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## The European Union's Axiological Credo and Morality Policy Tensions

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## THE EUROPEAN UNION'S AXIOLOGICAL CREDO AND MORALITY POLICY TENSIONS

**Abstract:** Since the beginning of 21st century we have witnessed growing discussion on fundamental values (life, marriage, sexual education, freedom of conscience) within the European Union (the EU). The aim of this paper is to discuss the interconnection between those morality policy challenges and the EU's axiology. As the EU's value credo was formulated when moral struggles in European countries were already very intensive, the paper analyses if and how European cultural tensions are reflected in the primary law of the EU, as well as how the solutions adopted in the Treaty on the EU work in the political practice. To reveal the context and peculiarity of the solutions adopted within the EU, paper starts with some remarks on the approach to values typical of the constitutional traditions of the European states and shortly presents their reaction to moral challenges of late modernity. The main theoretical thesis presented here is that the current way of axiological thinking presented in the EU does no longer follow the natural law approach but tries to find its own peculiar axiological way by staying open to a different, not rarely opposite, understanding of fundamental moral values. Its peculiarity is to be observed at two levels: the level of axiology (what values are at stake?), as well as at the level of metaaxiology (what is the source of those values?). Analyses of EU policy reveal practical outcomes of such a "relativistic shift" for interpretation of values and morality policy of the EU.

**Keywords:** EU, axiology, metaaxiology, morality policy, human rights, fundamental rights, family, abortion, LGBTI

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It is no accident that the importance of moral debates has been theoretically recognized in last years by the political science research.<sup>1</sup> In European countries, we truly witness a particular “showdown” in arguments on fundamental values<sup>2</sup>: life, marriage, privacy, sexual education, freedom of conscience ... to mention the most “hot topics”. Nearly all of them appear as well, not rarely with much higher emotions, at the EU level. It is enough to recall the most discussed ethical topics of summer to winter 2013 such as “Guidelines of European Union Council (FAC) to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersexes (LGTBI) persons”, Civil initiative “One of us” (focused on the protection of human life in the embryonic stage) or Ms. Edith Estrella’s own-initiative report “on Sexual and Reproductive Health and Rights” (promoting *inter alia* right to abortion and early sexual education) between many others, followed by the Lunacek Report on LGBT Roadmap in January 2014.

The aim of this paper is to discuss the interconnection between those morality policy challenges and EU axiology. As it was formulated at the beginning of 21st century, when European moral struggles reached their peak, it seems to be interesting if/how European cultural tensions are reflected in the primary law of the EU (section 2), as well as if and how the solutions adopted in the TEU work in political practice (section 3). The main theoretical thesis presented here is that the way of axiological thinking presented in the European Union after the Treaty of Lisbon

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<sup>1</sup> Cf. Ch. Knill, *The study of morality policy: analytical implications from a public policy perspective*, Journal of European Public Policy 20(2013)3, 309–317; S. Heichel, Ch. Knill, S. Schmitt, *Public policy meets morality: conceptual and theoretical challenges in the analysis of morality policy change*, Journal of European Public Policy 20(2013)3, 318–334.

<sup>2</sup> M. Safjan, *Recht, Werte und Demokratie*, Christentum – Welt – Politik 3(2009), 17–19.

does no longer follow the natural law approach, but tries to find its own peculiar axiological way by staying open to a different, not rarely opposite, understanding of fundamental moral values. Its peculiarity is to be observed at two levels: the level of axiology (what values are at stake?), as well as at the level of metaaxiology (what is the source of those values?).

To understand rightly the peculiarity of the EU's solutions, it is necessary to present them in a broader European context. Therefore, my paper starts with remarks on the approach to values typical of the constitutional traditions of the European states and it shortly presents their reaction to moral challenges of late modernity (section 1).

## 1. MORAL VALUES AND FOUNDATIONS OF THE STATE

The language of values was developed in the moral reflection of the late 19th century, so in the moment of crisis of classical ontological language. It was created as a kind of defense against positivist's empirical approach to human being as well as against the materialistic one.<sup>3</sup> Philosophers of values were convinced that axiology, which presented for them a clear relation between values and their hierarchy,<sup>4</sup> provided a tool, which could defend societies from the relativism and guarantee the proper orientation of human action. Not going into the details of the different theories of values, it is important to underline that the language of values, in the area of politics, helped to sustain traditional moral convictions,<sup>5</sup> *de facto* equating the value with the good of the person.<sup>6</sup>

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<sup>3</sup> H. Joas, *Powstawanie wartości*, transl. M. Kaczmarczyk, Warszawa 2009, 37.

<sup>4</sup> As Max Scheler explained, higher values are longer-lasting than those located lower, and, above all, they put in order as well as give sense to the values which are on the lower level: this way vital values are the sense of hedonistic values and spiritual values are the sense of moral values. J. Tischner, *Etyka wartości*, Poznań 2001, 41.

<sup>5</sup> As values have an objective character and represent actual qualities, which one can recognize, the discourse on values reaffirmed to a large extent the understanding of moral values rooted in natural law reflection.

<sup>6</sup> Cf. M. Piechowiak, *Filozofia praw człowieka*, KUL, Lublin 1999. It may seem paradoxical, taking into account the fact that separating values and being was perhaps the most important condition for bringing axiology into existence. In reality, it is not

## 1.1. VALUES, STATE AND NATURAL LAW APPROACH

The importance of such an axiological language for constitutional traditions of the European states is self-evident. A characteristic feature even of one of the newest European Constitutions is the conviction that the political order is rooted in the axiological community based on values of truth, good and beauty.<sup>7</sup> As the foundation of those universal values, the Constitution presents the faith in God or other sources (for non-believers), which all are linked with the inherent dignity of the human being. From meta-axiological perspective, similarly like *inter alia* in German or in Irish case,<sup>8</sup> values have here objective status and find its source at the same time in God and in the inherent dignity of the man. Consequently, as Benedict XVI noticed in his speech in the Bundestag, “in the awareness of man’s responsibility before God and

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surprising, though. As Krzysztof Stachowicz notes, it quickly turned out that “value as an epistemological category needs an ontological foundation.” K. Stachowicz, *Problem ugruntowania moralności. Studium z etyki fundamentalnej*, Warszawa 2006, 13. Looking for it, especially after the Second World War, it was hard to ignore the European classical tradition. As a result, for example, *inclinations naturales* that are at the source of natural law are sometimes presented today as “natural remuneration making our axiological choices easier, a kind of moral vectors written in human nature.” W. Chudy, *Osoba ludzka w społeczeństwie*, in: *Katolicka nauka społeczna*, ed. S. Fel, J. Kupny, Katowice 2007, 45.

<sup>7</sup> Cf. Constitution of the Republic of Poland, 2.04.1997, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> [accessed 18 Jul 2013].

