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"Our Common European Value - Human Dignity"

Policy Paper by Young Researcher WP II / III Theories: Team 5 (D110)

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'You can not be just if you are not humane.'

Diderot

INTRODUCTION

Human dignity, equality and freedom play a central role in the value order of open and democratic societies. These values have a similar function in international law, and in the current shaping of a global law. This concept is expressed in a 1993 Declaration adopted at the World Conference on Human Rights in Vienna. According to this Declaration: 'The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. *The universal nature of these rights and freedoms is beyond question.*'

Human dignity, to say the least, is a concept that plays a salient role as a universal value of international law and in the constitutions of democratic states. It serves a double function: determining the status of human beings and making people conscious of their responsibility towards each other. It is according to these standpoints that this essay aims to analyse the function of human dignity in international and constitutional law, as well as its role in the legal system of the European Union.

As we shall see, the concept of human dignity went through a lot of changes during our history. In this process, its acceptance as a universal human quality can be seen as a landmark. Namely, it came to stand by the side of human beings in international agreements and democratic constitutions after the horrors of the World Wars, or these days not only in enforcing the claim of equal treatment but also as a final prohibitory principle in biotechnological practices and in electronic personal data processing.

1. ORIGINS OF THE CONCEPT OF HUMAN DIGNITY

Plato and Aristotle accepted the existence of slavery against the equal human dignity of all men. According to Aristotle, there are people who, lacking certain mental abilities, are slaves by 'nature'. Lacking the ability of 'considering', they are therefore only able to follow commands or advice. Although such argumentation was not generally accepted in his era, according to this concept it was in these persons' own interest to be slaves, slavedom therefore being natural and just (Hitseker, 2003. p. 31 and 365). Dignity in the Ancient Rome, namely the different meanings of 'dignitas', were understood as one concept. According to Jean Philippe Lévy's 'Dignitas, Gravitas, Auctoritas testium', (Miguel, p. 2-3.) one can find a moral and a socio-political meaning to this word. Moreover, an absolute (political character) and a relative (societal character) version exist within this second, socio-political meaning. The moral meaning of dignity can be found mostly in judicial or literary texts in which the term refers to, inter alia, merit, honour, and fidelity. In the republican era, the word 'dignitas' in its socio-political sense was used for outstanding personalities, for example for Roman magistrates (quaestores, censores, senatores, and the senate). Similar to the earlier one, in its relative sense, it was used to indicate a person's place in society. Dignity thus being a goal to achieve, people were not equal in their dignity. This notion changed with Cicero, who declared dignity in his famous work 'On obligations' a universal human quality. According to Cicero, the human personality instilled in us by nature raises us highly above other creatures (Tóth, 2003. p. 257).

It was Christian theology that first linked the concepts of dignity and humanity. Christianity contended that the Lord gives all people, whom he created in his own image, equal love, for they are to live in eternal fraternity and community. Following Judaism, Christianity regarded the concept of dignity as universally valid (Novak). For the scholastic philosophers, particularly St. Thomas, human dignity was strongly connected to a life-line acceptable to the order of intellect. Insofar as people do not behave this way, namely when they commit a crime, they can lose their dignity (Miguel, p. 4-5.). The humanism of the Renaissance – which was strongly linked to Christian dogmas about the origin of man – found the sources of human dignity somewhere else. Although the Renaissance still put man in the centre of Creation, it derived his dignity from his rational nature. Giovanni Pico della Mirandola in his 'Oratio on Dignity of Man' considers men the only creatures that have an endless ability to change. That is to say that while the nature of other creatures is limited by laws written by Divinity, men are left free will in determining their nature. This unique free will, combined with the ability to create, is the final possibility to either sink to the level of animals or reach an existence similar to God's (Tóth, 2003. p. 258).

In the Enlightement era, and particularly in Kant's moral philosophy, human dignity became the expression of the moral autonomy of man as a rational being. Dignity then is an absolute value, a condition-free, irreplaceable quality which is equally due to all men. Dignity for Kant is the essential component of a rational existence, a reflection of the ability of man to live according to the maxims of his will, maxims that could also be universally valid moral laws. According to Kant, we have to behave in a way that regards man and mankind in our own and others' personality as aims in themselves and not merely tools. This maxim serves to set limits to individual freedom of action, in relation to the individual and to others. As a consequence, one acting according to his own moral laws has to respect the decisions driven by the conscience and the dignity of others, seen also as autonomous moral beings (Kant, 1991. p. 62-68.). It is important to emphasize that Kant considered dignity to be the foundation of the legal system.

