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Zasada poszanowania godności ludzkiej w wykładni Trybunału Sprawiedliwości Unii Europejskiej¹

The principle of human dignity as interpreted at the Court of Justice of the European Union: Article has been focused on the notion of human dignity as interpreted by the CJEU and its evolution during history of European integration. In the beginning the competence conferred on the European Communities pertained generally to the economic area so the possibility of affecting the rights of individuals was not apparent. The expressive recognition of the principle of human dignity by the CJEU occurred rather late with the ruling of 2001 regarding the Directive on the legal protection of biotechnical inventions. The CJEU's judgement in Omega was of crucial importance because it confirmed that a fundamental right to human dignity is part of EU law. The Brüstle judgement of 2011, regarding the context of bioscience and biotechnology, brought more light on the CJEU position with reference to the issue of human dignity. In this case the age-old problem of the moral status of the embryo is the central issue. Today this decision is seen as a justification and vindication of the principle of human dignity.

Keywords: dignity, European Union, human rights, Court of Justice of the European Union (CJEU)

Słowa kluczowe: godność, Unia Europejska, prawa człowieka, Trybunał Sprawiedliwości Unii Europejskiej (TSUE)

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Introduction

“Respect for human dignity is a universally accepted principle of law”. There is no controversy in the literature over the fact that law in Europe regards human dignity as its rationale.² The concept of human dignity constitutes the basis as

¹ This article is a part of the research project “Theory and dogmatics in the process of globalization of law”. The project was funded with the support from the National Science Centre in Poland; decision number DEC-2013/08/M/HS5/00345.

² *Principe Du Respect de la Dignité de la Personne Humaine. Montpellier 2-6 July 1998. Proceedings*, European Commission for Democracy through Law, Council of Europe

well as the *raison d'être* of human rights. The latter derive from the dignity of the human person, being the central subject for these principles.³ The discussed principle is guaranteed simply by virtue of a person being a human, and is not dependent on any particular additional status, and thus cannot be damaged or disowned.⁴ Human dignity, just as in the case of the substantial rule of law, to be understood as the source of all other fundamental rights enjoyed by the individual in EU law and establishes their status as equals under this legal order. The notion of human dignity is frequently invoked to provide normative foundations for other fundamental rights and to help to determine and influence their content and limits.⁵ Whenever the views held on human dignity vary from one country to another, there is a potential conflict between this principle and the fundamental freedoms: one Member State may invoke the protection of human dignity in order to curtail cross-border economic activities that are not illegal in other Member States.⁶

Chronological perspective

Originally, there were no indications relating to human dignity and human rights in the law of the European Union.⁷ At the beginning of the European integration

Publishing 1999, p. 13; N. Lickiss, *On Human Dignity: Fragments of an Exploration* [in:] J. Malpas, N. Lickiss (ed.), *Perspectives on Human Dignity. A Conversation*, Springer, Dordrecht 2007, pp. 30-32.

³ O. Schachter, *Human Dignity as a Normative Concept*, "The American Journal of International Law" 1983, vol. 77, no. 4, pp. 848-854.

⁴ C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, "European Journal of International Law" 2008, vol. 19, no. 4, p. 657, <https://doi.org/10.1093/ejil/chn043> (30.4.2018).

⁵ G. Boggetti, *The Concept of Human Dignity in European and US Constitutionalism* [in:] G. Nolte (ed.), *European and US Constitutionalism*, CUP, Cambridge 2005, p. 85.

⁶ O. Zetterquist, *The Judicial Deficit in the EC - Knocking on Heaven's Door?* [in:] U. Bernitz (ed.), *General Principles of EC Law in a Process of development, Reports from a conference in Stockholm 23-24 March 2007, organised by the Swedish Network for European Legal Studies*, Kluwer Law International 2008, Alphen aan den Rijn, p. 125.