<sup>8</sup> Preamble to the Irish Constitution states: “In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred. We, the people of Éire; Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial; Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation; And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution”. The religious source of values is here much strongly presented than in the Polish or German case, nonetheless fundamental values of the political community are also here subordinated to “the dignity and freedom of the individual.”

in the acknowledgment of the inviolable dignity of every single human person there have been established criteria of law.”<sup>9</sup>

In some of the European constitutions, like in Belgium or Austria, metaaxiological issue is not directly addressed<sup>10</sup> and in some other we can find a purely secular grounding of the values. In the latter case, they originate from the inherent human dignity only. The Spanish Constitution, for example, states in art. 10 that the “human dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.” Such a secular approach is characteristic of international regulations as well. From the perspective of the Universal Declaration of Human Rights, human rights derive from the inherent dignity, which is the main value protected under the international legal order.<sup>11</sup>

In the both mentioned types of meta-axiological foundations, which can be named semi-religious and secular, one discovers a similar approach to values that we can call “metaphysical”. In that perspective, “stating that something is right, just, good, etc. is generally regardless of the will of subjects, of concluded agreements or of changeable conditions (including cultural ones), but it is a thing of cognition, above all the cognition of man and of what is good for his development.”<sup>12</sup> To talk about the inherent dignity means then to assume that we can rationally know the fundamental requirements of this dignity as well. Adequate anthropology creates then a foundation for the system of values.

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<sup>9</sup> Cf. Benedykt XVI, *Serce rozumne. Refleksje na temat podstaw prawa, Przemówienie w Bundestagu*, Berlin 22.09.2011, L'Osservatore Romano 10–11/2011.

<sup>10</sup> Which, of course, does not mean that there is no metaaxiological solution at all.

<sup>11</sup> As the Preamble to Universal Declaration states: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. By recognizing that the inherent dignity is the source of all rights, one shows “in a way their secondary nature compared with the person and that they are subject to the good of the person. (...) The relation to the good of man as a whole is an integral element of every law.” M. Piechowiak, *Filozofia praw człowieka*, op. cit., 78.

<sup>12</sup> M. Piechowiak, *Karta Praw Podstawowych UE a tradycyjne wartości*, in: *Zmagania początku tysiąclecia*, ed. M. Gierycz, J. Grosfeld, Warszawa 2012, 200.

Consequently, in that approach the issues of values and human rights remain inextricably linked as fundamental values form an indivisible and integral system, in the normative language defined as principles of universality and indivisibility of human rights.<sup>13</sup>

Such a meta-axiological background is crucial if we wish to understand the role that values traditionally play in the political communities in Europe. The imperative of inherent dignity, through its connection with the concept of natural law, allows the state to create objectively favorable conditions for personal development. Basing it on the imperative of dignity “one can derive a rational form of the political order, in which individuals – even those who cannot or do not want to act morally – are subject to the morally right, i.e. those which respect their dignity, external regulations.”<sup>14</sup> Such a metaphysical approach to values builds (integrates on the deepest level) a nation-state political community (rudimentary ethical community is here at the basis of the political community), and ethically directs crucial political decisions. Consequently, values stay then at the heart of the constitutional system and, thanks to their “independence”, serve as a defense against potential arbitrariness of the authorities.

## 1.2. CURRENT MORAL DISCUSSIONS AND THE LAW

Acknowledged at the beginning of my paper, the current morality requires some remarks on the consequences of current moral debates for the permanence of metaphysics of values in the European states. In the “ideal models” we can single out two types of approaches to current demands of changes in the understanding of fundamental moral values.

The first model can be named model of axiological equivalence. In this case, state authorities consistently maintain the logic of metaphysics of values as the basis of social and political order in the situation of cultural dispute. Due to cultural trends, one specifies more precisely

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<sup>13</sup> H. Juros, *Problem wartości w preambule Traktatu Konstytucyjnego Unii Europejskiej*, in: *Ustrojowo-polityczny wymiar Traktatu Konstytucyjnego Unii Europejskiej*, ed. K. Karbowska, A. Wnukowska, Pułtusk 2004, 42.

<sup>14</sup> Z. Stawrowski, *Wokół idei wspólnoty*, Kraków 2012, 169.

the way of understanding values in ethically sensitive areas, preventing relativization of values. The essence of this approach is to determine what is right and thus protected by law as a social value.<sup>15</sup> The example of such logic may be the constitutional definition of marriage as a „conjugal union of a man and a woman based on their independent consent” in the Hungarian constitution enacted in 2012 (thus already in the period of a heated dispute over values)<sup>16</sup> or a precise specification by the Polish Constitutional Tribunal of the way in which the scope of protection of the value of human life is understood. In the latter case, although the regulations of a constitutional nature legally binding in Poland did not include any article directly referring to life protection, the constitutional life protection has been derived by the Tribunal from the rule of the democratic state of law.<sup>17</sup>

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<sup>15</sup> This approach does not mean of course that we can put a sign of equality between the normative and moral orders.

<sup>16</sup> It is worth emphasizing that the previous European constitutions did not always define marriage and family, since they assumed that the importance of these legal institutions was obvious and they focused on the scope of the legal protection of these values.

<sup>17</sup> As it emphasized Polish Constitutional Court in its ruling, “if the essence of the rule of the state of law is a set of fundamental directives derived from the essence of the democratically made law and guaranteeing the minimum of justice, the first such a directive must be the respect in the state of law for the value, without which any legal capacity is excluded, i.e. human life from its beginning. The democratic state of law as the primary value has a human being and his most valuable goods. Such a good is life, which in the democratic state of law must be under constitutional protection at every stage of development (...). Therefore, from the moment of coming into being, human life becomes a value protected constitutionally. It concerns its prenatal phase, as well.” To clear all the doubts, the Tribunal emphasized that “the value of legal interest covered by constitutional protection, such as human life, including life at the prenatal stage of development, cannot be subject to any differentiation. There are no sufficiently precise and justifiable criteria allowing for such a differentiation with respect to the stage of development of human life. Therefore, human life becomes a value protected under the Constitution from its outset. The same applies to the prenatal stage.” We can notice here that the above excerpt contains an *implicite* identification of values with the moral good, typical of the natural law logic. Unequivocally defining constitutional values, the judgment did not exclude the impunity of abortion in liminal cases (such as threat to life and health of a mother or when the pregnancy resulted from rape).

The second ideal model can be named model of axiological relativism. In this case, the result of cultural dispute would be – in reference to fundamental moral values – to agree for a change in the understanding of some crucial moral values. As a consequence, “new” values would exist somewhat “next to” previous values, resulting in the relativization of the latter. As an example of such logic one can take “the constant demand for the freedom to have an abortion”<sup>18</sup> presented nowadays sometimes as one of the human rights or the idea of redefining marriage. The logic behind the new approach to this institution, which so far has protected the value of stable union of man and woman as an especially important element of personal development,<sup>19</sup> has been well shown by Belgian politician, Kristien Grauwels. In the occasion of granting the status of marriage to same-sex couples, she stated that the law should make „it clear that any enduring and loving relationship is appreciated in the same way in our modern society.”<sup>20</sup> If we were to apply the same way of thinking consequently, the state should affirm each form of “loving relationship”, regardless of the number and nature of those engaged, as an element of common good, which should be legally protected.

Of course the ideal models usually do not occur “in the pure form”. Nonetheless, the practice of some European countries comes close to them and a considerable amount of political and legal solutions adopted by nation states in Europe oscillates between these two axiological perspectives, adopting, so to say, hybrid solutions. By hybrid solution I mean a situation, in which, on the one hand, constitutional logic supports metaphysics of values, on the other hand, not rarely in the name of the autonomy of law, specific solutions weaken its practical meaning.