In his philosophy, Friedrich von Schiller distinguishes between the categories of 'grace' and 'dignity'. He sees grace as a partly aesthetic, partly ethical question. According to him, the idea of dignity is an ethical category that includes one's ability (will) to prevail over one's instincts to get closer to the law of rationality. Schiller believes that since we are endowed with will from the moment of our birth, we are all born with a 'certain' dignity. Simultaneously, in Schiller's perception, we do not all have the same level of dignity. There are differences in our ability to control our instincts. According to him, instincts-limiting dignity is able to ensure the balanced behaviour of man only when the concept of grace is also involved. Grace also serves to ensure that respect does not turn to fear (Altneuland).

Georg Wilhelm Friedrich Hegel keeps dignity an ethical idea. According to him, man is not born with dignity or with merit, but acquires these the moment he becomes a citizen. He therefore gains the upper hand in two situations: the particular interest as a thesis, and the abstract general interest as an antithesis. Seeing that people reach this synthesis, Hegel contends it is rational to say that each citizen is equal in dignity (Miguel, p. 15-17.).

In the philosphical approaches presented above, there are two main directions. According to one, the dignity of man is relative and can be lost in the end, while according to the other, dignity is absolute and is therefore due to man by the fact of his birth, is inalienable and equaly shared by all. Kant's approach may be seen as determinant, since his concept of dignity as a universal and equal value can nowadays be found in several constitutions or constitutional court decisions.

2. HUMAN DIGNITY IN INTERNATIONAL LAW

According to our current notion of the concept of human dignity, respect for human dignity has a double function: on the one hand, it is a principle that lays the foundation of human rights and responsibilities and on the other, it is a concrete right in the Bill of Rights of several national constitutions. We can separate several periods in the history of the concept. The

post-World War II period, when a new era of human rights set in, human dignity thus gaining a crucial role, is particularly important in this respect. The role human dignity played in the democratic transition of the post-socialist states also has to be mentioned here as a symbol of a break with the autocratic past and as a founding principle of the new constitutional orders. Today's period can be characterized as a search for answers to new technological challenges.

2.1. INTERNATIONAL AGREEMENTS

The 1945 Charter of the United Nations is one of the post-World War II codifying international documents that put the question of human dignity at the forefront of the new human rights system. According to the Preamble of the UN Charter: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples...'.

In order to achieve the purposes of the UN, namely the creation of the conditions of stability and well-being that are necessary for peaceful and friendly relations among nations, based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote:

a) higher standards of living, full employment and the conditions of economic and social progress and development;
b) solutions for international economic, social, health and related problems; and international cultural and educational cooperation; and
c) universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

In order to achieve these aims, the Charter grants a key role to international co-operation: 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'.

We can also find similar concepts in the Universal Declaration of Human Rights (1948). Accordingly: '...the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...'. Moreover, Article I of the Declaration states that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' The International Covenant on Economic, Social and Cultural Rights [adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December, 1966] considers that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The Covenant recognizes that these rights derive from the inherent dignity of the human person, and that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

The Final Act of the Conference on Security and Cooperation in Europe, August 1, 1975, [14 I.L.M. 1292 (Helsinki Declaration)] recognizes in its Article VII that the participating

States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief for all without distinction as to race, sex, language or religion. Furthermore, they will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms, all of which derive from the inherent dignity of the human person and are essential to his free and full development.

These international documents define respect for human dignity as a prime principle and as a source of human rights. This approach is also followed by the International Covenant on Civil and Political Rights, and indirectly by the European Convention on Human Rights (hereinafter cited as: ECHR). Although these last two documents do not appraise human dignity as a fundamental right, it is important to note that they contain the right to privacy or the right to a private life. The aforementioned rights are strongly connected to those life relations which are protected by human dignity as a concrete human right. In the conceptualization of the European Court of Human Rights (hereinafter cited as: ECtHR), respect for human dignity and freedom is the foundation and a comprehensive impulse of the ECHR (Pretty v. United Kingdom, 2002.). In other cases, the ECtHR examined the possible violation of human dignity without defining its subject-matter (Lawless v. Ireland, 1961.).

The fact that the requirement of respect for human dignity has its prime place in international (human rights) covenants means that in spite of the social, cultural, and philosophical differences between peoples, it seems a need for nations to recognize the importance of respect for human dignity. This has resulted in the lack of a proper definition of the concept, which reminds us of the old Roman axiom: 'optima est legum interpress consuetudo'. The absence of a stable subject-matter for the concept of human dignity, however, also has its advantages: as a result, the concept is able to adapt to ever changing social conditions and thus constantly redefine the elements of its subject-matter**.** Globaliztion obviously should not, and can not, result in a worldwide cultural and legal uniformization. It is therefore only greater tolerance towards diversity that can lead to global harmony. Even so, if we try to define the general legal aspects of human dignity, we can ascertain the following. In a broad sense, human dignity involves the claim to respect for individual autonomy, the assumption of being treated equally, as well as the prohibition of cruel, inhuman treatment both in a physical and a psychological sense. Giving a broader meaning to the concept of human dignity lends it a slightly ambiguous sphere. It is therefore a necessity - also regarding legal certainty - that we appraise concrete personality rights derived from it. We can find some good examples of this in the constitutions of democratic states.