⁷ M. Dybowski, *Prawa fundamentalne w orzecznictwie ETS*, C.H. Beck, Warszawa 2007, p. XI-XII; G. de Búrca, *The Road Not Taken: The EU as a Global Human Rights Actor*, "American Journal of International Law" 2011, no. 105, pp. 7-21; <http://ssrn.com/abstract=1705690> (13.2.2016); L. Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*, Wydawnictwo Sejmowe, Warszawa 2012, s. 230-256; C. Dupré, *Human Dignity in Europe: A Foundational Constitutional Principle* 2013, 19 "European Public Law" No. 2, pp. 319-339; S.A. De Vries, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice*, "Utrecht Law Review" 2013/1...; M. Kożuch, *Karta Praw Podstawowych UE – samoistne źródło*

reference to those principles seemed to be unnecessary. One should remember that the competence conferred on the European Communities by the Treaties in the 1950s pertained generally to the economic area.⁸ It was many years after political declarations on human rights were made by the EU institutions and the judgements of the Court of Justice of the European Union that the changes in the primary law finally occurred.⁹

There are a number of rulings of the Court of Justice of the European Union referring to human dignity.¹⁰ It is believed that *Stauder* case¹¹ was the first in connection with the human dignity protection in EU law.¹² However this principle was not indicated explicitly in the text yet. First and foremost the novelty of the CJEU's ruling of *Stauder* was a direct reference to fundamental rights. The CJEU stated that fundamental rights were "enshrined in the general principles of Community law and protected by the Court". With this declaration the CJEU has changed its initial position that excluded fundamental rights from the legal order of EU law at the very beginning of the European integration. However there was no specific definition of the fundamental rights yet in *Stauder* ruling. All the more human dignity has not been mentioned at all. 'With the general reference to 'principles' the Court confirmed the symbolic attachment to 'human rights'

prawa czy zbiór zasad interpretacyjnych?, "Europejski Przegląd Sądowy" 2015, nr 10; C. Dupré, *The Age of Dignity. Human Rights and Constitutionalism in Europe*, Hart Publishing, Oxford 2016.

⁸ J. Dutheil de la Rochère, *Fundamental Rights in the Global and European Law Order* [in:] G. Anthony, J.-B. Auby, J. Morison, T. Zwart (ed.), *Values in Global Administrative Law*, Hart Publishing, Oxford and Portland 2011, p. 300.

⁹ B. Brandtner, A. Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, "The European Journal of International Law" 1998, No. 9, p. 470.

¹⁰ Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini* [1997] ECR I-3843, paragraph 31, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB* (C-34/95) and *TV-Shop i Sverige AB* (C-35/95 and C-36/95) 9.7.1997; Case C-36/98, *Arben Kaba*, [2000] ECR I-2623 (judgment of 11 April 2000), para. 20; and Case C-413/99 of 17.9.2002 *Baunbust and R v. Secretary of State for the Home Department* [2002], ECR I-7091; T-315/01 21 September 2005 *Kadi v. Council and Commission*, ECLI:EU:T:2005:332; C-179/11, 27 September 2012 *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* [2012] – 594; C-23/12 *Mohamad Zakaria* 17 January 2013 [2013] – 24; C-57/12, 11.7.2013 [2013] – 517 *Fédération des maisons de repos privées de Belgique (Femarbel) ASBL v. Commission communautaire commune de Bruxelles-Capitale*.

¹¹ Case 29/69 *Stauder v City of Ulm*, ECLI:EU:C:1969:57.

¹² *Principe Du Respect de la Dignité de la Personne Humaine. Montpellier 2-6 July 1998. Proceedings*, European Commission for Democracy through Law, Council of Europe Publishing 1999, p. 13.

and installed a legally authenticated history of the Community's ethical origins and design'.¹³

One cannot forget about the opinion of Advocate General Jacobs who, in 1992, referring to constitutional traditions of the Member States, declared that "there exists a principle according to which the State must respect not only the individual's physical well-being, but also his dignity, moral integrity and sense of personal identity".¹⁴ The expressive recognition of the principle of human dignity by the CJEU occurred rather late with the ruling of 2001¹⁵ regarding the Directive on the legal protection of biotechnical inventions.¹⁶ It was an opportunity for the Court of Justice to explain in detail the status of human dignity and the reason for protection of this principle under EU law. The CJEU pointed out that it is within the scope of its authority to review the compliance of the EU legislation with the general principles of the EU law "to ensure that the fundamental right to human dignity [...] is observed." With this judgement it was confirmed that a fundamental right to human dignity is part of EU law. A few years later the notable ruling of *Pupino* called attention to the fact that each Member State is obliged to ensure that victims are treated with due respect for their personal dignity during proceedings.¹⁷