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<sup>18</sup> E. Picker, *Godność człowieka a życie ludzkie*, przeł. J. Merecki, Warszawa 2007, 13.

<sup>19</sup> M. Krapiec, *Człowiek i polityka*, Lublin 2007, 59–63.

<sup>20</sup> G. Harding, *Belgium legalizes gay-marriage*, 31.01.2003, [http://www.upi.com/Business\\_News/Security-Industry/2003/01/31/Belgium-legalizes-gay-marriage/46741044012415/](http://www.upi.com/Business_News/Security-Industry/2003/01/31/Belgium-legalizes-gay-marriage/46741044012415/) [accessed 9 Feb 2015].

## 2. MORAL VALUES IN THE EU PRIMARY LAW

The shortly described role of values within the nation state can help us to understand the wide scope of possible hopes and challenges connected with the value formulation on the EU level. Political integration (and identification) within the EU, legitimization and ethical orientation of the political action of the EU, as well as the very process of the constitutionalisation of the European Union demand in a special way some kind of reference to values. The axiology, similarly as it happens in the case of the nation states, could contribute to the process of integration of the European political community as well as help to shape its identity. Moreover, it could legitimize the EU's actions, especially in the area of fundamental rights, as well as guide the European policies in ethically sensitive areas. At the same time, cultural context in Europe and the changes in the explanation of the foundations of legislation in Europe pose an important challenge to the axiological thinking of the EU.<sup>21</sup> Let us then look closely at the axiological credo of the EU formulated in the Charter of Fundamental Rights (CFR) and the Treaty of Lisbon (TEU) to describe the EU's foundations of morality policy.

### 2.1. SENSITIVE MORAL VALUES IN THE CHARTER OF FUNDAMENTAL RIGHTS

One of the important aims of the CFR was to strengthen the protection of fundamental rights “in the light of changes in society, social progress and scientific and technological developments.”<sup>22</sup> In the perspective of morality policy struggles, expressed in the CFR's preamble aim could suggest that, despite European disputes over values, it was important for the CFR's authors to maintain the axiological equivalence

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<sup>21</sup> *De facto* it seems to be a kind of “double challenge”, if we take into account that each European decision needs an international compromise to be established.

<sup>22</sup> Cf. *Charter of Fundamental Rights*, Official Journal of the European Union C 303 from 14 December 2007, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF> [accessed 19 Jul 2013].

in the spirit of metaphysics of values, and consequently, to strengthen right protection in view of the ongoing social and cultural changes.

Some commentators of the Charter accede to this attitude, pointing out that already the set of fundamental values of the Union presented in the second section of the CFR preamble<sup>23</sup> shows that the metaphysics of values is followed.<sup>24</sup> As it was shown in the first section, in the traditional system of values, which underlies also the modern system for the international protection of human rights, the inherent inalienable dignity is believed to underlie these rights. Therefore, human dignity has a special status among other values. The Charter of Fundamental Rights follows this approach *explicite*. It makes a direct reference to human dignity in the preamble and in Article 1. Moreover, in the Explanations to the Charter<sup>25</sup> dignity is defined as “the source of rights.”<sup>26</sup> All of this seems to indicate that the authors of the Charter follow metaphysical approach to values in its secular version.<sup>27</sup>

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<sup>23</sup> It reads as follows: “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. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”

<sup>24</sup> Cf. R. Sobański, *O Karcie Praw Podstawowych*, *Chrześcijaństwo – Świat – Polityka* 3(2008)7; M. Piechowiak, *Karta Praw Podstawowych UE – wróg czy sprzymierzeniec tradycyjnych wartości?*, *Chrześcijaństwo – Świat – Polityka* 3(2008)7, [www.politologia.wnhis.uksw.edu.pl/zeszyty](http://www.politologia.wnhis.uksw.edu.pl/zeszyty) [accessed 7 Aug 2009].

<sup>25</sup> Cf. *Explanations relating to the Charter of Fundamental Rights*, Official Journal of the European Union C 303 from 14 December 2007, which are presented there as “a valuable tool of interpretation whose aim is to explain the Charter’s provisions.”

<sup>26</sup> Consequently, it seems to be justified to claim that “the Charter of Fundamental Rights fits well in the tradition of how human rights have been interpreted so far.” M. Piechowiak, *Karta Praw Podstawowych UE a tradycyjne wartości*, op. cit., 24. Since it places human dignity at the heart of its axiology, showing that the reason for a certain content of the rights is “the human being, they do not exist alone. The relation to the human good as a whole is an integral element of every right and one may not choose not to take it into consideration while defining the content of postulates.” M. Piechowiak, *Filozofia praw człowieka*, op. cit., 78.

<sup>27</sup> The fact that in one of the two official versions of the Charter religion is mentioned does not change general orientation of the Charter.

However, two reservations could be expressed about the above-presented observations. Firstly, one can note that the CFR makes reference to dignity without directly referring to the fact that it is inherent and inalienable.<sup>28</sup> In the context of European cultural tensions, “evasion” of making a straightforward proclamation of the fact that dignity is inherent and inalienable seems to have its meaning. Secondly, there are commentators who doubt if it is only the relation to the human good as a whole that determines the content of fundamental rights. They show that there are at least three, crucial from the perspective of morality policy, cases when the Charter introduces amendments to the way in which the fundamental rights are interpreted for other reasons.<sup>29</sup>

Article 2, included in the part of the CFR relating to dignity, refers to the right to life and is based on the ECHR. If one compares two key paragraphs from both documents, it is easy to discover that the obligation to protect the right to life by law, included in the ECHR, does not appear in the Charter of Fundamental Rights.<sup>30</sup> Taking into consideration the fact that “the present dispute held within the framework of European civilization is not about accepting the right to life but about the extent to which it should be protected by national/ EU law”<sup>31</sup>, it can be claimed that this provision is in fact a declaration of the position taken in this dispute and that it states that “the obligation of public authorities to protect the right to life does not include the situation of abortion or euthanasia.”<sup>32</sup>

The above presented problem is to be seen even more clearly in the context of Article 3 of the CFR, which states that everyone has the right

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<sup>28</sup> In fact, it says that dignity is inherent only in the explanations to the CFR but the words about inherent dignity do not come directly from the authors of the Charter, they are quoted from the UDHR.

<sup>29</sup> Cf. P. Mazurkiewicz, *Wokół Karty Praw Podstawowych*, Chrześcijaństwo-Świat-Polityka 3(2008)7, [www.politologia.wnhis.uksw.edu.pl/zeszyty](http://www.politologia.wnhis.uksw.edu.pl/zeszyty) [accessed 7 Aug 2009].

<sup>30</sup> Moreover, the Article 2 of the CFR is based only on the first sentence of the first paragraph of Article 2 of the European Convention (ECHR). The second sentence, which specifies the extent to which this right shall be protected by law is not included in the CFR.

<sup>31</sup> P. Mazurkiewicz, *Wokół Karty Praw Podstawowych*, Chrześcijaństwo-Świat-Polityka 3(2008)7, 30.

