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Author: Monika Jagielska, Mariusz Jagielski

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Monika Jagielska[1], Mariusz Jagielski[2]

"CONSTITUTIONALISATION" OF CONSUMER RIGHTS IN EUROPEAN AND POLISH LAW

1. INTRODUCTION

Protection of consumer rights must be considered as a new legal phenomenon. Although – as one of the EU Consumer Affairs Commissioner once said – the need for consumer protection is amongst the oldest of all: in the field of contract is as old as the world itself as evidenced by the fact that the first ever consumer contract was made between Eve and the serpent. The snake sold her the apple on the basis of misleading advertising, the product did not conform to a promise given by the seller and the contract included a clause exempting the snake from any liability for damage caused by the defective product. In fact it is only the second half of the XX century which experienced the actual evolution of the protection of consumer rights.

It is generally accepted that the consumer rights were first emphasized and acknowledged in President J.F Kennedy's famous Message to the Congress on 15 March 1962. In this message he not only used the now famous phrase "we all are consumers" but also spelled out the now recognized fundamental consumer rights (the right to safety, the right to information, the right to choose and the right to be heard) (Łętowska, 2004: s. 4).

The aim of this essay is to examine the process of creating and constituting consumer rights under European and Polish law. First of all the legal basis for distinguishing such rights will be examined and thereafter the substance of these rights will be defined and their independence evaluated.

2. EUROPEAN UNION "CONSTITUTIONALISATION" OF CONSUMER RIGHTS

2.1. EVOLUTION OF EUROPEAN CONSUMER PROTECTION

2.1.1. FIRST STAGE

The European dimension of consumer protection has existed for over thirty-five years. In 1973 the Council of Europe approved a European Charter of Consumers. (Eur. Consult. Ass., On A Consumer Protection Charter, 25th Sess., Res. No. 543 (1973), available at http://digbig.com/4gmrj). According to its provisions consumers have the right to protection and assistance understood as protection against physical damage due to unsafe products and protection against damage to their economic interests. Thereafter the right to redress against damage, the right to information, the right to education and the right to representation and consultation are listed. All these rights are not directly

[1] Doctor, University of Silesia, Faculty of Law and Administration.
[2] Doctor, University of Silesia, Faculty of Law and Administration.

"granted" to the consumers, rather the national legislative bodies are encouraged to include appropriate measures in national legal systems for the protection of these rights.

The original Treaty of the European Community of 1957 did not foresee any specific competence in the field of consumer policy. Although the word "consumer" appears a few times in the text of the Treaty, it is connected each time to a different EC policy (such as protection of competition, health or environment). In 1975, the European Community for the first time recognized the relevance of consumer protection to the operation of the common market in a resolution concerning consumers' rights and interests (Council Resolution (EC) No. 92/1, Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 1975 O.J. (C 92) more details on this and subsequent programs *Maliszewska-Nienartowicz* 2004). The rights established by the Resolution concern consumer health and safety, protection of consumer economic interests, advice and right to damages, information and education, and consultation and representation of consumers. The importance of the Resolution lies also in a fact that it clearly states that consumer protection and information policy should be implemented at Community level and that it formulates the basis for later programs and strategies. Since that moment consumer protection became a constant topic on European agenda. However, it is important to note that at the time, the European Community lacked specific competence in the field of consumer protection, which was incorporated into measures adopted for the establishment and operation of the internal market, and even referred to as "a byproduct" of the common market.

2.1.2. THE 80-TIES

The lack of progress in Community legislation for achieving protection of consumer rights led the Council to adopt its Second Action Programme in 1981. This Programme listed five fundamental consumer rights: protection of life, health and safety, economic interests, the right to compensation, the right to education and information and finally the right to be represented. Council Resolution of 23 June 1986 stressed the necessity of a high level of consumer protection and underlined the value of information and education directed to consumers. In the 1987 Single European Act the Community recognized consumer protection as an autonomous policy aim, still connected to the internal market. Under the third paragraph of Article 114 TFUE (ex 100a) the EC Commission, in its measures aimed at the approximation of national provisions which have as their object the establishment and functioning of the internal market accepted a high level of protection for matters concerning health, safety, environmental and consumer protection. It must be underlined that the SEA did not provide for a specific legal basis for consumer legislation. Nevertheless it gave the Commission the legal basis for adopting directives targeted to consumer protection.