Nevertheless the key ruling of the CJEU as regards the human dignity principle is *Omega* of 2004.¹⁸ This is an example where fundamental rights prevail over one of the EU's founding freedoms. In this case the Court, following the line of argumentation of Advocate General Stix-Hackl,¹⁹ held that "the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law". The Court confirmed that the measure taken to protect the principle of human dignity fulfilled the conditions for justifying restrictions imposed (such as those consequent to free movements of goods and services) in order to achieve this objective. Furthermore compatibility of this objective with the law of the European Union was also declared by the CJEU. However "the national measure does need necessarily have to comply with a common opinion shared by

¹³ S. Douglas-Scott, N. Hatzis, *Research Handbook on EU Law and Human Rights*, Edward Elgar Publishing, Cheltenham 2017, s. 19.

¹⁴ Opinion of AG Jacobs in Case C-168/91, Christos Konstantinidis, ECLI:EU:C:1992:504.

¹⁵ Case C-377/98 *Netherlands v European Parliament and Council*, ECLI:EU:C:2001:523.

¹⁶ Directive 98/44/EC of 6 July 1996 of the European Parliament and of the Council on the legal protection of biotechnological inventions, OJ L 213 of 30.07.1998, p. 13.

¹⁷ Case C-105/03 *Pupino*, ECLI:EU:C:2005:386 regarding Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82, 22.3.2001.

¹⁸ Case C – 36/02 *Omega*, ECLI:EU:C:2004:614.

¹⁹ McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 "European Journal of International Law" 2008, no. 4, p. 669; <https://doi.org/10.1093/ejil/chn043> (9.4.2018).

all Member States on how to protect the fundamental right or legitimate interest in question.”²⁰ It is worth stressing that the opinion of AG Stix-Hackl emphasized the fundamental importance of human dignity also in EU law.

Having in mind *Omega* ruling, it is interesting why the CJEU have not re-considered issues such as abortion which had held earlier in *Grogan*²¹ on service within the meaning of Community law. It may be true – as some authors claim²² – that the decision in *Grogan* was motivated by a desire not to interfere with the Irish understanding of the right to life.²³ “The Court’s way of adjudicating the case might be seen as an indication of its reluctance to engage with an issue as delicate as constitutional abortion rights.”²⁴

Some kind of similar reluctance of the CJEU as regards ethical matters was also visible in *Brüstle* ruling of 2011.²⁵ The question referred to the Court of Justice regarded the issue of patenting embryonic stem and precursor cells. The CJEU pointed out that the intention of EU legislation was to exclude any possibility of patentability where respect for human dignity could thereby be affected. The Court claimed that “any human ovum must, as soon as fertilised, be regarded as a ‘human embryo’ [...], since that fertilisation is such as to commence the process of development of a human being”. It has also described the principle of human dignity as an individual fundamental right. The CJEU did not share the view of Advocate General Y. Bot, who cautiously paid attention to the fact that the legal analysis on human embryo should be based on objective, up-to-date and scientific information.²⁶ Moreover some authors claim that the proposed judicial resolution offered “bewilderingly broad definition” of human embryo ignoring scientific subtleties.²⁷ However AG Bot noted that the questions referred to the Court were legal in their nature and therefore he draw a legal framework for the definition to be prepared by the CJEU. The key element of this legal framework

²⁰ F. Schorkopf, *Human Dignity, Fundamental Rights of Personality and Communication* [in:] D. Ehlers (ed.), *European Rights and Freedoms*, De Gruyter Recht, Berlin, p. 402.

²¹ Case 159/90 *Grogan*, ECLI:EU:C:1991:378.