<sup>32</sup> *Ibidem*.

to respect for his or her physical and mental integrity. In order to make this right more precise in the fields of medicine and biology, the CFR prohibits “the reproductive cloning” in accordance to the Convention on Human Rights and Biomedicine and to the Protocol on Cloning. However, the Protocol clearly states that “any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited.”<sup>33</sup> As the Union prohibits only one form of cloning, it potentially opens space for provisions that in reality accept cloning or even creation of human-animal hybrids. According to Mazurkiewicz, the two above-mentioned articles indicate that the logic adopted by the authors of the Charter, even though it proclaims the superior value of human dignity, in order to avoid a dispute within the EU “decided not to raise objections to what, in fact, violates explicitly this dignity.”<sup>34</sup>

The sources of the solution adopted in the Charter seem to be clearly linked with the necessity to bring together different national strategies in the case of values. For example, the creation of human-animal hybrids is allowed by the British Human Fertilisation and Embryology Act but it is banned by law in Slovakia. Similarly, abortion that in some European countries (like Spain or France) is legal almost “on demand”, in other states it is either very restricted (Poland, Ireland) or completely banned (Malta).<sup>35</sup> If we then look at the presented provisions of the CFR from the perspective of a nation-state approach to values presented in the second section, we can state that the authors of the Charter tried to adopt a kind of a hybrid solution. On the one hand, the proclaimed moral values are

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<sup>33</sup> Cf. *Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings*, <http://conventions.coe.int/treaty/EN/Treaties/Html/168.htm> [accessed 7 Aug 2009].

<sup>34</sup> P. Mazurkiewicz, *Wokół Karty Praw Podstawowych*, op. cit., 30.

<sup>35</sup> The reaction of the authors of the CFR to “changes in society (...) and scientific and technological developments” leads thus to a potential weakening of the protection of the value of human life in the situations that are a direct result of these changes. Consequently, the Union as a whole seems to guarantee weaker legal protection of fundamental moral values (like human life, physical and mental integrity) than most Member States.

based *expressis verbis* on the metaphysics of values. On the other, the formulation of rights potentially opens gates to important restrictions in the protection of the proclaimed values.

“Hybrid – approach” does not necessarily eliminate the logic of metaphysics of values. Nonetheless, it puts it to a serious test. Although it does not proclaim “new” values, it makes them more abstract categories; more loosely connected with social practices to realize those values. Belief that values have the status of objectively existing properties and remain inextricably linked with human rights, which, present in the normative language of universal values,<sup>36</sup> does not disappear but loses its clearness. It thus seems to be marked, to some extent, with the logic of a so-called soft relativism.<sup>37</sup> To understand the difference, it is enough to check the political usage of a hybrid formula. For example, the Center of Reproductive Rights, basing *inter alia* on the CFR provisions, claims that the fact that law “protects the right to life without addressing when the right to life begins” shows that “International and European (...) jurisprudence support the position that protecting life from the moment of conception, as a fundamental human right would interfere significantly with women’s basic human rights.”<sup>38</sup>

We could eventually stop our reflection on the Charter here and, as important commentators do,<sup>39</sup> deem the provisions of the Charter to be generally in accordance with the tradition of the metaphysics of values. Nonetheless, the issue becomes more complicated when one considers, also crucial for morality policy, article 9 of the CFR relating to the

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<sup>36</sup> Cf. H. Juros, *Problem wartości w preambule Traktatu Konstytucyjnego Unii Europejskiej*, op. cit.

<sup>37</sup> J. Donnelly, *Universal Human Right in Theory and Practice*, Cornell University Press, Ithaca and London 2003, 11.

<sup>38</sup> Center for Reproductive Rights, *Written Comments on Protection of the Right to Life from the Moment of Conception in the General Principles Guiding Hungary’s Constitution and the proposal of the constitution issued by Fidesz-KDNP*, March 2011, 1–3. One can recall in that context a reflection of Eduard Picker who noticed that “a coherent axiological approach to human dignity remains in clear disharmony with a new axiological approach to human life.” E. Picker, *Godność człowieka a życie ludzkie*, op. cit., 11.

<sup>39</sup> Cf. R. Sobański, *O Karcie Praw Podstawowych*, op. cit.

right to marry and to found a family. It reads: “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”.

Also in this case, it is not difficult to find the logic of compromise. Since some Member States (even though the minority) recognized or were on the way to recognize same-sex marriage, one sought a solution that could be adopted by everyone. Nonetheless, from the reflection on values and human rights theory, the adopted provision presents a special kind of “gravity”. Article 9 does not specify the content of the value that falls under protection within this article. Basically, it could be anything that the legislation of member states considers family or marriage. We thus go imperceptibly from the natural law logic to the positive law logic, towards which human rights should play a critical role. This issue is clearly seen in the statement of the Explanations that says “this Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex”. In this place the Charter *de facto* redefines the very concept of marriage (even though it does not impose the redefined interpretation on the member states), and does no longer reflect the way of the understanding of the marriage in the Universal Declaration of Human Rights.

Looking at it purely theoretically, the adopted solution may have a potentially important political impact. Since Article 21 of the Charter asserts that discrimination on the grounds of e.g. sexual orientation or gender identity shall be banned, when reading the CFR one may suggest a hypothesis that the lack of a clear definition of marriage and family in the EU may in a way automatically direct the EU, which is bound in its action by the Charter, more towards the equality of different forms of relationship rather than towards recognizing the unique role of monogamous marriage. Since the Charter does not notice the innate value of such a marriage, its special protection, in the light of the Charter, may be regarded more as discrimination than as the protection of a fundamental value of the EU.

The solutions adopted in the analyzed article pose then challenges not only to the theory of human rights but also to the metaaxiology of the Charter. Let us recall that in the perspective of metaphysics of values defining what is not allowed to do is possible when we know what is

good for the development of human being. Acknowledging *de facto* the unrecognizability of what is good for human development in the context of marriage and family is then a serious assault on the meta-axiological foundations presented *expressis verbis* in the Charter.

## 2.2. METAAXIOLOGY OF THE TREATY OF LISBON

An interesting contribution to the above-mentioned questions comes from the Treaty of Lisbon [TL]. The two most important declarations in that context are to be found in the preamble of the TEU as well as in Article 2 of that Treaty. Let us have a look at those provisions to discover meta-axiological perspective of that Treaty.<sup>40</sup>

The axiological provisions of the TEU, representing a secular approach to values, seem to be quite typical and not especially controversial. We discover there a well-known set of values: freedom, democracy, dignity, etc. Nonetheless, a close reading of axiological solutions reveals a certain disorder or inconsistency in presenting the values. Let us just mention that the preamble to the TEU does not mention human dignity, which is a core value in the whole value-system typical of Europe, and of the tradition of metaphysics of values and human rights. It's hard to admit that someone could "forget" about that value in the first presentation of crucial values.<sup>41</sup> That and other confusions<sup>42</sup> can reveal a deeper

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<sup>40</sup> The preamble states: "drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law...". In Article 2 of the TEU one can read: "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".

<sup>41</sup> The ontological perspective, as it was shown above, places human dignity at the very heart of axiology, showing that the reason for a certain system of values as well as for the content of human rights is "the human being" as such.

