Chapter VI

A New Garment for an Old Question: ‘A Clash between Man’s Rights and Citizens’ Rights in the Enlarged Europe?’

Pasquale Policastro*

1. The European Legal Tradition, Constitutional Transitions and the Question of the Human Rights

1.1.

In a significant contribution from the latest years of the 20th century, Brian Tierney highlights that the conception of the natural rights develops through the social conflict at the beginning of the XIV century. The relevance of the social problems related to the issue manifested in the arguments developed in the disputation between Pope John XXII and the Franciscans, with special

* Chair of European Union Law, The Catholic University of Lublin, Professor of Constitutional Law and European Law, University of Szczecin. “Rientro dei cervelli” professor, University of Salerno. ppolic@kul.lublin.pl. I would like to dedicate these reflections to the memory of Aleksander Peczenik who unexpectedly passed away some months ago, and with whom I discussed the assumptions and the results of this paper on our last talk, September 15th 2005.
reference to ‘Fra Bonagrazia da Bergamo’. Michael Stolleis has pointed out that the reflections developed in the protestant universities of that time, were indeed the result of the attempt of the protestant society to protect itself from the consequences that the principles of the Westfalia Peace might have had towards the protestant minorities in Central Europe. His studies are grounded on the question of the use of the political power at the end of the wars of religion in Central Europe, and their relation with the development of different doctrines of the human rights. Many years before, Georg Jellinek attempted to analyze the origins and the development of the concept of human rights that took its positive form in the French Declaration of 1789. His studies looked at the development of the democratic institutions in the American colonies that was possible due to the grounding assumption for the founding societies that no deliberation may have interfered with the religious creed of their members. In dealing with the question of the development of the concept of human rights in the Age of the Enlightenment, Habermas instead prefers to point out that the reasons of economic development led the bourgeoisie to champion the expression in legal shape of the preconditions for the exercise of their activity. Marx also insisted on the relationship between the formulation of the rights and the influences of dominating social groups. He therefore refused the legal expression of the rights of the Declaration of 1789, because the social influences of the working class were not prevailing in it.

1.2.

The relationship between societal needs and the formulation of the rights, has been playing so far a deciding role in the interest of the scholars aiming to study the legal foundations of the human rights. Along this path, there have been developing approaches, such as the Bobbio conception of the different generations of the human rights. We may express the approach of Bobbio