²² R.C. Craufurd Smith, *Community Intervention in the Cultural Field: Continuity or Change?* [in:] R.C. Craufurd Smith (ed.), *Culture and European Union Law*, Oxford University Press 2004, Oxford, pp.37-40; N. Nic Shuibhne, *Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law*, 34 “European Law Review” 2009, 230, pp.243-244; D. Sarmiento, *The Silent Lamb and the Deaf Wolves* [in:] M. Avbelj, J. Komárek (ed.), *Constitutional Pluralism in the European Union*, Hart Publishing, 2012, pp. 294-295.

²³ E. Cloots, *National Identity in EU Law*, Oxford University Press 2015, Oxford, p. 263.

²⁴ *Ibidem*, p. 263.

²⁵ Case C-34/10 *Brüstle*, ECLI:EU:C:2011:669.

²⁶ Opinion of AG Y. Bot in Case C-34/10 *Brüstle*, ECLI:EU:C:2011:138.

²⁷ S.H.E Harmon, G. Laurie, A. Courtney, *Dignity, Plurality and Patentability: The unfinished Story of Brüstle v. Greenpeace*, 38 “European Law Review” 2012, no. 1, p. 101.

is the principle of human dignity recognised by the Court as a general legal principle ‘before it was even enshrined as a fundamental value in Article 2 of the EU Treaty’.²⁸

In spite of the CJEU declaration of non-involvement in any ethical considerations or lack of reference to human dignity as a principle protected in the EU Charter the very fact that the EU institution adjudicated the definition of a human embryo has brought this issue into the centre of the EU legal system with the fundamental dilemma regarding the concept of human life as well as understanding of human dignity in the EU law.

In search of definition on human dignity by Advocates General

It appears that for the Court of Justice of the European Union the concept of human dignity is based on a comparatively wide understanding, as expressed in Article 1 of the Charter of Fundamental Rights of the European Union. It reads that human dignity is inviolable. It must be respected and protected. So the recognition of this principle by the CJEU appears often in different contexts as well as in connection with other principles. As regards the principle of equality or non-discrimination the interrelation between the latter and human dignity is explained through the term ‘égale dignité’. According to the CJEU “the concept of the legal equality of all is also inherent in the idea of human rights in general and human dignity in particular, so that reference is also often made of the phrase ‘égale dignité’ which embraces both concepts”.²⁹

Advocate General Stix-Hackl³⁰ in her opinion to *Omega* judgement brought some light on the idea of human dignity as a concept of EU law. According to her opinion human dignity „concerns the protection of and respect for the essence or nature of the human being per se – that is to say, the ‘substance’ of mankind. Mankind itself is therefore reflected in the concept of human dignity; it is what distinguishes him from other creatures”.³¹ She also draw the attention to the fact that human dignity originates from a conception of mankind existing in European culture. The latter regards man as an entity capable of spontaneity and self-determination. “Because of his ability to forge his own free will, he is a person (subject) and must not be downgraded to a thing or object”. One cannot deny that her reasoning is quite informative as regards the moral foundations of EU legal order.

²⁸ Opinion of AG Y. Bot in Case C-34/10 *Brüstle*, ECLI:EU:C:2011:138.

²⁹ Case C – 36/02 *Omega*, ECLI:EU:C:2004:614.

³⁰ Opinion of AG Stix-Hackl in Case C – 36/02 *Omega*; ECLI:EU:C:2004:162.

³¹ *Ibidem*.

Human dignity, as a fundamental expression of an element of mankind founded simply on humanity, forms the underlying basis and starting point for all human rights distinguishable from it; at the same time, it is the point of convergence of individual human rights in the light of which they are to be understood and interpreted. It reflects the idea that every individual human being is considered to be endowed with inherent and inalienable rights.³²

Advocate General Poiares Maduro stated that ‘the most obvious way in which such a person’s dignity and autonomy may be affected is when one is directly targeted because one has a suspect characteristic.’³³ Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognizing the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably.³⁴