<sup>42</sup> For example: solidarity, in the CFR treated as a fundamental value of the EU, has a bit different status in the light of Article 2 of the TEU. In the light of the latter, it is not treated as the value on which "Union is founded". It seems to be an important

meta-axiological confusion to be found in the TEU. If we concentrate not on the list of values but on the grounding of those values, we can discover that the TEU follows a different meta-axiological way from that of the nation states. In the light of Article 2 TEU, the Union is founded on the listed values not because they are universal but because they are common to the Member States. It is then the situation of the Member States that is important and not the knowledge about the human being as such. A recital added in Lisbon to the TEU preamble constitutes an even more significant declaration in this context. In accordance with the adopted formula, the EU's values result from the cultural, religious and humanist inheritance of Europe. As Marek Piechowiak notes, "from the point of view of meta-axiology, in the discussed recital, we can see a clear recognition of cultural relativism", "in this perspective dignity, perceived as an inherent, in its nature independent of culture, source of rights, is consistently not mentioned. Fundamental properties of human rights are denied. Above all, their universality and with it the demand to universally acknowledge human rights in all cultures."<sup>43</sup>

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The EU primary law reveals two *explicite* proclaimed meta-axiological models and "open" formulas of presentation and protection of ethically sensitive values. For sure, it reflects the fact that the discussion about the EU's values is in progress. Nonetheless, it shows also that the axiological logic of the EU seems to be in transition from the metaphysics of values towards some kind of the sociology of values. Such

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change, as solidarity, normally treated as one of fundamental values, shows that human being is not just an individual but a person who needs others for its proper development. Moreover, Treaty in its English version instead of "human being" speaks about "human person". This small change could be potentially very meaningful if we take into account its philosophical meaning. So called personism states that the concept of a person should not refer to every human being, and that idea of human rights shows features of species chauvinism and as such it should be replaced with the concept of a person's rights. Cf. P. Berger, *Practical Ethics*, Cambridge 1999

<sup>43</sup> M. Piechowiak, *Karta Praw Podstawowych UE a tradycyjne wartości*, op. cit., 202.

a situation makes the EU's axiology flexible and, at least potentially, opens it to a radically different interpretation.

The flexibility of the EU's axiology is sometimes regarded as a special advantage of the EU. As one commentator notes, "the agreement in the area of values (...) does not mean the agreement relating to the ontology of these values. It is not necessary to incorporate the ontological explanations into axiology, and it seems even inadvisable in a pluralistic and differentiated European society."<sup>44</sup> Among basic practical reasons for the adopted axiological logic, some mention the fact that it allows to avoid conflicts over values, and thus it assures peace and, in its own way, unity, as well as it allows each society to follow its own moral tradition.

### 3. THE EU'S MORALITY POLICIES

The changes in understanding axiology and meta-axiology within the EU require an answer to a question about their political consequences. The very first remark is that the claim that flexible axiology makes the axiological disputes in the Union disappear, is, at least, open for criticism. Already at the stage of the formulation of the primary law, suffice it to note the objections of Poland and the Great Britain regarding the CFR. It was not the literal meaning of the Charter that Poland was afraid of but the fact that in the future the solutions accepted in the Charter may result in ideologization of the fundamental rights in the political practice.<sup>45</sup>

Already the comments to the Charter formulated by Poland reveal that the areas not specified in the primary law that try to somehow "mediate" between different axiological views of the member states, ultimately determine the area of dispute over the EU's morality. First, it is about the issue of guaranteeing the human dignity and the right to life, especially in the embryonic stage. Another area of dispute is the issue of

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<sup>44</sup> D. Bunikowski, *Podstawy aksjologiczne Konstytucji dla Europy*, <http://www.racjonalista.pl/kk.php/s,4577> [accessed 31 March 2011].

<sup>45</sup> It seems that this very perspective constitutes a significant question concerning the Union's approach to values, which should create space for mutual trust and cooperation between Member States and EU institutions.

guaranteeing the status of monogamous marriage and family. Although the EU has no direct competence in any of these areas, it addresses these problems due to its other competences (spill-over effect). For example, the matter of life protection becomes important in the context of current research in biotechnology, which falls under the EU's competence. Let us then look closer at these two areas to see the political output of the EU's flexible axiology for framing morality policy of the EU.

### 3.1. PRACTICAL OUTCOMES: THE EU AND HUMAN LIFE PROTECTION

With regard to the EU one can distinguish two ethically problematic areas of human life protection: abortion and research on human embryos.<sup>46</sup> As far as the EU's competences are concerned, these issues belong to the areas of coordination competences (health and research), in which the EU may only complement the activities of the Member States, not leading to harmonisation of law. Although it may seem that it should eliminate the possible dilemmas of morality policy (the EU does not impose its models), recognizing even a soft competence of the EU in this area does not solve ethical problems relating to the CFR wording.

A classic example of such a situation was the discussion surrounding the 7th Framework Programme for Research, within which the EU was responsible for distributing the EU funds (and thus money from the common budget financed by all Member States) for research projects. The European Commission proposed to exclude from the EU funding research projects "that intend to engage in 'reproductive cloning', modifications of the genetic heritage of human beings which could make such changes hereditary and the creation of human embryos solely for the purpose of research, including by means of somatic cell nuclear transfer". However, in accordance to Art 3 of the CFR, other research projects involving human embryos and human embryonic stem cells were not excluded from the EU financing. Such an approach stood in line with the Opinion of the European Group on Ethics in Science to

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<sup>46</sup> M. Gierycz, *Unijne spory o wartości podstawowe. Źródła, kluczowe problemy i „polski głos” w Parlamencie Europejskim.*, w: *Od akcesji do prezydentury*, ed. P. Burgoński, S. Sowiński, Toruń 2011, 133–134.

the European Commission, which already in 2000 stated that there is no clear argument for excluding funding of embryonic stem cell research from the Framework Programme.<sup>47</sup>

The legislative proposal of the Commission regarding the 7th Framework Programme (7FP) presented to the Parliament and to the Council stated that all the research activities supported by the EU “shall be carried out in compliance with fundamental ethical principles, and the opinions of the European Group on Ethics in Science and New technologies are and will be taken into account.”<sup>48</sup> “Open” formulations were thus adopted – similarly to the solutions of the CFR; which in this case suggested but did not impose a final interpretation. There was a vivid discussion in the Parliament around the above articles. Its aim was to determine more precisely the area of application of ethical principles to which they refer. The key Amendment 66 was adopted with the majority of 284 votes to the art. 6 of 7FP legislative proposal. It states, *inter alia*, that “research on the use of human stem cells, both adult and embryonic, may be financed, depending both on the contents of the scientific proposal and the legal framework of the Member state(s) involved”. 249 deputies were against it and 32 abstained from voting. Concurrently, with a similar majority, analogical amendments were adopted (for example Amendment 47) and those that tried to put a ban on financing research on embryos or on embryonic stem cells from the European Union’s budget were rejected (Amendments 352–357).<sup>49</sup> Not even the amendment, which did not try to ban research on embryos but

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<sup>47</sup> European Commission, *General report on the activities of the European Group on Ethics in Science and New Technologies to the European Commission*, Brussels 2001.