2.2. COMPARATIVE CONSTITUTIONAL PERSPECTIVES

The concept of dignity is not unknown to legal systems founded on Roman law since Roman law sanctioned its violation in both civil and criminal law- as actio injuriarum and crimen injuria.

On the level of national constitutions, we can also find examples where human dignity prevails as a principle, as a concrete right, or as both. It is in the German Constitution (1949) that human dignity primarily appears as a fundamental principle. The relevant provision reads as follows: 'Human dignity is inviolable. To respect and protect it is the duty of all state authority. The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world'. The rights protected by the Bill of Rights that follows Article I are interpreted by the Federal Constitutional Court in the light of human dignity as a central value. We can therefore see that respect for human dignity functions here as the founding value, the source of other guaranteed human rights, as well as a tool for interpreting those other fundamental rights. The Constitution of Portugal is another example where human dignity prevails as a constitutional principle. There, the Constitution declares that Portugal shall be a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free and just society based on solidarity.

Hungarian constitutional law is a good example of the appraisal of human dignity as a concrete, fundamental right. Human dignity – as a constitutional value – is a determining

moulder of the Hungarian legal system. More than fifteen years ago, human dignity as a fundamental value, along with the right to life, contributed to declaring the death penalty unconstitutional. More recently, in a case relating to the use of electronic monitoring systems, the Hungarian Constitutional Court decided that limitations of fundamental rights that affect human dignity – in the field of property-keeping – cannot be solely justified by the emergence of the ownership or the protection of property rights (Decision 480/A/2005. AB.). As remarks one of the judges in his concurring opinion: 'We may not be sure whether we are being watched or not, but we can be sure that it can take place anytime'.

The Preamble of the Hungarian Constitution declares party-pluralism, parliamentary democracy, social market-economy and the rule of law as basic constitutional values. Following the recognition of republican statehood, we can read in the Constitution that the Hungarian Republic is an independent, democratic state governed by the rule of law. From the concept of a 'democratric state governed by the rule of law' that guarantees legal certainty, the Constitutional Court derived other constitutional values such as separation of powers. We can study, from another point of view, the question of the relationship between the concept of rule of law and fundamental rights. In this respect, the Hungarian Constitutional Court declared that – regarding questions of fundamental rights - although the 'protection and enforcement of fundamental rights is a matter related to the guarantees provided by the rule of law, it is primarily for the Constitution's Bill of Rights to orientate the Court in cases where the violation of an explicit fundamental right is at stake' (Decision 799/E/1998. AB, ABH 2001. 1011., 1016.). The right to human dignity is granted special weight in our Constitution's Bill of Rights. The philosophical aspects of the foundation of the Hungarian concept of human dignity were developed by the Constitutional Court in a decision declaring the unconstitutionality of the death penalty. The decision was based on the inseparable unity of human life and human dignity, both being values of the highest order that override all others. These values are not only unseparable and absolute, they are also the source and the condition of the guarantee of several other fundamental rights. The guarantees given to human life and human dignity as absolute values serve as limits to the state's power to punish (Decision 23/1990. (X.31.) AB).

According to the Hungarian Constitutional Court, the right to human dignity has a double function. On the one hand, it defines a 'core sphere' in the heart of the autonomy and self-determination of the individual where any interference by others is unconstitutional and that results in that individual's guaranteed status as an object rather than merely a tool or a subject. The Constitutional Court regards the right to human dignity as a subsidiary, 'general personality right'. This right may be referred to by the Constitutional Court or by ordinary courts in order to protect personal autonomy in case none of the concrete rights can be applied to the facts of the case. Besides, the interpretation of the concept of human dignity used to declare the unconstitutionality of capital punishment helped the Constitutional Court in deciding such divisive cases as abortion, drugs and euthanasia-related cases, as well as questions regarding the Hungarian social security system.

Besides guaranteeing individual autonomy, the right to human dignity has another important function: to ensure the equal dignity of all. The Hungarian Constitutional Court deals with the requirement of equality as an element of the concept. According to László Sólyom: 'the right to equality in human dignity, combined with the right to life, ensures that it be impossible for the law to treat differently 'valuable' lives in a different way. There is nobody more or less worthy of living. Equality in dignity results in the life and dignity of both the disabled and the morally monstrous criminal being untouchable. Each and every human being has dignity regardless of how or how much he has made use of the possibilities granted to him as a human being. The unity of life and dignity does not only guarantee equality in death: human dignity ensures the equality of our lives.' (László Sólyom's personal opinion in Decision 23/1990. (X.31.) AB.).