2.1.3. TREATY OF MAASTRICHT AND TREATY OF AMSTERDAM

The general developments that took place in the 1990s gradually shifted the emphasis from market and economic considerations to a wider synthesis between economic and social issues. An important step was taken with the Treaty of Maastricht of 1992. It not only established the European Union and transformed the European Economic Community into the European Community (marking the changes in solo-economic approach), but also inserted a new chapter XI on Consumer Protection in the EC Trea-

ty and added "a contribution to the strengthening of consumer protection" to the list of the activities of the Community in former Article 3 (s). According to Article 129a(1) EC (now 169 TFUE) the Community shall contribute to the attainment of a high level of consumer protection, through

(i) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
(ii) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers".

The Treaty of Amsterdam introduced some changes in art. 129a also renumbering it to art. 153. After the Lisbon Treaty art. 153 was renumbered to 169 TFUE and former art. 153.2 was made art. 12 TFUE. Now the EU legal basis for consumer protection is formulated in the following words:

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:
   (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
   (b) measures which support, supplement and monitor the policy pursued by the Member States.
   (…)
4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them."
   (art. 169 TFUE) (see also *Reich 1999,* Bourgoignie 1997, Chillon 1998).

A comparison between article 129a and 153/169 of the Treaty reveals some differences. First of all the list of recognized consumer rights was widened by the right to information, the right to education and the right for consumers to organize themselves in order to safeguard their interests. Then a new provision stating that consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities was added (also Bourgoignie 1998).

For the purpose of this essay it must be emphasized that the right to information, education and to organize are no longer seen as interests to be taken care of but as subjective rights of consumers while health, safety and economic interests of consumers still have the status of interests and objectives of consumer policy, without being recognized as "rights" under article 169 TFUE (Stuyck 2000: p. 384). The SEA confirmed this and recognized consumer protection as a legitimate goal of the Community within the context of the internal market: The Treaty of Maastricht, by contrast, provided for a *distinct* legal basis for specific Community measures in the field of consumer protection. Accordingly, consumer protection has moved up to the rank of a fundamental constitutional value of EU law (Unberath, Johnston 2007: p. 1243).

2.1.4. EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS AND TREATY OF LISBON

Consumer protection is also mentioned in the European Charter of Fundamental Rights approved in Nice in 2000. According to article 38 of the Charter "Union policies shall ensure a high level of consumer protection." Significance of said provision arises from the fact that Charter is now a internal part of the Treaty of Lisbon and from the moment when the Treaty went into force on 1 December 2009 it is binding. Therefore this provision can have a persuasive role, as it can influence the work of the EC law-making institutions and lawmakers on the national levels.

On the other hand this provision is rather vague and needs detailed specification. What is more important to note is that the consumer protection provision of the Charter still can not create fundamental consumer rights because of the close relation between consumer and economic rights.

2.1.5. PROTECTION BY OTHER TYPES OF FUNDAMENTAL RIGHTS

We assume that a consumer right can become a fundamental right only on the basis of being formally acknowledged as such. As far as consumer protection is concerned such a source can be a right to privacy. The concept of privacy protection exists in all EU countries but the most important factor which influences the process of creating it, is article 8 of the EChaHR. Strasbourg Tribunal interprets the spheres of protection of the Charter very widely. Each person has a right to be protected against interference with his or her private, family and home life; his or her physical or mental integrity, and his or her moral or intellectual freedom. Article 8 also covers insults such as "painting some black", disclosing irrelative, embarrassing facts relating to private life, usage of name, identity or likeness, spying, prying, watching and besetting, interfering with correspondence, misuse of means of private communications, written or oral, disclosure of information given or received by person in circumstances of professional confidence (Robertson: p. 33). In this way the right to protect privacy – which is a fundamental right and constitutes a part of European Charter of Fundamental Rights, can possibly serve as a foundation for the protection of consumers.

Another basis may be found in data protection law. The system of personal protection was developed in Europe from the late 1960's and at present the protection of personal data forms a part of EU legal system too. In this way consumers may – in some areas – be protected by general EU data protection provisions and specific instruments related directly to consumers in certain areas. EU Directive 95/46 regulates processing of personal data in Community area. It creates conditions of data processing (which must be fair and lawful (art. 6)) and of data collection (which must be for specified, explicit and legitimate purposes, adequate, relevant and not excessive in relation to the purposes for which data are collected, accurate and, where necessary, kept up to date and kept in a form which permits identification of data subjects). It gives a person rights to be informed (art. 10, art. 11), to have access to data (art. 12), to object (art. 14) and to have access to automated decision processes (art. 15), and administrative and judicial remedies (art. 22, art. 23). The Directive may be treated as a very important consumer protection instrument in relation to consumer information.