<sup>48</sup> European Parliament, *Report on the proposal for a decision of the European Parliament and of the Council concerning the seventh framework programme of the European Community for research, technological development and demonstration activities* (2007 to 2013), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2006-0202+0+DOC+XML+V0//EN> [accessed 23 Mar 2011].

<sup>49</sup> Amendments 356, 357 referred to Recital 4 and 352 – Recital 21. Amendments 354 and 355 Art. 6 of the programme. Not only the amendments which *explicite* banned financing such research from the EU’s budget were rejected, but also those which cited international law documents as a reference point for evaluating the legitimacy of financing research. These documents take a clearer position than the CFR towards

which aimed at limiting it to the already existing embryos, was adopted by the Parliament.<sup>50</sup> As a consequence of these changes, in the 7th Framework Programme research on human embryos was financed from the Union's budget in spite of the fact that in some states (such as Germany, Austria, Ireland, Malta or Slovakia) it is prohibited by law.<sup>51</sup> It is worth emphasizing that this decision has a long-term political importance. At present, the stance regarding the 7th Framework Programme is treated as a point of reference for ethical solutions in the framework of Horizon 2020, the EU's research programme for 2014–2020.

The discussion on abortion in the European Parliament seems to express a similar practical dynamic of the flexibility of the Union's axiology. Over the past several years,<sup>52</sup> the parliament has discussed and adopted several resolutions regarding this issue every year. What is constant in these resolutions is the fact that they invoke reproductive rights and the statement included e.g. in the resolution of 8 March 2011 on “reducing health inequalities in the EU”, saying that “the EU and the Member States should guarantee women easy access to methods of contraception and the right to safe abortion”. In this way, there appears in the documents of the Union – for the time being, on the level of political declarations – a category of “the right to abortion”. From this perspective the failure of the 2013 Report on reproductive rights, which recommended *inter alia* that abortion, as “a human rights concern (...) should be made legal, safe, and accessible to all”<sup>53</sup> may seem surprising. In spite of the fact that FEMM adopted it with the majority of votes 19:15,

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carrying out such research, e.g. the Oviedo Convention or the Additional Protocol to this convention regarding ban on human cloning.

<sup>50</sup> Precisely before 31.12.2003 – Amendment 319.

<sup>51</sup> It means that only in 2010 all European Union states sponsored 12 projects in which human embryos were used Cf. O. Mirguet, M.-M. Buckens, *MEPs build pressure against embryonic stem cell research*, <http://www.europolitics.info/sectorial-policies/meps-build-pressure-against-embryonic-stem-cell-research-art342810-18.html> [accessed 10 Jul 2013].

<sup>52</sup> The Lanckner's report from 2002 can be considered decisive.

<sup>53</sup> And called on Member States “to ensure compulsory, age-appropriate and gender-sensitive sexuality and relationship education for all children and adolescents (both in and out of school)”, more than 200 amendments had been tabled.

the European Parliament passed a non-binding resolution on sexual and reproductive health and rights instead.<sup>54</sup> It stated that: “The formulation and implementation of policies on sexual and reproductive health and rights and on sex education in schools is a competence of the member states”. Such a result has been treated as the first big political victory of pro-life circles in the EU for many years.<sup>55</sup>

As far as the activities of other institutions are concerned, one can discover a certain ambiguity. On the one hand, the European Commission regularly states that the issue of abortion lies beyond its competence.<sup>56</sup> On the other hand, it has been proved that officials of the European Commission brought in 2006 pressure to bear on the authorities of Nicaragua, which introduced punitive sanctions for having an abortion.<sup>57</sup> Similarly, a recent report of European Dignity Watch proves that the EU's money has been used to finance the activities of abortion organizations in the Third World.<sup>58</sup>

The possible solution of axiological dilemmas, which arose around understanding the value of human life and its protection can eventually come from the ECJ. However, also in this case it is not clear in which

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<sup>54</sup> Tabled by the EPP and ECR group.

<sup>55</sup> European Dignity Watch, *Estrela report rejected*, <http://www.europeandignitywatch.org/day-to-day/detail/article/estrela-report-rejected-massive-popular-protest-wins-over-well-funded-lobby-groups-at-the-european.html> [accessed 9 Feb 2015].

<sup>56</sup> C. Vierling, *Los derechos de la mujer y la regulación del aborto en el Parlamento Europeo*, [http://www.prolifeworldcongress.org/zaragoza2009/index.php?option=com\\_content&task=view&id=192&Itemid=109](http://www.prolifeworldcongress.org/zaragoza2009/index.php?option=com_content&task=view&id=192&Itemid=109) [accessed 10 May 2013].

<sup>57</sup> As C. Vierling reports: “The representative of the European Commission in Nicaragua threatened to block the EU help, and the official responsible for Nicaragua within DG RELEX (Directorate General for External Relations) said that the European Commission treated this legislation as a step back. He emphasized that “for the European Union, abortion constitutes an integral part of policies implemented to fight poverty.”

<sup>58</sup> In years 2005 – 2009 the European Commission gave almost 16 million pounds for the activity of an abortion organization *Marie Stopes International* (MSI), which were spent, among other things, on a so-called “menstrual regulation” that is *de facto* a form of abortion. European Dignity Watch, *The Funding of Abortion through EU Development Aid. An analysis of EU's sexual and reproductive health policy*, EDW, Brussels 2012.

direction the judiciary will develop. The issue of abortion (the so called Irish abortion case<sup>59</sup>) was examined by the ECJ already at the beginning of the 90s. The key issue in this case was whether the decision of the Irish court, which banned foreign abortion clinics advertising, did not break Community law as a result of breaching the principle of freedom to provide services. The Advocate General stated that it is a case of discrimination, however, he pointed out that “important political, social and cultural reasons may justify such restrictions”, provided that they are under the control of the ECJ. He tried thus to weigh the arguments. The Court rejected this reasoning. In its ruling, it confirmed that an abortion procedure is undoubtedly a service in the understanding of the then Article 60 of the TEC. In the ruling, although for formal procedural reasons, it did not overturn the decision of the Irish court and it did not raise the issue of the importance of right to life.

A different logic has been adopted by the ECJ in a recent ruling in the case *Bruestle vs. Greenpeace* concerning embryonic stem cell patents in Europe. The Court made an indirect reference to one of the crucial problems of the axiological dispute in the context of the protection of human dignity: the value of human life. In its ruling, the ECJ concluded that “the concept of ‘human embryo’ has to be understood in a wide way” because “the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could be thereby affected”, and therefore “any human ovum after fertilization, any non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilized human ovum whose division and further development have been stimulated by parthenogenesis constitute a ‘human embryo’ within the meaning of Article 6(2)(c) of the Directive.”<sup>60</sup> It is worth noticing that the logic of the ECJ argumentation stemmed from the fact that the value of human

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<sup>59</sup> Case C-159/90, in: *Prawo Wspólnot Europejskich. Orzecznictwo*, ed. W. Czaplinski et al., Warszawa 2009, 627–630.