In the light of the Constitutional Court's decisions- from which the Kantian concept of dignity appears – we can see that in the Hungarian Republic, human dignity is more than just a 'simple' constitutional right. It functions as a real constitutional value. The importance of respect for human dignity cannot be overemphasized. It proves that the right to life in the

Constitution is not only meant to protect the mere possibility of existence, but was codified by the constituent power to guarantee the accomplishment of our human existence and the possibility of realizing our humanity' everyday. Such recognition of the right to human dignity also creates, however, obligations for individuals as well as for the state: sheltering liberty is thus a common responsibility.

We could have cited in addition to the value systems already presented examples of the constitutional practice of other European states. Human dignity exists in nearly all 25 Member States of the European Union as either a constitutional principle, a concrete right, or both. Some member states' constitutions allude to human dignity with similar concepts, for example by generally referring to the personality rights of man, or to the right to the free development of one's personality.

Human dignity is also a constitutional value in democratic societies outside Europe. For example, the Constitution of the Republic of South Africa states that 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b) Non-racialism and non-sexism.
c) Supremacy of the constitution and the rule of law.
d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Besides considering human dignity as a constitutional value, the South African Constitution also recognizes it as a fundamental right.

In several cases, human dignity appears together with other fundamental values such as 'liberty', a 'just society', the 'rule of law' or other democratic assumptions. Its function is to assign the place of fundamental rights in the Constitution seen as a document that mirrors a structurally solid or/and hierarchical value order.

The indispensability of the concept of human dignity is all the more apparent in that constitutional courts in some states have found and used it in their case law in spite of the right to human dignity not having any textual base. Although the Constitution of the United States does not expressly protect human dignity, the Federal Supreme Court in the Miranda case asserted that the basis of the prohibition of self-incrimination is 'the government's respect to the people regarding their dignity and integrity.' (Miranda v. Arizona, 1966) The Federal Supreme Court achieved the same result – emphasizing the central role of human dignity – in the prohibition of cruel, inhuman punishments. (Trop v. Dulles, 1958.; Gregg v. Georgia, 1976.) Another example is the constitutional practice of the Supreme Court of Canada. Although the Canadian Charter of Rights and Freedoms (1982) does not contain expressis verbis the requirement of respect for human dignity, the Supreme Court established that the inherent human dignity of man is a source of the concrete rights belonging to the Charter. Furthermore, it is also used as a tool of interpretation of the rights contained in the Charter. (R v. Oakes, 1986; In v. Morgenthaler, 1998.)

2.3. HUMAN DIGNITY IN THE ERA OF TECHNOLOGY

Human dignity faces a number of challenges due to the rise of modern technologies. Constituents of the past probably could not have guessed that the concept would be used to find answers to serious ethical and legal issues stemming from, for example, the use of electronic watching and data processing, research on the foetus, the several kinds of biobanks, selective abortion, the manipulation of the human genome, or the transplantation of human organs. Simultaneously, another question may arise: whether it is possible to protect human dignity merely with legal means against the technical possibilities provided by our modern era? Giving a chance to the possibility of scientific development while protecting human dignity results in heavy regulation. There is no doubt that therapeutical and preventive research on the human body has to continue. Some ethical principles, however, do have to prevail.

The Universal Declaration on the Human Genome and Human Rights was adopted by the General Conference of the UNESCO at its 29th session, on November 11, 1997. It is the first universal instrument in the field of biology. This Declaration gives a crucial role to human dignity. The document refers to the concept four times in its preamble and no less than fifteen times in the body of the text. One of the references establishes that the recognition of the genetic diversity of humanity must not give rise to any interpretation of a social or political nature which could raise doubts about 'the inherent dignity and (...) the equal and inalienable rights of all members of the human family', in accordance with the Preamble to the Universal Declaration of Human Rights. The Declaration admits that the human genome and the resulting applications open up vast prospects for progress in improving the health of individuals and of humankind as a whole, but emphasizes that such research should fully respect human dignity, freedom and human rights, as well as the prohibition of all forms of discrimination based on genetic characteristics.

No research or research applications concerning the human genome, in particular in the fields of biology, genetics and medicine, should prevail over respect for the human rights, fundamental freedoms and human dignity of individuals or, where applicable, of groups of people. Practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted. States and competent international organizations are invited to co-operate in identifying such practices and in taking, at national or international level, the measures necessary to ensure that the principles set out in this Declaration are respected. Benefits from advances in biology, genetics and medicine, concerning the human genome, shall be made available to all, with due regard for the dignity and human rights of each individual.

