first step towards the deontologization of values, so the step of departure from constrained anthropology, related to acknowledgment of objective and cognizable requirements, human nature. If one doesn't share this opinion, one must

112 More on this subject in: priest Mazurkiewicz, P. *Wspólne wartości w Traktacie...*

113 Piechowiak, M. (2012). “Karta Praw Podstawowych a tradycyjne wartości”. In: Gierycz, M.; Grosfeld, J. [editors]. *Zmagania początku tysiąclecia*. Warszawa. Łośgraf, 202.

114 Piechowiak, M. *Karta Praw Podstawowych a...*, 202.

115 Mazurkiewicz, P. *Wokół Karty...*, 29.

acknowledge that two separate anthropological positions are presented in the EU's primary law. Next to constrained anthropology, perceived a man as a subject with a specific ontology along with constraints it entails, one discovers unconstrained anthropology, which perceived a man as a source and creator of values<sup>116</sup>.

## 4. The EU's anthropology and the right to life and marriage

The Charter of Fundamental Rights attached to the Treaty on the EU clearly shows that the deontologization of values does not have to change the content of human rights. The majority of the proclaimed rights do not arouse any doubts as to their anchoring in the European tradition of thought on human dignity and human rights, introducing "certain changes which result from the better understanding of human rights than in the past, greater specification of specific provisions or the appearance of new challenges"<sup>117</sup>. Nevertheless, as the commentators point out, at least in three cases "the real reason for change is [...] different"<sup>118</sup>. All these cases are connected with two rights that are discussed here.

### 4.1. *The right to life*

The first problem concerns the structure of the right to life. Article 2<sup>o</sup> of the CFR states that "everyone has the right to life". It is based on article 2<sup>o</sup> of the ECHR, which states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law". It is not difficult to see the difference between these two articles. The article of the Charter does not determine the scope of obligatory protection of this law, save for one exception, namely the death penalty –which is forbidden by law. Except for this case the scope of life protection remains unspecified. It is paradoxical, since in the past –in the

116 More about the theory of constrained and unconstrained anthropology is to be found in: Gierycz, M. (2017). *Europejski spór o człowieka. Studium z antropologii politycznej*. Warszawa. UKSW.

117 *Ibid.*, 30.

118 Mazurkiewicz, P. *Wokół Karty...*, 30. See also Zoll, A. (2016). "Prawa człowieka: źródła i zakres w ujęciu chrześcijańskim i w Unii Europejskiej". In: *Godność-wolność-prawa człowieka*. Gliwice. Wokół nas, 42-52.

1950 version of the European Convention— death penalty was also an exception. But at that time it was the only exception excluded from the obligatory protection of life.

Taking into account the fact that “the dispute held currently in the European civilization does not concern the recognition of the right to life but the scope of its obligatory protection by the state/European Union”<sup>119</sup>, the solution adopted in the CFR, avoiding determining the scope of legal protection of the right to life can be interpreted, as some commentators do, as taking a specific position in the dispute, namely recognizing that “the obligation to protect life, vested upon public authority, does include the situations related to abortion or euthanasia”<sup>120</sup>. In any case, there are no doubts as to the fact that the reaction of Charter editors on “changes to the society [...] and scientific and technological development” was not to strengthen the dignity-related guarantee of protecting the right to life in situation caused by such changes. On the contrary, the provisions of the Charter “do not settle the most pressing European problems concerning the scope of life protection”<sup>121</sup>. In the context of biomedicine “there appear two fundamental questions concerning the status of human life before birth and also the question concerning the admissibility of euthanasia”<sup>122</sup>. To put its straight-forward, “the Charter of Fundamental Rights does not settle the issues of admissibility of abortion, tests on embryos or embryo stem cells. The wording of article 2° [...] does not exclude unambiguously the admissibility of euthanasia, including active euthanasia”<sup>123</sup>, allowing for considering within its context even “the existence of the right to die”, to which neither the biomedical convention nor the ECHR are authorized<sup>124</sup>. The adopted structure of the right to life in the CFR is, so to speak, maximally open, which in the present cultural climate facilitates the narrowing interpretations of the right to life, not excluding the “permissive interpretation towards the new phenomena resulting from the progress of science”<sup>125</sup>.