<sup>60</sup> European Court of Justice, *Judgement of the Court* (Grand Chamber) from 18 October 2011 in case C-34/10, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30db8c46932a52564c4ab7caded4d59d2b9b.e34KaxiLc3qMb40Rc h0SaxuLbNn0?text=&docid=111402&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1736456> [accessed 15 Jul 2013].

dignity has been recognized as a superior one, in reference to the classic European metaphysics of values.

### 3.2. PRACTICAL OUTCOMES: MARRIAGE VS. LGTBI POSTULATES

In a series of resolutions concerning homophobia adopted in years 2006 and 2007, and continued in the following years<sup>61</sup> the European Parliament treated homosexuality as an obvious element of the common good and presented, among the examples of homophobia, next to one another, acts of physical violence and legal solutions differentiating the status of same-sex marriages and relationships.<sup>62</sup> Consequently, it assumed that homophobia – similarly to racism, xenophobia and antisemitism – is caused only by irrational reasons and “persons having a different opinion on this matter (...) go by prejudice, therefore, they should not have the right to express their stance and to participate in the public discourse.”<sup>63</sup> It is worth adding that these resolutions were generally adopted by the majority of votes, not

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<sup>61</sup> Cf. *European Parliament resolution of 5 July 2012 on violence against lesbian women and the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in Africa* (2012/2701(RSP)), P7\_TA(2012)0299; *European Parliament resolution of 24 May 2012 on the fight against homophobia in Europe* (2012/2657(RSP)), P7\_TA(2012)0222; *European Parliament legislative resolution of 13 June 2013 on the draft Council decision on the conclusion of the Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part*, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, P7\_TA(2013)0273; *European Parliament resolution of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime* (2013/2543(RSP)), P7\_TA-PROV(2013)0090; *European Parliament resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity* (2013/2183(INI)), P7\_TA-PROV(2014)0062; *European Parliament resolution of 16 January 2014 on recent moves to criminalise lesbian, gay, bisexual, transgender and intersex (LGBTI) people* (2014/2517(RSP)), P7\_TA-PROV(2014)0046.

<sup>62</sup> *European Parliament resolution on homophobia in Europe*, 18 January 2006, P6\_TA(2006)0018.

<sup>63</sup> P. Mazurkiewicz, *Aksjologia polskiej polityki zagranicznej w sferze praw człowieka*, w: *Prawa człowieka w polskiej polityce zagranicznej*, ed. A. Bieńczyk-Missala, Warszawa 2007, 31.

generating an equal division of deputies.<sup>64</sup> It seems characteristic of the Parliament's stance that the Lunacek report, which builds the so-called roadmap of affirmative policies towards LGBTI in the Union and through the rejection of which the pro-life groups wanted to take advantage of their success related to the rejection of the Estrela report, was passed in the Parliament with no problems at the threshold of 2014.

The above logic sets the standards for the activity of executive institutions (as the European Commission, the Agency for Fundamental Rights). On the annual EU Day against Homophobia in 2010 Viviane Reding, Vice-president of the European Commission and Commissioner for Justice, Fundamental Rights and Citizenship, condemned homophobia as "a blatant violation of human dignity", adding that it was "incompatible with the principles on which the EU is founded."<sup>65</sup> Already in 2008 the Commission proposed the so-called Horizontal Anti-Discrimination Directive, whose aim was to implement the principle of equal treatment of, *inter alia*, people of different sexual orientation in the field of social protection, including social security and health care, social benefits, education and access to goods and other services available to the public, including housing. Its adoption would mean, *inter alia*, that it would be impossible to build social benefits for marriages and families or limits on employing teachers. The directive not only called on countries to "have a dialogue" with the LGBTI community<sup>66</sup>, but also shifted the burden of proof to the defendant.<sup>67</sup>

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<sup>64</sup> Cf. M. Gierycz, *Chrześcijańscy politycy w ponadnarodowych sporach o wartości. Perspektywa europejska*, w: *Religia i stosunki międzynarodowe*, ed. A. Solarz, H. Schreiber, Warszawa 2012, 421–449.

<sup>65</sup> News, *Top EU Leaders Mark International Day Against Homophobia*, <http://www.ukgaynews.org.uk/Archive/10/May/1701.htm> [accessed 18 May 2010].

<sup>66</sup> With regard to the supportive dialog of the EU and LGBT groups, it is worth mentioning that the activity of the International Lesbian and Gay Association is financed to a large extent with the European Union funds. In years 2007–2010 this organization received support from the Union of over 4 million euro, which constituted about 80% of its operating costs. Data available on <http://ec.europa.eu/budget/fts/> [accessed 1 Dec 2011].

<sup>67</sup> Precisely: "with relevant stakeholders, in particular non-governmental organizations, which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on the grounds and in the

Specialized EU agencies adopt a similar policy. The Agency for Fundamental Rights, from its foundation, has paid a special attention to the LGBTI rights.<sup>68</sup> With regard to the Agency's findings on the situation of gays, lesbians, bisexuals and transgenders (LGBT) in the EU, its director Morten Kjaerum pointed out to the increasing number of member states that recognize "the right to marriage for same-sex couples". It is worth noticing that for the director of this Agency – safeguarding human rights in the EU, providing European institutions with data regarding the following of these rights and with guidelines on how to guarantee them in a better way – the fact that the right to marriage of same-sex couples exists was unquestionable. The problem was that too few member states recognized this right, which, in his view, stemmed from stereotypes and negative reception of the LGBT community.<sup>69</sup>

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areas covered by this Directive." According to Art. 8 of the project "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that (...) it shall be for the respondent to prove that there has been no breach of the prohibition of discrimination". As a result, one can recognize that by applying strong sanctions and in cooperation with the LGBTI community, it aimed at legitimizing the efforts of these groups. The directive has not been adopted yet due to the objection of some Member States (unanimity is required). Cf. European Commission, *Wniosek Dyrektywa Rady w sprawie wprowadzenia w życie zasady równego traktowania osób bez względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną*, KOM(2008) 426 wersja ostateczna, Bruksela 2008.

<sup>68</sup> Studies carried out to date: *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis* (June 2008); *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation* (June 2009); *Report on Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity* (November 2010); *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States*" (2011); *FRA survey of the discrimination faced by lesbian, gay, bisexual and transgender (LGBT) people on a daily basis* (2013); *Study surveying LGBT people and authorities: qualitative component for public authority's research* (2013).

<sup>69</sup> M. Kjaerum, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity*, [http://www.fra.europa.eu/fraWebsite/research/publications/publications\\_per\\_year/pub-lgbt-2010-update\\_en.htm](http://www.fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub-lgbt-2010-update_en.htm) [accessed 30 Nov 2010].

