

Magdalena Bainczyk

THE CONCEPT OF HUMAN DIGNITY IN EUROPEAN UNION LAW¹

Although European Union law is a impressive, hierarchically-structured edifice neither its construction nor its foundations (ie. its basic laws) were carefully planned and laid out. The shape and evolution of the system has always been affected by the agendas of its participants, but now, with more countries joining the club, the difficulties of consensus-building are all too obvious. The European Court of Justice may provide some relief by rulings which reach out into the field of general law and go some way to bridging the gaps in EU fundamental laws, but it is no more than an ad hoc procedure.² The EJC is not in a position to act systematically. It can only deal with cases as they turn up, and even then its judges are not immune to criticism from politicians who insist that in an organization like the European Union the principal lawmaking authority at the constitutional level rests with the member states, and not an institution.³

A good illustration of this assessment of the problems faced by the EU legal system can be found in one aspect of its history, ie. the staking out of the legal foundations for the protection of human rights, first by the European Community, and then by the European Union. Originally human rights remained outside the area of community integration, a state of affairs confirmed by the judgments of the Court

¹ Tekst stanowi uzupełnioną wersję referatu wygłoszonego na X Międzynarodowej Konferencji Naukowej „Państwo, gospodarka, społeczeństwo”, Kraków, 13–15 czerwca 2010 r., powstał w oparciu o kwerendę finansowaną ze środków na badania własne WSM/BW/3/2010.

² N. Foster, *EU Law Directions*, Oxford 2010, p. 107.

³ About lawmaking function of the EU courts, especially in relation to secondary law: T. T. Koncewicz, *Aksjologia unijnego kodeksu proceduralnego*, Warszawa 2010, p. 307.

of Justice. However, under pressure from some member states, especially Germany which treated the protection of human rights as an absolute priority after the Second World war, they were gradually brought under the roof of the ECJ. In the 1960s in a series of its rulings human rights were admitted to the rank of essential principles of the European treaties. As the treaties themselves did not contain any specific catalogue of human rights, the Court had to make up that deficiency by drawing on the common constitutional traditions of the member states and various international treaties, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁴

The establishment of the European Union in 1993 did not result in any significant changes in the existing human rights legislation. In line with the established practice of the European Court of Justice Art. F Clause 2 (or the present Art. 6.3) of the original Treaty⁵ declared the Union's commitment to human rights as spelled out in the EUHR or derived from the constitutional traditions common to the EU member states. The Treaty of Amsterdam (1997), drafted to strengthen the axiological foundations of the Union on the eve of its expansion into Central and Eastern Europe, amplified the old Article F by a clause containing a list of core principles, among them respect for human rights and fundamental freedoms. In addition, both member states and the candidate states for membership were committed to safeguard human rights by Articles 7 and 49 of the TEU. Yet, it must be made clear, none of these amendments were tantamount to the adoption of a clear-cut catalogue of human rights protected by the EU. In consequence, the legal ground on which the ECJ produced a whole series of human rights judgments in the 1990s was rather dubious. Even then, however, their contribution to the development and clarification of the relevant general law is beyond dispute.

The drafting of the Charter of Fundamental Rights (the Charter) in 2000 was hailed as a final breakthrough on the road to safeguarding human rights in the EU. Yet when it was to be adopted and made into law some member states put on the brakes. As a result this formidable piece of legislation remained for a long time a mere political declaration. For some reason this inadequacy did not hinder the Court of the First Instance,⁶ and then the Court of Justice⁷ itself from giving the Charter

⁴ A. Arnall, A. Dashwood, M. Dougan, M. Ross, E. Spaventa, D. Wyatt, *European Union Law*, London 2006, p. 257; N. Foster, *Foster on EU Law*, Oxford 2011, p. 120.

⁵ Consolidated version of the Treaty on European Union, OJ 2010, C 86, p. 13 ff.

⁶ Case T-54/99, *max.mobil v. Commission*, ECR 2002 Page II-00313, "The diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 confirms that [e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union."