The anthropological logic behind article 2° seems to be fully revealed in the next, third article of the CFR. It declares that everyone has the right to respect for his or her physical and mental integrity<sup>126</sup>. Specifying this

119 Ibid., 30.

120 Ibid.

121 Zoll, A. *Prawa człowieka...*, 48.

122 Grzymkowska, M. (2009). *Standardy bioetyczne w prawie europejskim*. Warszawa. Wolter Kluwers, 238.

123 Ibid.

124 Ibid., 239.

125 Ibid.

126 Article 3°, *Charter of Fundamental Rights...*

right in the context of biology and medicine, the CFR forbids “reproductive cloning”<sup>127</sup>. It refers in this point to the Convention on human rights and biomedicine. However, the Convention clearly states that “any interference aimed at creating a human being genetically identical with another living or dead human person is forbidden”. Nonetheless, the Union forbids only one form of cloning. This results from the fact that “in some member states of the EU cloning human beings, or even creating human-animal hybrids is –under certain conditions– allowed”<sup>128</sup>. The desire to avoid disputes within the Union accounted for the fact that in the area of human dignity authors “resigned from opposing the things that clearly violate this dignity”<sup>129</sup>, even if Explanations to the Charter emphasize that the Charter “does not in any way prevent law makers from introducing bans on other forms of cloning”<sup>130</sup>.

The two above articles clearly indicate that the logic adopted by the authors of the Charter, though declaring the superior value of human dignity, seems, in its content, to be dodging the consistent protection of this dignity in places where civilization development puts it to the test. This is consistent with the meta-axiological orientation of the Union’s axiology, which is not rooted in human nature that is possible to learn objectively, but in the cultural and social contextualism. As a result, the declared logic of the metaphysics of values and inherent rights loses with the logic of the sociology of values, implicitly moving towards unconstrained anthropology.

#### ***4.2. The right to marry and found a family***

The anthropological change in the EU law is even more clearly manifested in Article 9 of the CFR, concerning the guarantee of the right to marry and to found a family. It states: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”<sup>131</sup>. Looking at it from the perspective of the philosophy of human rights, this article is a real puzzle. The Charter subjects the protected good to the decision of the national law maker. This definitely goes beyond the logic of the rights resulting from human nature. To put it straight: in the field of human rights, the idea that a particular good should not be protected, but its content should depend on the decision

127 *Ibid.*

128 Mazurkiewicz, P. *Wokół...*, 31.

129 *Ibid.*

130 *Explanations relating to the Charter of Fundamental Rights*, Official Journal of the European Union C 303 from 14-12-2007.

131 Article 9°, *Charter of Fundamental Rights...*

of the law maker, is beyond any comprehension. If the interest is inherent, it cannot depend on the law maker. If it depends on the law makers, it loses its inherent nature. As an attempt at breaking this deadlock, the lack of the legal definition of marriage in the article 9° of CFR was compensated with a definition presented in *Explanations*, which –according to its the authors– provide the key to the interpretation of the Charter. Let us quote them in full:

“This article is based on article 12 of the ECHR, which reads as follows: ‘Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right’. The wording of the Article has been modernized to cover cases in which national legislation recognizes arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides”<sup>132</sup>.

The concept of “modernized wording” and the “similarity” of this article to article 12 of the ECHR can sound somehow mysterious. If we apply the anthropological analysis to what has been modernized, we are faced with a totally new philosophy of human beings and the institutions of marriage and family.

As stated in the Explanations, article 9° “neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex”. To put it differently, it allows the homosexual interpretation of a marriage relationship, thus it redefines marriage, so far necessarily related to the logic of complementariness of the sexes. As a result, fundamental rights do not include, for example, the right of a child “to the closest contact in family with a mother and a father, with a woman and a man”<sup>133</sup>. They do not include them, because the sense of common good has been redefined as a result of the anthropological change. In order to fully understand it, one needs to refer to article 21 of the CFR, in which we read: “Any discrimination based on any grounds such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion,

<sup>132</sup> *Explanations...*

<sup>133</sup> Zoll, A. *Prawa człowieka...*, 50. As Andrzej Zoll observes, “[...] the constitutive function of marriage and family, though by no means its exclusive one, is procreation and bringing up the new generation. In the upbringing process each sex plays an important and irreplaceable role. Each child has the right. This right is not guaranteed by article 9° of the Charter”.

membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”<sup>134</sup>.

*Differentia specifica* of this regulation in the context of international and constitutional regulations concerning non-discrimination is to reflect sexual orientation among the features lying at the basis of non-discrimination<sup>135</sup>. There is no coincidence that this category is absent in the previous catalogues of human rights. Within the constrained anthropology, constituting the basis of those catalogues, it is not clear what sexual orientation would be. If this concept denotes natural sexual attraction to the person of the opposite sex (a man to a woman, a woman to a man), the new foundation would not differ from the prohibition of discrimination on the grounds of sex. Its sense is revealed only when we adopt different anthropology in the starting point, according to which a woman’s attractiveness to a man and a man’s attractiveness to a woman has nothing natural in itself, not only in the biological dimension (even though according to representative research, 96-97 % of the population identify with it<sup>136</sup>), but also in the substantial dimension. Quoting the concept of sexual orientation as a variable independent of the category of sex, we make a new division of the human kind. Being a man or a woman seems to have here nothing to do with human sexuality. Such sexuality is determined according to other criteria, allowing to distinguish hetero-, homo-, bi-, trans-, omni-, inter-, poli-, etc. sexual orientations<sup>137</sup>.