Despite the fact that the case law of the Court of Justice is unsatisfactory with regard to correlation between fundamental rights and human dignity³⁵ the opinion of AG Stix-Hackle in the *Omega* case is of key importance concerning this issue. She claims that “‘human dignity’ is an expression of the respect and value to be attributed to each human being on account of his or her humanity”. Moreover as a fundamental expression of an element of mankind founded simply on humanity, it forms the underlying basis and starting point for all human rights distinguishable from it. AG Stix-Hackle also points out that all (particular) human rights, being an emanation and as specific expressions of human dignity, ultimately serve to achieve and safeguard the discussed principle.³⁶

According to the CJEU the discussed principle not only require the State to abstain from any treatment of individuals that would be contrary to human dignity. It also insists on to act in order to prevent such treatment among individuals³⁷.

³² *Ibidem*.

³³ Opinion of AG Maduro in Case C-303/06 *Coleman*; ECLI:EU:C:2008:61.

³⁴ *Ibidem*.

³⁵ M. Dybowski, *Prawa fundamentalne*, *op. cit.*, p. 176.

³⁶ Opinion of AG Stix-Hackl in Case C-36/02 *Omega*, *op.cit.*

³⁷ T. Ackermann, *Case Law, A. Court of Justice, Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Judgment of the Court of Justice (First Chamber) of 14 October 2004*, 45 “Common Market Law Review” 2005, no. 4, p. 1116.

The principle of human dignity as a guiding ethical norm in EU law

The discourse on human dignity in bioscience and biotechnology is being interpreted as a new horizon of human rights in Europe. As a result the main point of lively debates focuses on what should be more respected: freedom of research or human dignity. The basis for the dispute was an adoption of the European Biopatenting Directive (Biotechnology Directive).³⁸ With the judgement of 2001 The CJEU for the first time confirmed that the guarantee of human dignity is of fundamental legal value of the European Union law.³⁹ It also confirmed that human dignity is a part of the primary law source of EU. However it is not only the Court's responsibility as regards the guarantee of human dignity. The CJEU also acknowledged this as a precondition and standard of the guarantee for the legality of EU legal acts.⁴⁰ As regards respect for human dignity the Court indicated the content of the Directive which provides that the human body at the various stages of its formation and development cannot constitute a patentable invention. No less important as regards the protection of human dignity under the regime of the Directive is additional security excluding from patentability, processes for cloning human beings, processes for modifying the germ line genetic identity of human beings and uses of human embryos for industrial or commercial purposes. All those issues are regarded as contrary to public order and morality. The Court further claimed that the above mentioned processes did not create an exhaustive list but all processes the use of which offends against human dignity should be also excluded from patentability. It means that "as regards living matter of human origin, the Directive frames the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded."⁴¹

On the contrary rather critical evaluation on this judgement was presented by M. Dybowski. In his opinion the statement of CJEU, that only inventions which combine a natural element with a technical process enabling it to be isolated or produced for an industrial application can be the subject of an application for a patent, "did not explain why this would be decisive in safeguarding human dignity in the challenged provisions."⁴² This is the issue which was also submitted by the applicant who claimed that "the patentability of isolated parts of the human

³⁸ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213, 30.7.1998, pp. 13-21.

³⁹ Case C-377/98 *Netherlands v European Parliament and Council*, ECLI:EU:C:2001:523.

⁴⁰ P. Wallau, *Die Menschenwürde in der Grundrechtsordnung der Europäischen Union*, Bonn University Press, 2010.

⁴¹ B.K. Oğuztürk, *Human Dignity Principle and the Protection Guarantee of the Principle in EU Law System*, 1 "Human Rights Review" 2011, no. 1, pp. 80-81.