⁷ Case C-540/03, *European Parliament v Council of the European Union*, ERC 2006 Page I-05769 , "The Charter of Fundamental Rights of the European Union likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents."; A. Wyrozumska, *Ochrona praw podstawowych w Unii Europejskiej – problemy pluralizmu porządków prawnych*, [in:] Suwerenność

unqualified acknowledgement in their rulings. As the EU pressed ahead with the consolidation of its constitutional framework the Charter of Fundamental Rights was incorporated into the text of what was generally referred to as the European Constitution. It became thus an integral part of an international treaty signed up by member states, and in effect an element of EU primary (ie. constitutional) law.⁸ At the time when the Charter was being drafted and later, when it was presented at an intergovernmental conference, it attracted far less controversy than another element of the proposed Constitution, the Preamble.⁹ It is hard not to find it odd as preambles are not legally binding. The debate was unexpectedly drowned out when French and Dutch voters rejected the Constitutional Treaty in two separate referendums in 2005. It was not until June 2007 that the European Council took action to break the deadlock.¹⁰ The Council agreed on a set of guidelines (Mandate)¹¹ for an Intergovernmental Conference which was to revamp the discarded bill (called first the Reform Treaty, and later Treaty of Lisbon). In accordance with recommendation I.9 of the Mandate the article concerned with the protection of fundamental rights was to refer explicitly to the Charter of Fundamental Rights, but the text of the Charter was not to be included in the new treaty. This solution, which had been backed by a number of countries including Poland, meant that Charter was not an integral part of the amended treaty. The decoupling of the Charter from the main document was treated as an important element of a strategy of deconstitutionalization, ie. playing down the constitutional implications of the new treaty to ease its passage over the hurdles of the ratification process.¹² The treaty had to be ratified by each of the member states (as required by Art. 48 of the TEU). The strategy was successful but only to a point. The adoption by the United Kingdom and Poland of the British protocol¹³ and the opt-out assurances given to the Czech Republic¹⁴ show that there is a group of member states that are not prepared to accept the Charter as an indispensable element of the process of European integration.

Although it was left out of the main text the amended treaty, the TUE accords to the Charter the legal status of a treaty (Art. 6.1). It seems that this provision

i ponadnarodowość a integracja europejska, ed. J. Barcz, Warszawa 2006, p. 158; R. Streinz, C. Ohler, C. Hermann, *Der Vertrag von Lissabon zur Reform der EU*, München 2010, p. 127.

⁸ Part II of the Treaty establishing a Constitution for Europe, OJ 2004, C 310.

⁹ J. J. Weiler, *Chrześcijańska Europa: konstytucyjny imperializm czy wielkokulturowość?*, Poznań 2003.

¹⁰ Brussels European Council 21/22 June 2007, Presidency Conclusions, I Treaty reform process, www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf [14.02.2012].

¹¹ Idem, Annex I, IGC Mandate.

¹² Idem, Annex I, IGC Mandate, I.1.; F. Jasinski, *Chapter II. Charter of Fundamental Rights: structure, scope, of regulation and present practical meaning*, [in:] *Fundamental Rights Protection in the European Union*, ed. J. Barcz, Warszawa 2009, p. 45.

¹³ Protocol (No 30) on the application of the Charter of fundamental rights of the European Union on Poland and the United Kingdom, OJ 2010, C 86, p. 313.

¹⁴ Brussels European Council 29/30 October 2009, Presidency Conclusions, I.1.2., Annex I, Protocol on the application of the Charter of fundamental rights of the European Union to the Czech Republic, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf [14.02.2012].

admits a new category of legislation to the set of EU primary laws. So far only treaties concluded between nations and general principles of law laid down by the ECJ have been ranked as primary law. The Charter, however, is neither an international accord nor is it part of the Treaties.¹⁵ It is worth noting that as Art. 6.2 of the TUE makes it possible for the UE to accede to the ECHR there is no reason why the Union should not be guided in its activities by the catalogue of human rights recognized by all European countries, including the member states of the EU.

One may wonder what are the political and legal reasons why forty-seven European countries have accepted the Convention and implemented its mechanisms for more than fifty years while the twenty-seven UE member states find it hard to endorse the Charter of Fundamental Rights. Surely a major stumbling block is the extraordinarily wide scope of the Charter. Its fifty articles enumerate a panoply of rights all of which, if the Charter's title is anything to go by, would have to be called fundamental (!). The Convention is by comparison much more modest. Another source of concern is the activity and political role of the Court of Justice. To many observers its track record is a good illustration of judicial activism rather than judicial restraint.¹⁶ To be fair, though, similar misgivings have often been voiced about the judges from the European Court of Human Rights in Strasbourg.

This brief presentation of the evolution of the legal framework encompassing the protection of human rights indicates that working out compromises on the axiological foundations of the Union will be a exceptionally hard job. Likewise, the adoption of the Charter is not going to put an end to debates about legal safeguards of human rights, including the thorny issue of interpreting the Charter's concept of human dignity.