In effect we may treat development of privacy and data protection instruments in the EU legal system as a process of "constitutionalisation" of consumer protection in

this area. Some consumer rights, such as the right to be informed, to have access etc. which are derived from the fundamental rights mentioned above are likely to become separate rights in future.

2.1.6. SIGNIFICANCE OF CONSUMER ECONOMIC RIGHTS

The same can not be said about consumer economic rights. In the beginning consumer policy was always connected to internal market policy (Cseres 2005). Through the last forty years ECJ has developed a wide catalogue of fundamental rights, derived from the constitutional traditions of the member states and several international conventions, particularly the European Convention on Human Rights. Its core constitutes four fundamental freedoms aimed at the proper functioning of the internal market (Case 8/74, *Procureur du Roi* v. *Dassonville*, [1974] ECR 837,). They have a significant effect on consumer protection (Dauses, Strum 1997: p. 52). EC consumer law shows the tension between the objective of establishing a single market with four freedoms on one hand and the protection of consumers on the other. ECJ has developed in the famous *Cassis de Dijon* case (Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] ECR 649) the formula that national measures which restrict the marketing of goods originating in another Member State are contrary to Article 34 TFUE unless they are justified by mandatory requirements in the general interest, such as consumer protection (also Pawłowski 2003). This is at least relevant, but only as a ground to justify rules that restrict trade. It is not for the EU directly to satisfy consumer needs but rather to ensure that consumers are enabled to participate as a very important actor, in the proper functioning of the market. (Tischner 2006). This approach is mirrored in ECJ rulings on the concept of consumer. Without going into details (vide Tischner 2006: p. 225–226) it would be sufficient to quote the ECJ position in *Gut Springheide* (Case 210/96) where it was held that an average consumer is a person who is reasonably well informed and reasonably observant and circumspect (partly critical on the concept of the confident consumer Wilhelmssonn 2004).

2.2. CHARACTER OF EUROPEAN CONSUMER RIGHTS

As mentioned above, article 169 TFUE Treaty lists consumer interests and rights. Now it must be settled whether this provision has the direct effect, namely if it can be used directly by consumers as a legal basis for their claims. It must be noted that article 169 is mainly directed to EU bodies and imposes an obligation on them to ensure a high level of consumer protection. It empowers them to undertake suitable activities. It does not impose obligations on either member states, or on individuals (Jagielska 2009: p. 1153).

In a case Rivero ECJ stated that the scope of Article 129a (now 169 TFUE) is limited. It provides that the Community must seek to achieve a high level of consumer protection and grants competence to the Community to formulate consumer protection policy, without burdening Member States or individuals with obligations in this regard. What is more important, is that according to ECJ "article 129a cannot justify the possibility of clear, precise and unconditional provisions of directives on consumer protection which have not been transposed into Community law within the prescribed period being directly relied on as between individuals. In the absence of measures implementing the directive within the prescribed period, a consumer may not, even in

view of article 129a of the Treaty, base a right of action on the directive itself against a lender who is a private person" (7 March 1996 El Corte Inglés SA v Cristina Blázquez Rivero Case C-192/94).

Article. 169 TFUE can not be treated as a separate and individual base for consumer claims and does not have such direct effect. It must be complemented by provisions of secondary law. Furthermore, directives must also be implemented properly into national legal systems.

At present the most important consumer secondary legislation are: the directive 1985/577/EEC on contracts not negotiated at business premises, directive 1990/314 on package travel, directive 1993/13 on unfair terms in consumer contracts, directive 1997/7 on contracts conclude at a distance, directive 1999/44 on certain aspects of the sale of consumer goods and guarantees, directive 2002/65 on distance marketing of consumer financial services, directive 2005/29 on unfair business-to-consumer commercial practices in the internal market, directive 2008/48 on timeshare contracts and directive 2008/48 on credit agreements for consumers.

3. THE POLISH "CONSTITUTIONALISATION" OF CONSUMER RIGHTS

3.1. CHARACTER OF CONSTITUTIONAL PROVISIONS RELATING TO CONSUMER PROTECTION

Article 76 of the Polish Constitution of 1997 provides: "[P]ublic authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute".