The '*Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research'* emphasizes that the aim of the Convention, as defined in Article 1, is to protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine. Parties to the Protocol shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to any research involving interventions on human beings in the field of biomedicine. In accordance with these documents, the Charter of Fundamental Rights of the European Union in its first Chapter, titled 'Dignity', emphasizes that in the fields of medicine and biology, the following must be respected in particular:

a) the free and informed consent of the person concerned, according to the procedures laid down by law,
b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
c) the prohibition on making the human body and its parts as such a source of financial gain,
d) the prohibition of the reproductive cloning of human beings.

We can see from the examples presented above that the principle of respect for human dignity plays a central role in the creation and develpoment of the legal regulation of biotechnology.

International law clearly declares that the interest and well-being of humans always enjoys a greater importance than the mere interests of society or science. In order to render them effective, the Convention ensures judicial protection to the rights it contains. It has to be noted, however, that the principles and rules declared in the Convention are not protected by any international mechanisms such as specialized monitoring organs.

Issues raised by bioethics and biomedicine are rarely treated by national constitutions. Here we can mention the Swiss Constitution as a remarkable exception for it regulates issues relating to human gene technology and artificial insemination (in vitro fertilization) in three paragraphs. The Swiss Constitution declares that persons shall be protected against the abuse of medically assisted procreation and gene technology. The

Confederation shall legislate on the use of human reproductive and genetic material. It shall ensure the protection of human dignity, of personality, and of family, and in particular it shall respect the following principles:

a) All forms of cloning and interference with genetic material of human reproductive cells and embryos is prohibited;
b) Non-human reproductive and genetic material may neither be introduced into nor combined with human reproductive material;
c) Methods of medically assisted procreation may only be used when sterility or the danger of transmission of a serious illness cannot be avoided otherwise, but neither in order to induce certain characteristics in the child nor to conduct research. The fertilization of human ova outside a woman's body shall be permitted only under conditions determined by statute. No more human ova may be developed into embryos outside a woman's body than are capable of being immediately implanted into her;
d) The donation of embryos and all forms of surrogate maternity are prohibited;
e) No trade may be conducted with human reproductive material or with any product obtained from embryos;
f) A person's genetic material may only be analyzed, registered or disclosed with the consent of that person, or if a statute so provides;
g) Every person shall have access to the data concerning his or her ancestry.

The Portuguese Constitution provides another such example. It states that the law shall guarantee the personal dignity and genetic identity of the human person, particularly in the creation, development and use of technologies and in scientific experimentation.

Deryck Beyleveld and Roger Brownsword identify two competing concepts of human dignity in the field of bioethics and biolaw. The first one serves as a 'limit' while the other one is 'empowering'. These two concepts can be found in both of the two antagonistic views of human rights: the one based on the community and the one based on the individual (Beyleveld and Brownsword: 2001.). The first concept does not treat the issue of human dignity as one related to the individual characteristics of each man. It refers much more to the question of the definition of what is considered civilized in a given society and its members' obligations in this respect. This concept therefore stresses the question of what is of particular importance in a given society regarding its members' social life. In opposition with this view, human dignity as 'empowering' concentrates on the fact that humans – since they can make autonomous choices – have to be considered by putting an emphasis on their uniqueness. As self-determining creators of their own fates, they also are empowered to enjoy the conditions of their own development. The new bioethical thinking primarily considers human dignity as a limit, but endeavours to harmonize the aforementioned two concepts (Brownsword, 2003. p. 413, 421-2.)

In order to demonstrate the difference between these two concepts of human dignity, Beyleveld and Brownsword cite a case of the French Conseil d'Etat. According to the facts of the case, in some French provinces, dwarfs used to be thrown as an attraction to entertain the audience. This activity was later prohibited by the police. One of the dwarfs taking part in the dubious production challenged the legality of the prohibiton. He argued that he had decided with his own free will to take a part in the attraction, thus giving him a chance to earn a salary. He emphasized that a final prohibition of the activity would result in him being unemployed again. The Conseil d'Etat verified that the dwarf had really endangered his dignity of his own accord by letting himself be used as a mere means of entertainment. It then declared that the prohibition of the attraction was legal in order to protect human dignity. In the light of the Conseil d'Etat's concept of dignity, human dignity is a value that must be respected by all members of society and that can also sometimes overrule the free will of individuals in that society.

According to Beyleveld and Brownsword, this understanding of the concept prevails in the field of biolaw today since human dignity as a restriction plays a crucial role in ascertaining the limits of biolaw. This refers to the belief that biomedical practice in the 21st

century may not merely develop through series of incalculable individual decisions but has to be overviewed with a vision of human dignity that reaches over the individual. In other words, if we consider respect for human dignity a founding principle of our society, then those individual preferences and choices deviating from the accepted norms of respect for human dignity can simply be seen as preferences and choices falling out of the admitted sphere (Beyleveld and Brownsword, 2001. pp. 26-29.). In this approach, human dignity therefore serves to limit the free use of new, modern technologies.