⁴² M. Dybowski, *Prawa fundamentalne*, op. cit., p. 179.

body reduces living human matter to a means to an end, undermining human dignity. Moreover, the absence of a provision requiring verification of the consent of the donor or recipient of products obtained by biotechnological means undermines the right to self-determination.”⁴³ Dybowski claims that the issue of human dignity has been identified by the CJEU only with self-determination of a human being.⁴⁴

Only the *Brüstle* judgement of 2011, also regarding the context of bioscience and biotechnology, brought more light on the CJEU position with reference to the issue of human dignity. It was of key importance for the Court to answer several major questions concerning the patentability of stem as well as and the definition of a human embryo. “Based on morality grounds, the Court ruled that such invention was not patentable according to Biotechnology Directive. This decision raised a lot of concerns in the scientific and research fields, as it may have severe consequences on the stem cell industry. In order to understand this complicated matter, the background of the decision has to be clearly defined before looking at the case in itself.”⁴⁵ The CJEU had to determine the meaning of the term of “human embryos” as well as the expression “uses of human embryos for industrial or commercial purposes”. The very last question referred to problem of technical teaching which should be considered unpatentable even if it does not claim the destruction of a human embryo. This judgment bears a heavy moral burden therefore it should be applauded. Instead of hiding behind different ‘national identities’, the CJEU ruled unequivocally that “there is no patentability on scientific research using embryonic stem cells. This confers a uniform point of view on a morally contested matter. The CJEU was determined not to submit to moral relativism and came up with an actual judgment.”⁴⁶

In this case AG Bot in his opinion provided the Court with proposal for the definition of a human embryo, stating that “totipotent cells carrying within them the capacity to evolve into a complete human being must be legally classified as human embryos and must therefore be excluded from patentability.”⁴⁷ He also considered that the principle of human dignity is a principle which must be applied not only to an existing human person, to a child who has been born,

⁴³ Case C-377/98 *Netherlands v European Parliament and Council*, ECLI:EU:C:2001:523.

⁴⁴ M. Dybowski, *Prawa fundamentalne*, op. cit., p. 179.

⁴⁵ B. Sautier, *Oliver Brüstle vs. Greenpeace: how to read the moral compass?*, KSLR EU Law Blog; <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?tag=brustle-case#.XBsBpIt-KiJA>.

⁴⁶ W. Van Hoof, S. Smet, *Deference or Substantive Resolution? The ECJ's Brüstle Judgment on the Use of Human Embryos for Scientific Research*, <https://strasbourgobservers.com/2011/11/28/deference-or-substantive-resolution-the-ecjs-brustle-judgment-on-the-use-of-human-embryos-for-scientific-research/> (19.3.2019).

⁴⁷ Opinion of AG Bot in Case C-34/10 *Brüstle*, ECLI:EU:C:2011:669.

but also to the human body from the first stage in its development, i.e. from fertilisation.”

A very broad interpretation on what should be considered as a human embryo, and therefore would be unpatentable was given by the Court following Advocate General's opinion. The Court ruled that “any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a ‘human embryos’”. Today the decision of the CJEU is perceived as justification and vindication of the principle of human dignity. Despite the fact that the ruling did not prevent human embryos from being destroyed or stop scientists from using human embryos in research it made more difficult for European commercial companies to profit from destruction of human embryos.

One should notice some paradox regarding the *Brustle* ruling. The CJEU, pronouncing that it only interpreted the text of the Biotechnology Directive, parallelly reached a very broad interpretation of a human embryo as well as “construed the related prohibition of patenting equally broadly, leading to non-patentability in the EU of most stem cell research involving the destruction of embryos at any stage of the research process.”⁴⁸

The principle of human dignity in the context of the internal market

According to Article 2 of the Treaty of the European Union, the principle of human dignity is one of the fundamental values of the EU. It is founded on the value of respect for human dignity, inter alia, internally. One cannot deny that this principle is firmly embedded in the EU law regarding the internal market.