This provision is to some extent similar to the provisions contained in both: the European Charter of Consumers and the European Charter of Fundamental Rights, as it does not constitute a subjective human right, but rather empowers public authorities to take actions aimed at accomplishing special objectives (Łętowska 2002: p. 63). A consumer is not granted a direct right to bring legal claims. Likewise, a person is not entitled to bring a constitutional claim (CT judgment on 8 May 2000, SK 22/99, OTK ZU 2000 nr 4) on such basis. On the other hand he has a right to turn to the Polish Ombudsman for assistance in protecting his freedom or rights and – if applicable – a right to claim compensation for harm caused to him by actions contrary to law by a public body (article. 77 of the Constitution).

Art. 76 of Polish Constitution can be used as an instrument of directing and shaping activities of public authorities. It can also serve as an interpretation tool for the judiciary, as it establishes general rules which can be used in the process of creating and using the law. (Łętowska 2002: p. 64 i 71).

3.2. CONSTITUTIONAL TRIBUNAL STATEMENTS AND INTERPRETATIONS

An analysis of the rulings of Polish Constitutional Tribunal supports this concept. The Court states that article 76 should at least be treated as an interpretation direc-

tive, even if it does not create constitutional rights (P 10/04 OTK nr 1A/2005, poz. 7). The Tribunal regards protection of consumers as a "constitutional value", but only in a scope prescribed by a statute. Article 76 of the Constitution formulates a state policy, including some state obligations, which must be specified in statutes. The provision mentioned do not create direct personal rights and claim for citizens (CT judgment on 2 Dec. 2008 r., sygn. K. 37/07, OTK A 2008, nr 10, poz. 172). The requirement of consumer protection in terms of article 76 of the Constitution must be taken into consideration as an interpretation formula. It means that all exceptions to general rules of law, which can be disadvantageous for consumers must be interpreted strictly and in a rigid manner (CT judgment on 26 January 2005, OTK-A 2005/1/7).

Although article 76 does not create a subjective right, it formulates state obligations which must be embodied in statutes. Not only Polish legislation but also *acquis communautaire* should be taken into account in the interpretation of the provisions of law. (CT judgment on 21 April 2004 r. K 33/03, OTK ZU nr 4/A/2004, poz. 31). Art. 76 of the Constitution is formulated in a very broad manner and in the process of its interpretation not only tendencies in Polish law but also European standards should be taken into account (CT judgment on 13 September 2005, K 38/04, OTK ZU 2005, Nr 8A; CT judgment on 26 January 2005, P 10/04, OTK ZU 2005, Nr 1A).

Although the scope of consumer protection is outlined on statutory level, it does not mean that the legislature is completely free in shaping it. Statutes may be evaluated by the Constitutional Tribunal if adopted means are adequate (proportional) to the aims of protection (CT judgment 21 April 2004 K 33/03 OTK ZU 2004 Nr 3A). Obligations imposed on the State are not purely formal. It should be examined whether the proposed solution is effective and can – in an existing market situation – have the expected results. (CT judgment 26 January 2004, P 10/04 OTK ZU 2005, Nr 10A).

The judgments of the Polish Constitutional Tribunal not only settled some general rules for the application of art. 76 of the Constitution but also gave some hints when more detailed issues are at stake.

First of all it dealt with the problem of the notion of consumer used in article 76. It reasoned that this notion cannot be understood in its precise, private law meaning (according to art. 22^1 of the Polish Civil Code a consumer is a natural person concluding a contract which is not directly connected to consumer's business activity). Therefore, consumers can act within the scope of their business but this cannot be directly connected to their professional activities. (CT judgment on 20 April 2005 r., sygn. K 42/02, OTK ZU nr 4/A/2005, poz. 38). Explaining its point of view the Tribunal reasoned that notions used in a Constitution have their own, autonomous meaning, which should not be determined by reference to statutory law (CT judgment on 2 December 2008 K 37/07 OTK-A 2008/10/172).

The same should be said about other notions used in article 76 of the Polish Constitution, such as the notion of "unfair commercial practices". At the time of drafting the Constitution this phrase did not have a special legal meaning. Afterwards in 2005 an EU Directive 2005/29 on unfair commercial practices was enacted. Although the Directive was implemented in Polish legislation, the notion used in the Constitution should be interpreted autonomously, and the statute which implements the Directive can serve only as a helpful tool of interpretation (also Stefanicki 2008: p. 9).