Human dignity in the rulings of the European Court of Justice

The concept of human dignity in the law of the European Communities and then the law of the EU cannot be studied in isolation from the process of framing EU primary laws, as described above. In spite of the fact that the dignity of the human person has been universally recognized as the source of all human rights¹⁷ this very concept was virtually absent from not only the European Community legislation but also the ECJ rulings until the 1990s. The few exceptions will be presented below.

One of the first judgments in which the ECJ evoked the concept of dignity was connected with its interpretation of Council Directive 76/207/EEC¹⁸ on the

¹⁵ C. Mik, *Chapter III. The Charter of Fundamental Rights: determinants of Protective Standards*, [in:] *Fundamental Rights Protection...*, p. 63.

¹⁶ D. Dąbek, *Prawo sędziowskie w polskim prawie administracyjnym*, Warszawa 2010, p. 627.

¹⁷ R. J. Schweizer, F. Sprecher, *Menschenwürde im Völkerrecht*, [in:] *Menschenwürde als Rechtsbegriff*, ed. K. Seelmann, "Archiv für Recht und Sozialphilosophie", ARSP Beiheft Nr. 101, p. 127; J. M. Bergmann, *Das Menschenbild der ERMK*, Baden-Baden 1995, p. 119; regarding the German Constitution: A. Bleckmann, *Staatrecht II. Die Grundrechte*, Köln 1997, p. 539.

¹⁸ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, p. 40–42.

implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions with regard to the rights of transsexual persons.¹⁹ The Court ruled that protection from discrimination on the ground of sex constitutes a fundamental human right and it is the duty of the Court to uphold that principle. Furthermore, the scope of the Directive must not be narrowed to discrimination against persons of one sex, but also to cases of discrimination of persons who have changed their sex. The judgment insists that toleration for such discriminatory practices would amount to a breach of the fundamental human rights of respect and freedom. It also reaffirms the Court's commitment to the protection of those rights.

More explicit references to human dignity on the part of the ECJ can be found in the 2001 ruling following an action challenging the legal basis of the Biotechnology Directive 98/44/EC,²⁰ which introduced important regulations in the field of biotechnological research and patenting.²¹ The Dutch government's challenge was based on the argument that the application of the principle of patentability to elements extracted from the human body reduces "living human matter to a means to an end and undermines human dignity". In its rejection of the Dutch plea the Court came up with the following definition of its own role: "It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed". Also in addressing the specific issues raised by the applicant the Court sought to clarify its position by invoking the concept of human dignity, ie. "As regards respect for human dignity, this is guaranteed in principle by Article 5(1) of the Directive which provides that the human body at the various stages of its formation and development cannot constitute a patentable invention. Nor are the elements of the human body patentable in themselves and their discovery cannot be the subject of protection. 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." (Para. 71–72)

Human dignity also features in Case 36/02, in which the ECJ was called upon to rule on the legality of a ban imposed on some forms of business activity in the interests of public order. The action was lodged by a German leisure-centre entrepreneur who was banned by the City of Bonn from offering to the public a simulated killing-game with laser guns ordered from a British supplier. In its preliminary judgment the EJC sought both to endorse the freedom to exchange of

¹⁹ Case 13/94, P v. S and Cornwall County Council, ECR 1996 Page I-02143, "To tolerate such discrimination would be tantamount, as regard such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has duty to safeguard" (Para. 22).

²⁰ 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, p. 13–21.

²¹ Case C-377/98, Kingdom of the Netherlands v European Parliament and Council of the European Union, ECR 2001 Page I-07079; C. Meisner, *Biopatentierung und Menschenwürde*, Baden-Baden 2006, p. 153; M. Rau, F. Schorkopf, *Der EuGH und Menschenwürde*, "Neue Juristische Woche" 2002, Heft 34, p. 2448.

services and to justify the prohibition by grounding it in the obligation to protect fundamental human rights enshrined in the EU law. The judgment affirms that '[...] the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.'²²

In each of the judgments mentioned above the Court made only short references to the concept of dignity without offering even a minimum description of its scope. The judges merely reaffirm the place of dignity in EU law and rank it alongside the general principles of law. Moreover, their interpretation of the Biotechnology Directive may suggest that they see human dignity not only as a general principle but also an inalienable personal right.²³

Dignity of the human person in the Charter of Fundamental Rights

The Treaty of Lisbon²⁴ has extended significantly the range of EU's competences in all dimensions, including the sphere of axiological foundations. The upgrading of 'the respect for human dignity' to the highest rank of the Union's values in the new Article 2 of the TEU is of great importance both to the coherence of the primary treaty law and the concept of human dignity. One of the consequences of this move is that human dignity is to receive maximum level of protection not only inside the EU but also outside, in its relations with the rest of the world. The latter point, if there were any doubts about it, is made absolutely clear in Article 21.1 the TEU.