One should emphasize that the key intergovernmental and decisive body, the Council of the European Union, adopted in 2010 a Toolkit and in 2013 the Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. As a result, the EU members have to monitor in the third countries *inter alia*: is gender reassignment treatment accessible; can LGBTI associations organise public and non-public events like Gay Pride Marches; are there laws concerning morality or public order used to outlaw same-sex relations, etc.<sup>70</sup>

The political stance of the EU in this area seems to be summarized by the standpoint of Herman van Rompuy, the President of the European Council. He stated that "the European Union can take some pride in being at the vanguard of combating homophobia and other forms of prejudice and discrimination. (...) In this respect, discrimination on the basis of gender and sexual orientation has ceased to constitute a political cleavage, and is enshrined in the EU's founding act and statement of values. It is something that distinguishes Europe from many other parts of the world."<sup>71</sup>

The crucial problem in Rompuy's speech is why it distinguishes Europe from the "many parts of the world". One can suppose, that the rest of the world understands fundamental values as they are presented in the Universal Declaration of Human Rights, which clearly states that the family, founded on the marriage of man and women, "is the natural and fundamental group unit of society and is entitled to protection by society and the State."<sup>72</sup> The problem is serious. "European pride" in combating homophobia, which means also combating special legal protection of the family founded on marriage, stays consequently in

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<sup>70</sup> Council of European Union, *Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGTBI) persons*, Brussels 2013.

<sup>71</sup> H. van Rompuy, *Statement by President Herman Van Rompuy on the International Day Against Homophobia*, PCE 88/10, Brussels 2010.

<sup>72</sup> *Universal Declaration of Human Rights*, <http://www.un.org/en/documents/udhr/> [accessed 10 Feb 2015].

open contradiction to universal values.<sup>73</sup> As a result, the “mediation stand” of CFR then means *Veränderung der Werte* in political practice.

#### 4. CONCLUSION

In the EU's axiological credo one discovers a new approach to the foundations of values (metaaxiology), as well as the change in understanding of some fundamental moral values (axiology). From the logic of natural law, typical of the metaphysics of values, the Union has moved within its framework in a relativistic direction. Although one can understand the origin of this move, an important political importance of this change is revealed by the morality policy of the EU. The conducted political analysis allows for two types of conclusions: (1) regarding general consequences of the Union's departure from the logic of natural law in understanding its moral values; (2) regarding the importance of the form of this departure.

(1) The conducted analyses clearly show that the departure from the belief that the values are grounded in the truth about the being reduces their integration potential and opens an area of political battle. It is hard to recognize as the foundation of the integration a fundamental moral value that each of the subjects, entirely legitimately, understands differently (*vide* the case of marriage), or that for some absolutely excludes actions that others recognize as fully consistent with the same value (*vide* case of cloning and human-animal hybrids). Moreover, the flee from the metaphysics of values and the related axiological flexibility means also that, in the ethically disputable areas, EU *de facto* does not have any clear criterion for shaping the policy. A good example here is the above mentioned case of research financed within the 7th Framework Programme. Fundamental ethical issues have been solved here by the means of voting. Finally, in the proclaimed by the European Parliament

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<sup>73</sup> Very interesting is in that context to read an official and quite sharp reaction of ACP countries on EU's efforts to impose them EU's perspective on homosexuality: cf. *Declaration of the 21st Session of the ACP Parliamentary Assembly on the peaceful co-existence of religions and the importance given to the phenomenon of homosexuality in the ACP-EU Partnership*, Brussels, 28. September 2010, ref. 2/3/15(Vol.1) 10.

and supported in the third world “right to abortion” or in the way of understanding the right to marriage by the Agency for Fundamental Rights we discover the fact that “flexible” axiology in political practice, so to speak, becomes rigid and sometimes is even seeming.<sup>74</sup> It creates bigger or smaller (depending on the case, including the legal importance of the analyzed document) political pressure on the states.<sup>75</sup>

(2) The issue of exerting pressure moves us to the second type of conclusions. It is worth noticing that the presented cases show that the hybrid, although still connected with natural law, understanding of fundamental values and the laws relating to them (*vide* protection of human life and integrity) has importantly different political impact from a clearly relativist view (*vide* marriage). The political praxis of the EU shows that in the former case morality policy constitutes an area of a real debate, whose outcome has not yet been settled. Clearly, the politically dominant is the axiology contrary to the logic of natural law. In this context, it seems characteristic that the rejection of the Estrela report, considered to be a big success by the pro-life groups, was not concurrent with the adoption of a resolution on life protection from the prenatal phase but it was connected with invoking the subsidiarity principle. Nevertheless, this case and, even more, the ECJ judgment in the *Bruestle* case show that the issue is far from being settled and that perhaps it will be settled by the court’s ruling.

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<sup>74</sup> The way of defining the right to marry and to found a family shows that sometimes the EU’s axiological flexibility is seeming. In the case of the recognition *implicite* of the right of the homosexual unions to marry and to found a family it is not about enlarging the understanding of this right, but about promoting the structure logically contrary to the previous one. More in: R. Sobański, *O Karcie Praw Podstawowych*, op. cit., 11.

<sup>75</sup> Such approach poses an important challenge to the Union’s foreign policy. Namely, if the Union really does not believe that its axiology results from anthropological assumptions, one may ask if it is authorized to promote its own values outside the European culture. Paradoxically, such a view of axiology seems to undermine its mission of civilization. To give a specific example, one may look at its development policy and ask what right does the Union have demanding that the beneficiaries of help respect the human rights and democratic principles? The further we pursue the road of cultural relativism, the more difficult it will be to reject the potential accusations of “cultural imperialism”.

If one can state that the mediation stand of the CFR in case of life protection, which remains in accordance with the traditional grounding of values, is after all reflected in the activities of the EU's institutions, the situation is different in the metaaxiologically redefined area. As far as the approach to marriage and to the LGBTI postulates is concerned, the dynamic of non-discrimination leads to the situation in which, one could say, the "mediation" stand of the CFR, in that case contrary to the metaphysical grounding of values, becomes a strong non-mediation stand in the activities of the institutions. In this area, basically all institutions bound in their activities by the CFR seem to speak with one voice, which *de facto* affirms the postulates of the LGBTI organizations and their interpretation of values.

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Vaclav Havel in his speech to the European Parliament in 2009 expressed his disappointment with the fact that European Union pays lip service to the European values and regards them simply "as pretty packaging for the things that really matter."<sup>76</sup> He asked then: "aren't these values what really matter, and are not they, on the contrary, what give direction to all the rest"? An example of the EU's current morality policy shows that his question can receive a positive answer, but in a quite peculiar way. As it was presented, the EU's values give – in important respects – direction to the EU's policy. Nonetheless, examination of that policy leads to the question to which extend the direction given by EU's values is really valuable. It reveals that "relativistic shift" and metaaxiological disorder can distort value discourse. It seems to pose a threat to the European political community because, in the end, as Ernst Wolfgang Böckenförde rightly pointed out, it can pave the way "to subjectivity and to positivism of popular assessments", which demand

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<sup>76</sup> V. Havel, *Speech at the European Parliament*, Brussels, 11 November 2009, [http://www.vaclavhavel.cz/showtrans.php?cat=projevy&val=1290\\_aj\\_projevy.html&typ=HTML](http://www.vaclavhavel.cz/showtrans.php?cat=projevy&val=1290_aj_projevy.html&typ=HTML) [accessed 22 May 2013].

for themselves “an objective importance, [and] rather destroy freedom than guarantee it.”<sup>77</sup>

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<sup>77</sup> E.W. Böckenförde, *Wolność – państwo – Kościół*, trans. P. Kaczorowski, Kraków 1994, 119–120.

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