All this brings to our attention that in today's world, the different kinds of risks endangering human dignity are not diminishing but, on the contrary, the past years, decades, have had the effect of multiplying them. The unstoppable development of science and technology as well as the rise of globalization that results from it raise several questions that give rise to new interpretations of our fundamantal rights and particularly of the value of human dignity. We can witness on the one hand the appearance of new rights derived from the concept of human dignity (for example the development of biolaw), and on the other the strenghtening of the legal protections accorded to the state, the extension of the 'institution-defense aspect', an expression often used by the Hungarian Constitutional Court in this respect.

This short insight in the development of the international regulation of human dignity shows that this fundamental value has an impact on each generation of human rights: personality rights, social and economic rights, bioethical and biomedicinal rights.

3. SOME ASPECTS OF THE PROTECTION OF HUMAN RIGHTS IN EU LAW

Human rights are an integral part of Community law as general principles of law. The requirement for respect for human rights first appeared in the preamble of the Single European Act. It is however the Treaty of Maastricht that declared that the European Union respects human rights as 'general principles of Community law', giving them the same level of protection as provided by the ECHR. Furthermore, this level of protection also results from the 'common constitutional traditions of Member States'. In this respect, it is important to note that the Treaty of Amsterdam completed this provision by declaring that the European Union is founded inter alia on respect for human rights and fundamental freedoms (Article 6.). In order to give effect to the above-mentioned provision, the powers of the ECJ were expanded (Article 46.) regarding the acts of Community institutions (not in relation to acts of the Member States).

According to ECJ case law, human rights and fundamental freedoms as 'general legal principles' serve as the grassroots and a braid-measure of Community law. General principles of Community law are not codified. They are progressively derived from precedents of ECJ case law. The method of the supranational Court consists in classifying rules accepted in most Member States, these then becoming part of Community law as general legal principles to be applied by all the Member States' courts. The power of the ECJ to create and develop law in this manner is based on Article 220 (the ECJ guarantees the respect of law) and Article 230 (judicial review) of the EC Treaty. The contents of these general principles of law are derived partly from the common constitutional traditions of Member States, and partly from international treaties the Member States are parties to.

The ECJ was first faced with the issue of the protection of fundamental rights in cases where the validity of Community acts was challenged by applicants on the basis of general constitutional or legal principles of national law. First the ECJ favoured the protection of Community law and rejected these applications. No such kind of explicit rights existing in the founding treaties, Community acts could not be challenged on this ground. A favourable change occured in *Erich Stauder v. Ulm Sozialamt* (1969), where the ECJ interpreted a Community rule in accordance with fundamental human rights. The ECJ held that it can guarantee the protection of human rights. In *J. Nold,* Kohlen – *und Baustoffroshandlung v. EC Commission* (1974) the ECJ held that the general principles it declares such constitute material limits to the Community's legal acts.

General principles of law and fundamental rights therefore appear in the case law of the ECJ – following constitutional, democratic traditions - as limits to the powers of Community institutions. Founding its decisions on the principles of homogenity and effectiveness of Community law, the ECJ only admits challenges to Community acts where these have a basis in Community law. This has played an essential role in the European Court progressively being able to aknowledge fundamental rights as an integral part of Community law. The ECJ thus wanted to rule out the possibility of challenges to Community law based on national law both before it and before the member states' constitutional court. The Court's aim was to guarantee a similar level of constitutional/judicial review as to what is applied by the Member States' constitutional courts.

The Luxembourg Court therefore made review by the Member States' courts unnecessary and stressed the autonomous character of Community law. That the ECJ has derived these general principles of law, or fundamental rights, from traditions common to the Member States and international norms that already bind these states also points to this connection.

The question here arises whether these principles are enforceable against acts of the Member States. Namely, the question is that of the nature of the measures taken by the Member States that general principles of law or fundamental rights as parts of Community law shall limit. In the *Roland Rutili v. Ministre de Intérieur* (1975) and *Regina Ernst George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss* (1978) cases, the ECJ considered special provisions of Community law as constituting fundamental rights. The ECJ interpreted them accordingly and dealt with the national measures in this light. The ECJ thus held that in cases where Community law does not contain such special provisions, the Member States have to take general principles of law and fundamental rights into consideration as tools of interpretation. In *Regina v. Kent Kirk* (1984), the Luxembourg Court made it clear that measures adopted by Member States in application of Community law must not violate fundamental rights. In *Martha Klensch et. al. v. state secretary of agriculture and viniculture* (1986) and in other cases, the Court held that each Member State has the obligation to respect general principles of law and fundamental rights when executing Community law in the same way as Community institutions do. Moreover, after *Vereinigte Familiapress Zeitungsverlags – und vertriebs GmbH kontra Heinrich Bauer Verlag* (1997), it became clear that these principles also apply to cases where Member States take measures that derogate from fundamental freedoms secured by the European Treaties (for instance the free movement of goods) in order to protect fundamental rights.