It is worth noticing that we can infer from the *Explanations* that it was not the change in the way marriage is perceived, but the change in the perception of a family that brought about the new definition of the right protected by article 9° of the CFR. It concerned “cases in which national legislation recognizes arrangements other than marriage for founding a family”. In fact, the interpretation of a family in the Charter seems to be in line with its understanding, as aptly defined by sociologist Jeffrey Weeks,

134 Article 21, *Charter of Fundamental Rights*.

135 We must agree with the Agency for Fundamental Rights that: it should be emphasized that the Charter of Fundamental Rights of the EU is the first charter of international human rights which includes the concept of “sexual orientation”. Agency for Fundamental Rights (2008). *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States. Part I – Legal Analysis*. Vienna, 10.

136 Chandra, A.; Mosher, W. D. and Copen, C. *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006–2008 National Survey of Family Growth*, “National Health Statistics Reports”, Number 36, March 3, 2011, 28.

137 Australian Human Rights Commission in an entitled *Protection from discrimination on the basis of sexual orientation and sex and/or gender identity* come up with a list of 23 “genders” B. Francis, *Gender bending: let me count the ways*, [http://www.mercatornet.com/articles/view/gender\\_bending\\_let\\_me\\_count\\_the\\_ways/](http://www.mercatornet.com/articles/view/gender_bending_let_me_count_the_ways/) [30-10-2016].

as “family of choice”. Family is no longer necessarily defined here by blood ties, marriage or adoption bonds, but it covers various relations and joint households of autonomous, adult individuals who agree to it and their offspring<sup>138</sup>. The only condition for recognizing them by the Charter is the positive-legal recognition by the Member State. In the above context, the assurance of article 33 that “the family shall enjoy legal, economic and social protection” is slightly embarrassing, as it is not fully clear what entity the law maker has in mind.

Thus although declaratively and conceptually the anthropology of the CFR is similar to the current anthropology expressed in international and constitutional law, it ultimately turns out to be contradictory regarding marriage and family. And this is by no means a trivial point. As mentioned earlier, it was the family that in the UDHR founded a human being as a social being, allowing us to avoid the logic of individualism and collectivism. In the light of the CFR a human being may be generally understood as a consistent individual. Admittedly, we are members of various groups, but these are instrumental groups or we belong to them due to natural (biological) necessity, behind which there is no moral or anthropological content<sup>139</sup>. This is unambiguously indicated by the fact of placing the right to marry and found a family in the “Freedom” title. The marriage of a man and a woman, being the foundation of a family, ceased here to be a natural (in the moral sense) and basic group unit of the society. On the contrary, it becomes “one of life options”, but no longer a form of life resulting from human nature.

## 5. Conclusions

The anthropological outline discovered in the primary law of the EU causes certain confusion. On the one hand, especially in the dimension of the applied concepts, the position included in it refers to constrained anthropology, implying that the rights are to protect the good characteristic of human nature. On the other hand, however, the in-depth analysis of both anthro-

138 Himmelfarb, G. (2007). *Jeden naród, dwie kultury*. Warszawa. WAIp, 69.

139 By the way, as early as in the 1980s Joan Aldous and Wilfrid Dumon pointed at the different dynamics of family policy in the USA and Europe. Whereas in Europe it was directed at individuals, involved in family roles, in the USA this policy was directed at the well-being of the whole group. See Aldous, J.; Dumon, W. (1980). “European Union and United States perspectives on family policy: summing up”. In: the same authors [editors]. *The politics and programs of family policy: United States and European perspectives*. Lovain. Leuven University Press, 253-289.

pological assumptions of the Charter and the sense of the rights relating to life and family indicates that the EU refers to unconstrained anthropology, in which a human being is the creator of values and a self-creator.

A fundamental question is whether it is possible for two anthropological positions to “co-exist” within one legal system.

The answer can be found in the recent decision of the EU Court of Justice concerning the Coman case. The Court stated in it that “Although the Member States have the freedom or not to authorize marriage between persons of the same sex, they may not obstruct the freedom of residence of an EU citizen by refusing to grant his same-sex spouse, a national of a country that is not an EU Member State, a derived right of residence in their territory”<sup>140</sup>. The Court on one hand (theoretically) left the freedom to determine the marriage issue to Member States, but on the other hand (practically) favored the new “modernized” definition of marriage, stating that the concept of a “spouse” in the understanding of the secondary EU law “is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned”<sup>141</sup>.