With respect to the freedom of movement of people, which is a cornerstone of EU citizenship, the principle of human dignity is enshrined in Articles 21 and 45 Treaty on the Functioning of the European Union. It states that every citizen of the European Union has the right to move and reside freely within the territory of the Member States (in any EU country of his/her choice). In this context the CJEU was requested for a preliminary ruling on a decision of a national authority refusing to issue a residence card of a family member of a Union citizen. Firstly, for the Court it was important to draw the attention to the fact EU law “does not confer any autonomous right on family members of a Union citizen who

⁴⁸ T. Mylly, *The Constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU* [in:] Ch. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*, Edward Elgar Publishing, Cheltenham 2015, s. 126-127.

are third-country nationals”. So any right granted to those nationals is “derived from the rights which the Union citizen concerned enjoys as a result of having exercised his freedom of movement.”⁴⁹ Therefore such a right may be conferred on the family members of those citizens, irrespective of their nationality.⁵⁰ Additionally it is to be exercised under objective conditions of dignity.⁵¹

It is claimed that “work is a domain in which people are especially vulnerable to loss of dignity.”⁵² Therefore securing safe and decent conditions of work “mark their bearers as respectable human beings, not mere tools until they wear out.”⁵³ So working conditions may be a frame of reference to equal treatment of men and women at work. The prohibition against discrimination on the ground of gender requires that all people, and in the context of the workplace all workers, have the right to receive the same treatment, and will not be discriminated against. With regard to entitlement to equal pay for men and women it is significant to present the opinion of Advocate General Cosmas in the case *Lilli Schröder* who declared that ‘in a community governed by the rule of law, which respects and safeguards human rights, the requirement of equal pay for men and women is founded mainly on the principles of human dignity and equality between men and women and on the precept of improving working conditions, not on objectives which are economic in the narrow sense.’⁵⁴ No less significant form of discrimination at work is dismissal of a transsexual for a reason arising from the gender reassignment of the person concerned.⁵⁵

It is noteworthy the issue of paid annual leave. This problem was a subject of analysis of Advocate General Tanchev relating to the case *C. King*.⁵⁶ He draw the attention to Article 31(1) of the Charter of Fundamental Rights which states that every “worker has the right to working conditions which respect his or her health, safety and dignity.” Article 31 is a provision ‘with very significant normative weight and importance. Indeed, one may regard Article 31 as the most fundamental of the labour rights in the EU Charter. One cannot deny that his way of thinking was based on the CJEU ruling in case *KSH AG* of 2011.’⁵⁷ The Court declared that “the right to paid annual leave is, as a principle of European Union social law, not only particularly important [...] but is also expressly laid down

⁴⁹ Case C202/13 *McCarthy and Others*, EU:C:2014:2450.

⁵⁰ Case C165/16 *Lounes*, ECLI:EU:C:2017:862.

⁵¹ Case C246/17 *Ibrahima Diallo*, ECLI:EU:C:2018:499.

⁵² E. Anderson, *Human Dignity as a Concept for the Economy* [in] M. Düwell (ed.), *The Cambridge Handbook of Human Dignity. Interdisciplinary perspectives*, Cambridge University Press 2014, p. 496.

⁵³ *Ibidem*.

⁵⁴ Opinion of AG Cosmas in Case C-50/96 *Lilli Schröder and Others*, ECLI:EU:C:2000:72.

⁵⁵ Case 13/94 *P v S and Cornwall County Council*, ECLI:EU:C:1996:170.

⁵⁶ Opinion of AG Tanchev in Case C214/16 *C. King*, ECLI:EU:C:2017:439.

⁵⁷ C214/10 *KSH AG*, ECLI:EU:C:2011:761.

in Article 31(2) of the Charter of Fundamental Rights of the European Union, which Article 6(1) TEU recognises as having the same legal value as the Treaties.”

The principle of human dignity in the Area of Freedom, Security and Justice

One can also point out a number of judgements regarding the Area of Freedom, Security and Justice as it is field well provided with the Court’s decisions referring to the principle of human dignity.

With reference to the performance of the duties of the border guards the Court of Justice stressed that they are required to fully respect human dignity.⁵⁸ Their activities must be essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity.⁵⁹ The respect for human dignity is of key importance as regards repatriation policy and removals of third-country nationals. This issue was a subject of the CJEU assessment in the case *Mahdi*.⁶⁰ The Court ruled that establishing an effective removal and repatriation policy should be based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.⁶¹ The Court also highlighted that

while Member States essentially retain the freedom to determine the requirements of public policy in accordance with their national needs, which can vary from one Member State to another and from one area to another, the fact still remains that, in the European Union context and particularly when relied upon as a justification for derogating from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the European Union, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union.⁶²

As regards the detention conditions in Member States the Court of Justice draw the attention to the fact that there were no minimum standards under EU law regarding such conditions. As a result the Court referred to Article 3 of the

⁵⁸ Case C-23/12 *Mohamad Zakaria*, ECLI:EU:C:2013:24.