At this point, however, I would like to analyze at some length Article 1 of the Charter²⁵, which I find crucial to my discussion. Its pithy formula ("Human dignity is inviolable. It must be respected and protected.") contains a wealth of normative implications on both practical and theoretical level. The latter have lately become the subject of wide-ranging debates.

One of its high points was a discussion held in 1999 by the European Convention, whose members were at that time still working on the wording of the Charter.²⁶ The summary of that discussion is available in a document (*Explanations relating to the Charter*)²⁷ compiled by the Bureau of the Convention, but it does not

²² Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, ECR 2004 Page I-09609, para. 34.

²³ M. Borovsky, [in:] J. Meyer, *Charta der Grundrechte der Europäischen Union*, Baden-Baden 2011, p. 114. According to Ch. Meisner the concept of human dignity was interpreted by the ECJ rather as a general principle: *Biopatentierung und Menschenwürde*, Baden-Baden 2006, p. 162; M. Rau, F. Schorkopf, *Der EuGH und Menschenwürde...*, p. 24489.

²⁴ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007 C 306.

²⁵ Charter of Fundamental Rights of the European Union, OJ 2010 C 83.

²⁶ A. Arnall, A. Dashwood, M. Dougan, M. Ross, E. Spaventa, D. Wyatt, *European Union Law...*, p. 285; M. Borovsky, [in:] *Charta der Grundrechte der Europäischen Union...*, p. 104.

²⁷ Explanations relating to the Charter of fundamental rights, OJ 2007 C 303, p. 17.

offer a great deal of insight into what the key concept of dignity actually denotes. We are merely reminded that the principle of human dignity was enshrined in the Preamble to the 1948 Universal Declaration of Human Rights, and that it recurs in the judgments of the European Court of Justice, most notably in C-377/98 (*The Netherlands v Parliament and Council* discussed earlier). There the ECJ unequivocally declared that the right to dignity was part and parcel of the EU law. The *Explanations* also affirm that “the dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights” and that it is “part of the substance of the rights laid down in this Charter”. In the light of statements declaring it to be ‘a fundamental right in itself’ and ‘the real basis’ or the very ‘substance of other rights’ dignity must be seen as both a general principle (rule) and a concrete, inalienable personal right.²⁸ In highlighting the latter aspect the *Explanations* go so far as to give the inviolability of dignity absolute primacy in situations of hard choice by stipulating that “none of the rights laid down in this Charter may be used to harm the dignity of another person” and that “it must be respected, even where a right is restricted”. It is no accident that the protection of human dignity was put at the very beginning of a normative text like the Charter.²⁹ This arrangement reveals the axiological choice made by the EU legislator and a declaration that human dignity provides the most solid foundation for the basic rights enumerated in the Charter. In them the idea of dignity is reflected and made concrete. This is indicated by the disposition of among others the right to life and the prohibition of the use torture in Chapter I named ‘Dignity’.

In addition to being regarded as a source of fundamental rights the concept of dignity proclaimed by Article 1 of the Charter may be used to empower and uphold the right which has its locus in any concrete human person. In the Charter that right is usually given a subsidiary role with regard to rights and freedoms named in the following articles. It is even suggested that this ‘subject-centred’ right should be resorted to in exceptional circumstances only; otherwise the underlying concept of dignity would soon be brought into disrepute.³⁰ The problematic legal cases highlighted in the judgments of the ECJ present us with an exemplary array of circumstances in which the concept of dignity attached to the ‘subjective’ right is open to interpretation. Biotechnology, as shown by C-377/98, offers the most notable example, but it is not the only field where the ECJ legislation sets new boundaries by upholding subject-centred rights for minority groups, eg. the transsexual persons.

As we have already noted the language of the EU primary law does not possess a uniform terminology that could address the issue of dignity. This deficiency may well lead to problems in charting the distinctions between human dignity and

²⁸ M. Borovsky, [in:] *Charta der Grundrechte der Europäischen Union...*, p. 114.