This recent judgment of the EU Court of Justice precisely reflects the logic of the Charter. The Charter does not negate the possibility of recognizing the monogamy relationship as a marriage. Nevertheless, in view of article 21 and Explanations to article 9<sup>o</sup>, it is hard to consider the situation in which same-sex relations do not have the same status as monogamy marriage as a desirable. One can raise a question if excluding same-sex marriage meets the logic of EU’s fundamental rights. Such exclusion, one can say, ultimately constrains human freedom, which is –according to the CFR– manifested in the marriage; such exclusion seems to be also close to the discrimination on the ground of the sexual orientation. It can be tolerated due to cultural and social conditions, to which the Treaty relates in its shape of human rights, but it is hard to say that it meets the requirements of, so to say, modernized understanding of human dignity. One can clearly see here that the co-existence of constrained and unconstrained anthropologies ultimately seems incompatible. The unconstrained logic undermines the foundations of the constrained anthropology. Even if it allows for an absorption of a significant part of constrained anthropological assumptions, they will be deprived of their objective anchoring in the human ontology and thus deprived of durability and certainty.

140 Press release 80/18, Luxembourg 5-6-2018.

141 EU Court of Justice, *Judgment of the Court (Grand Chamber) of 05<sup>th</sup> June 2018 in case number C-673/16...*, point 35.

Taking into account the findings concerning human values and human rights in the EU, one can conclude that the primary law of the EU does not present a coherent anthropological model, but attempts at reflecting two contradictory paradigms. Nevertheless, taking into account the evolution and political impact of these solutions, the anthropology adopted in the EU's law ultimately leans towards unconstrained anthropology, even though it still upholds vital categories and concepts characteristic of the current, constrained anthropology expressed in the Universal Declaration of Human Rights.

There is also one more general observation to be made. As Chantal Delsol notes, “deliberate weakening of the sense of concepts, shifting of the meaning of words used in everyday language lead to the metamorphosis of social morality and mentality. It can be seen in the experience of history, because already the Greeks and the Romans noticed the process of shifting done by disregarding meanings”<sup>142</sup>. The above study leaves no doubt that this process is currently taking place in the European Union's approach to human rights. Along the concepts that question or deny the previous way of thinking about man (like sexual orientation), there are concepts that redefine the so-far obvious categories (marriage or family in the light of article 9° of the CFR). It should be added that other concepts, not discussed here as they are present more in political debate than in the human rights law (like homophobia, transphobia, biphobia), seem to close the discourse, invalidating –as irrational– all the attempts to question the new narrative on values and human rights.

Such a situation demands consideration in the light of Catholic social teaching. Going beyond political and legal analysis towards moral analysis, which takes into account “the will of the Triune God, his plan for humanity, his justice and his mercy”<sup>143</sup>, it could be noted, for example, that the new understanding of right to marry presents morally disordered attitudes<sup>144</sup> as “normal” and “inevitable”<sup>145</sup>. Moreover, through the system of concepts that mutually support one another, European politics seems to exclude the pos-

142 Delsol, Ch. (2016). *Nienawiść do świata. Totalitaryzmy i ponowoczesność*. Trans. Marek Chojnacki. Warsaw. PAX, 72.

143 John Paul II. *Encyclical Letter: Sollicitudo Rei Socialis. Of the Supreme Pontiff John Paul II. To the Bishops, Priests, Religious Families, Sons and Daughters of the Church and All People of Good Will. For the 20th Anniversary of Populorum Progressio*, [https://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_30121987\\_sollicitudo-rei-socialis.html](https://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html) [7-2-2018].

144 *Catechism of the Catholic Church*, n. 2357

145 John Paul II, General audience 25 August 1999, [https://w2.vatican.va/content/john-paul-ii/en/audiences/1999/documents/hf\\_jp-ii\\_aud\\_25081999.html](https://w2.vatican.va/content/john-paul-ii/en/audiences/1999/documents/hf_jp-ii_aud_25081999.html) [7-2-2018].

sibility to argue with an inadequate, unconstrained anthropology, and as a result it could have the potential to destroy consciences, “which become confused and even incapable of discernment”<sup>146</sup>. If it were a case, very serious question on the ground of Catholic social teaching should be asked: aren’t we facing, however it badly sounds in the context of the democratic societies, an establishment of new “structures of sin”?

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146 Ibid.

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