Fundamental rights in EU Member States are guaranteed at three different levels. They are protected by national law, international agreements - such as the ECHR – as well as by Community law. Considering that the sources of Community law lie in general principles of law and fundamental rights, the powers of the ECJ extend to the protection of these principles in Community law. This competence includes the judicial review of Member States' legal acts. In the exercise of this competence, the ECJ might however run into obstacles such as the authority of national constitutional courts protecting their national constitutions or the ECtHR protecting the rights guaranteed by the ECHR. A real conflict may appear when the underlying material norms are different. Nevertheless, when underlying material norms correspond to each other formally, a different interpretation may take place by different forums, giving way to possible conflicts of interpretation between different institutions.

In order to find solutions to these issues, Articles II-112 and II-113 of the Constitutional Treaty of the European Union (hereinafter referred to as CT) provide that when the fundamental rights protected by the Charter of Fundamental Rights are also guaranteed by the ECHR, their interpretation and effect shall be the same as that guaranteed by the case law of the ECtHR. The CT nevertheless allows for Union law to provide more extended protection. As a complementary principle, the CT provides that when the Charter acknowledges fundamental rights derived from the common constitutional traditions of the Member States, those rights must be interpreted in harmony with these traditions.

Additionally, the European Court and the national courts must take into consideration the comments provided to assist them in the interpretation of the Charter.

Article II-113 determines the level of protection granted to the rights enunciated in the Charter. The provision states that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms, as recognised, in their respective field of application, by EU law, international law, international agreements to which the Union or all the Member States are party, including the ECHR, or by the Member States' constitutions.

Although the European Community is not a party to the ECHR, the ECJ regularly takes into account the Convention's provisions or the case law of the ECtHR. In this respect, the provisions of the ECHR are interpreted as an integral part of Community law.

It is an important point in this regard that the EctHR may not review acts taken by Community institutions, since the Community is not, as of now, a party to the Convention. Regarding possible conflicts with the Member States' constitutional courts, the ECJ's position is that it has exclusive competence in the interpretation of fundamental rights guaranteed by Community law.

The position of the ECJ regarding the superiority of Community acts having a horizontal effect to any national measure, regardless of its place in the national hierarchy of norms, is not easily accepted in the Member States. This absolute supremacy, moreover, is often hard to apply for Member State courts. Italy's Constitutional Court held in 1973 in the *Frontini* case that Community law may repeal certain 'ordinary' rules of constitutional law, but not some fundamental principles, or inalienable individual rights. In the second *'So lange'* decision, the Constitutional Court of Germany held that it maintains its power to guarantee fundamental rights. This competence will overrule Community law in cases where the protection granted by the ECJ is inferior to the level guaranteed by the German Constitution. The German Constitutional Court also required that the ECJ not limit the protection of fundamental rights to the lowest common denominator between what is protected in the Member States but instead ensure the possibility of the best possible development of these rights by taking into consideration the practice not only of national constitutional courts but also of the ECtHR (Chronowski, 2006 p. 110-111.). In France, the Constitutional Council both in its *Maastricht* and *Amsterdam* decisions, held that amending the Constitution is necessary before the ratification of any Treaty that contains provisions that violate it. The reasoning behind that position lies in that the transfer of powers to the EU may have effects on essential elements of national sovereignty. The Danish Supreme Court held that it has the power to decide whether a Community act is compatible with the transfer of sovereignty as determined in the accession statute (Chronowski, 2006. p. 113.).

A double obligation arises from the role fundamental rights play in Community law. On the one hand, respect for fundamental rights is a condition of the legality of Community acts. On the other, Member States must observe the requirements flowing from the protection of fundamental rights in the Community legal order when implementing Community norms – in their widest sense. The most important principle, however, is that the interpretation of these norms should be in conformity with fundamental rights, which can be understood to mean a form of interpretation in accordance with primary legislation or with constitutional principles. Provisions of Community law are therefore to be interpreted as far as possible in such a way as to be reconciliable with relevant fundamental rights. The Court of Justice has refused to allow objections to the validity of Community law to stand where they are based on systems of constitutional law applicable within the Member States. The reasons, still persuasive today as a matter of principle, were laid down by the Court of Justice in its policy-making judgment in *Internationale Handelsgesellschaft.* The decision states that: 'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and

without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure.' (Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970.)

The refusal to understand Community law according to the Member States' national perceptions of fundamental law must however immediately be put into perspective. First, the fundamental rights accepted as general legal tenets of Community law are drawn, in turn, with regard to substance – as established in the settled case law outlined above – from sources such as the constitutional traditions common to the Member States and from the ECHR in particular. Second, since the Treaty makes provision for grounds justifying restrictions on the fundamental freedoms it guarantees, considerations stemming from national systems of fundamental law are also, as is made clear in this case, ultimately incorporated in the Treaty.