²⁹ T. Rensmann, *Grundwerte im Prozess der europäischen Konstitutionalisierung*, [in:] D. Blumenwitz, G. H. Goring, D. Murswieck, *Die Europäische Union als Wertgemeinschaft*, Berlin 2005, p. 58.

³⁰ H. D. Jarass, *EG-Grundrechte*, München 2005, p. 118, in relation to the German Constitution: J. Isensee, *Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten*, “Archiv des öffentlichen Rechts“ 2006, p. 187.

the dignity of the human person. It seems that the concept of the dignity of the human person implies a narrower band of protection. ‘Dignity of the human person’, as K. Complak has demonstrated, tends to be associated with a certain phase of life, and consequently is rather less handy when used to justify protection of life’s either end, ie. its very early and very late phase.³¹

Work on developing a clear-cut interpretation of the meaning of human dignity is already bogged down by disagreements over the subject-centred range of protection postulated by Article 1 of the Charter. While some insist that the formula covers the whole lifespan of the subject of legal rights, a living human being, inclusive of the embryo phase, others question that interpretation. H. Jarass dismisses the idea that the earliest phase of life must be protected by arguing that the EU member states are nowhere near reaching a consensus on that point.³² Similar controversies have been triggered off by initiatives launched in some European countries to legalize euthanasia. Obviously the decision to decriminalize assisted suicide has to be squared with commitment of the legal system to the protection of the human dignity of the elderly or severely/terminally ill persons. If the judgment in the Grogan case³³ in which the EJC recognized abortion as a market service within the meaning of Community law is to be treated as a straw in the Court may, for example, order the lifting of a ban on ads about euthanasia in a country where this kind of service is illegal. And if we follow H. Jarass’s argument the lack of consensus between member states on the protection of human life in both the embryo and the advanced stage should result in leaving those categories of persons outside the safeguards afforded by the concept of human dignity. In other words, the logic of the argument compels us to go for the lower level of protection, ‘run to the bottom’ as it is called in the doctrine of EU law. J.H.H. Weiler who shares Jarass’s view would have the Court of Justice, EU’s principal court, do more to set and promote standards for the whole of Europe.³⁴ The question is whether such standards would be accepted by countries with a high levels of protection.

When accepted, the principle of protection of human dignity creates duties and obligations, both positive and negative, that have to be discharged, in accordance with Art. 51.1 of the Charter, by the institutions, bodies, offices and agencies of the Union. However, member states do not have to implement the provisions of the Charter over and beyond their declared commitment to EU law. Finally, the current doctrine has no clear answer to the question if provisions of the Charter are also addressed to third parties.

³¹ K. Complak, *O prawidłowej pojmowaniu godności osoby ludzkiej w porządku prawnym RP*, [in:] B. Bañaszak, A. Preisner, *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002.

³² H. D. Jarass, *EG-Grundrechte ...*, p. 118; M. Borovsky, [in:] *Charta der Grundrechte der Europäischen Union ...*, p. 116.

³³ C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, ECR 1991 Page I-04685.

³⁴ J. H. H. Weiler, *The Constitution of Europe*, Cambridge 1999, p. 117.

The ‘objective’ scope of the concept of human dignity is no less difficult to define than its subject-centred range of reference discussed above. In his study H.D. Jarass draws on the so-called *Objektformel* which functions in the jurisprudence of the German Constitutional Court.

According to that definition man is the subject, and not the object of the actions undertaken by the state, or, in the case of the EU, of an international body.³⁵ As the implementation of the norm of the protection of human dignity with regard to the large number of rights listed in the Charter has to observe the principle of subsidiarity, every act of commission and omission which seriously undermines a person’s integrity must qualify as an assault on his dignity. Torture, detention in inhuman conditions, or forcing people to become guinea pigs are some of the classic examples used to illustrate the violation of human dignity. However, none of these examples, except perhaps the one dealing with medical experiments, can in any conceivable way be related to the competences of the EU. In short, they are wholly inappropriate and cannot be used to illustrate the possible violation of Article 1. Meanwhile each of the ECJ cases discussed earlier, ie. the problem of patents in the world of biotechnological research, opening up the internal market of the EU to all kinds of controversial ‘products’ and ‘services’, UE financing of unethical research, may fall foul of Article 1 or both Article 1 and 2.³⁶ And if courts decided to change their attitude to abortion or euthanasia services, their judgments would belong to the same category.

³⁵ H. D. Jarass, *EG-Grundrechte...*, p. 117.

³⁶ M. Borovsky, [in:] *Charta der Grundrechte der Europäischen Union...*, p. 117.