The aim and the substance of the said provision is to ensure protection to all persons who create their relations autonomously though they are in a weaker (usually econom-

ically) position towards the other party. Among others, it means that this rule can be used for ensuring protection of employees in their relations to employers.

According to the Tribunal consumer protection should allow consumers to act freely in making consumer choices. Consumer's participation in the market must be shaped in such a way that a consumer could freely, on the basis of given knowledge and information and in accordance with his own interest satisfy his or her appreciated needs (CT judgment on 13 September 2005, K 38/04, OTK-A 2005/8/92). The Tribunal focused in many of its rulings based on art. 76 of the Constitution on the issue of information given to consumers. It clearly stated that the lack of information or usage of not transparent information will infringe art. 76. The consumer right to obtain plain and complete information is one of the guarantees needed to allow him to play his or her role in the market safely and consciously.

3.3. PROTECTION BY OTHER INSTRUMENTS

Article 47 of Polish Constitution guarantees the right to privacy as a fundamental right. Therefore a consumer can seek protection under article 47 and profit from constitutional instruments related to the protection of fundamental rights. (for example a constitutional claim, subject to the limitation clause in art. 31 para 3 which provides that all restrictions of the right should be justified on a statutory basis, must be proportional, preserve the essence of this right and be necessary in a democratic state (society). By contrast, Polish consumers can not relay on article 51 of the Constitution (on data protection) as it refers only to relations between a person and state.

The most important Polish consumer legislation embrace the Act on the Protection of Certain Consumer Rights and on the Liability for the Damage caused by Dangerous Products of 2 March 2000, the Act on Timeshare Contracts of November 2000, the Act on Consumer Sales" of 27 July 2002, the Act on Consumer Credit of November 2001, the Act on Tourist Services of July 1997 the Act on the Protection of Competition and Consumers of 2007 and the relevant provisions of the Civil Code.

4. CONCLUDING EVALUATION

A comparison of the European and Polish attitude to the process of "constitutionalisation" of consumer protection show many similarities.

Both provisions (art. 169 TFUE and art. 76 of Polish Constitution) do not have direct effect and can not serve as a basis for creating individual rights. They are constructed as State obligations and not as human privileges. They impose three types of obligations on the State: the obligation to *respect,* to *protect,* and to *fulfill* namely to *respect* the consumer as a person and not as market factor, to *protect* the consumer against dishonest market practices, and to *fulfill* the rights by direct protective legislative provisions.

They do not list all the consumer rights, but rather focus on a wide determination of the scope of protection. They are used by courts (especially ECJ and Polish Constitutional Tribunal) in interpreting laws and statutes and in shaping the limits of protection.

One of the main aims of both provisions is to empower public authorities to undertake activities in the field of consumer protection. For EU bodies this is crucial, as without such a rule and because of the subsidiarity principle, they would lose their compe-

tence to act in consumer matters. In case of Polish regulation this is not so important, as without art. 76 of the Constitution public bodies could after all act for the protection of consumer interests. We are is therefore still in the position that nothing would have happened if art. 76 had not been introduced into a Constitution (Jagielska, Jagielski 1999: s. 411, critically Łętowska 2002: s. 64). But after 12 years of its being in force, one may observe some advantages of having a provision on consumer protection in the Constitution. It fulfils an educational role for citizens and it helps judicial bodies (especially the Constitutional Tribunal) in interpreting law in favour of consumers where it is needed. The last target could of course be achieved in other ways but art. 76 simplifies the situation.

In conclusion, we want to pose the question whether consumer rights will one day become totally independent, separate, constitutional rights capable of being used directly. In other words we would like to consider whether the process of creating something from nothing will be completed. In our opinion it is rather doubtful, especially if we take into account the very sophisticated links between consumer protection and the internal market. Consumer protection is not seen as a wholly independent matter. It is rather connected to the consumer's role on the market. It perceives him as an active, conscious actor whose task is to finalize and enjoy the benefits of the market. In fact, consumer rights – like all other social rights – have two important social functions. On the one hand it serves as a basis for entitlements which can ensure an adequate standard of market relations, while on the other hand it serves as a basis for the recognition of personal rights. We assume that the fundamental status of consumer rights is limited to situations where consumer protection is elevated to the status of other recognized fundamental rights, such as privacy protection and personal data protection.

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