⁵⁹ Case C-57/12 *Femarbel*, ECLI:EU:C:2013:517.

⁶⁰ Case C-146/14 PPU *Mahdi*, EU:C:2014:1320.

⁶¹ Case C-61/11 PPU *El Dridi*, EU:C:2011:268.

⁶² C-554/13 *Z. Zh. and O*, ECLI:EU:C:2015:377.

European Convention on Human Rights. It imposes “on the authorities of the State in whose territory a person is being detained a positive obligation to satisfy themselves that a prisoner is detained in conditions which guarantee respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.”⁶³

It is important to stress that under Article 7(1) TEU, the Council assesses whether there is a clear risk of a serious breach of the values referred to in Article 2 TEU - namely human dignity. AG Tachev stressed that “by contrast, in the judgment in *Aranyosi and Căldăraru*, the examination by the executing judicial authority concerned the existence of a real risk of breach not of a value common to the Member States but of a fundamental right, the prohibition of inhuman or degrading treatment or punishment.”⁶⁴ This prohibition, laid down in Article 4 of the Charter is absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter. In this context the Court, following the Article 3 of the European Convention of Human Rights, draws the attention to the fact that

on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected.⁶⁵

However the CJEU goes further not permitting a Member State to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners even if the third-country national consents thereto.⁶⁶

In the above context one cannot omit the question whether the national courts could refuse to execute a European arrest warrant when the person to be extradited might face inhumane or degrading conditions of detention. The

⁶³ Case C-220/18 PPU *Conditions de détention en Hongrie* 2018, ECLI:EU:C:2018:589; por. C-404/15 i C-659/15 PPU, *Aranyosi and Căldăraru* EU:C:2016:198.

⁶⁴ Opinion of AG Tachev in Case C216/18 PPU *Défaillances du système judiciaire*, 28 June 2018; ECLI:EU:C:2018:517.

⁶⁵ Case C-112/00 *Schmidberger*, EU:C:2003:333.

⁶⁶ C-474/13 *Thi Ly Pham*, ECLI:EU:C:2014:2096.

Court provided with the positive answer at least under certain limiting conditions. According to the CJEU the prohibition of inhuman or degrading treatment of Article 4 of the Charter of Fundamental Rights of the European Union could be a legal ground for such a decision of a national court.⁶⁷

Summary

This article has been focused on the notion of human dignity as interpreted by the CJEU. It should be noted that in the beginning of the European integration the competence conferred on the European Communities by the Treaties in 1950s pertained generally to the economic area, so the possibility of affecting the rights of individuals was not apparent. It took many years for the EU institutions and the CJEU to implement political declarations on human rights into the EU legal system.

The expressive recognition of the principle of human dignity by the CJEU occurred rather late with the ruling of 2001 regarding the Directive on the legal protection of biotechnical inventions. However the CJEU's judgement in *Omega* was of crucial importance as it gave the opportunity for the CJEU to explain in detail the status of human dignity and the reason for protection of this principle under EU law. With this judgement it also was confirmed that a fundamental right to human dignity is part of EU law. Moreover the opinion of Advocate General Stix-Hackl in *Omega* helped to define the idea of human dignity as "an expression of the respect and value to be attributed to each human being on account of his or her humanity".

The Brüstle judgement of 2011, regarding the context of bioscience and biotechnology, brought more light on the CJEU position with reference to the issue of human dignity. In this case the age-old problem of the moral status of the embryo is the central issue. With this ruling the CJEU made a substantial point: there is no patentability on scientific research using embryonic stem cells. Today this decision is seen as a justification and vindication of the principle of human dignity.

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⁶⁷ C404/15 and C659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198.

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