In the field of EU law – particularly because of the multi-level protection of human rights and in the absence of total legal harmonization - we can hardly talk about the uniformity of human rights law. The diffrent kinds of conflicts of interpretation between national and international institutions, or between different international institutions protecting human rights, and their occasional rivalization, are not beneficial to legal harmonization. In so far as we profess that human rights and fundamental freedoms are the very foundations of the EU legal system, it is obvious that a stable legal system may only be founded on a consistent principal pedestal. To reach this goal raises serious challenges for the EU in the future.

4. HUMAN DIGNITY IN THE EU LEGAL SYSTEM

The idea of human dignity is closely connected to European culture. The more or less unified concept of man in our times links the realization of human dignity to such abilities as self-determination and self-disposition. We have already remarked that the concept of human dignity – although far from having a single meaning or interpretation - can be found in the legal systems of the EU Member States. If we consider respect for human dignity as a legal principle, it is all the more true that its concrete subject-matter and its realization is reached by the application of guaranteed human rights. It is often the case that it is in courts' decisions that the conceptual elements of human dignity are defined.

Similarly to the role it plays in international conventions, the universal idea of human dignity has a crucial role in the process of European integration. The Preamble of the Charter of Fundamental Rights of the European Union - which is not a legally binding document– declares that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity and is based on the principles of democracy and the rule of law. The EU places the individual at the heart of its activities by establishing the citizenship of the Union and by creating an area of freedom, security and justice. The first chapter of the Charter – in which we can witness a value-preference – is titled: 'Dignity'. The Charter, the elaboration of which was achieved with Roman Herzog's intellectual cooperation, states that 'human dignity is inviolable. It must be respected and protected'.

Regarding Community law we can say that although the notion of human dignity is not expressly mentioned in primary EU law, the express commitment to protect human rights implies its guarantee. This value thus prevails as a principle. Secondary law EU law, however, refers to it on several occasions. It is particular to EU law that human dignity in is especially linked to (both in reference and intepretation)

a) the four freedoms,
b) bioethical questions, and
c) the problems of prohibition of discrimination/the requirement of the equal treatment of human beings.

Ad a)

From the four freedoms guaranteed by the European Union, it is the free movement of persons that is relevant here. Regulation (EEC) No 1612/68 of the Council of 15 October, 1968, on the freedom of movement of workers within the Community declares that: '…the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country...'. REGULATION (EC) No 562/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 March, 2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) ascertains that border checks should be carried out in such a way as to fully respect human dignity. Border controls should be carried out in a professional and respectful manner and be proportionate to the objectives pursued. COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection defines the content of the protection granted and acknowledges that respect for fundamental rights and observance of the principles recognised in particular by the Charter of Fundamental Rights of the European Union shall be guanranteed. This

Directive seeks in particular to ensure full respect for human dignity and the right to asylum of asylum seekers and their accompanying family members. COUNCIL DIRECTIVE 2003/9/EC of 27 January, 2003, lays down minimum standards for the reception of asylum seekers and ensures respect for fundamental rights and observance of the principles recognised in particular by the Charter of Fundamental Rights of the European Union. This Directive seeks in particular to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter.

Free movement of services is also connected to human dignity, being in some cases limited by acts such as COUNCIL DIRECTIVE of 3 October, 1989, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC). This directive contrubutes to the defence of minors and human dignity in the field of audiovisual and informational services.

Ad b)

DIRECTIVE 2004/23/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March, 2004, on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells attempts to contribute to the protection of human dignity from the point of view of biology and medical science. DIRECTIVE 2001/20/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 April, 2001, on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use declares that the accepted basis for the conduct of clinical trials in humans is founded in the protection of human rights and the dignity of the human being with regard to the application of biology and medicine, as for instance reflected in the 1996 version of the Helsinki Declaration. The clinical trial's subject's protection is safeguarded through risk assessment based on the results of toxicological experiments prior to any clinical trial, screening by ethics committees and Member States' competent authorities, and rules on the protection of personal data. Agreement by the patient's legal representative, given in cooperation with the treating doctor, is necessary before participation in any such clinical trial.

Respect for human dignity, besides being a component of 'general principles of law', functions as a condition of the validity of Community acts. The ECJ defined in the case C-377/98 the role of human dignity in Community law, and the particularities of its protection by the Community's legal order. By an application lodged at the Court Registry on 19 October, 1998, the Kingdom of the Netherlands brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of Directive 98/44/EC of the European Parliament and of the Council of 6 July, 1998, on the legal protection of biotechnological inventions (OJ 1998 L 213, p. 13, hereinafter the Directive). The Directive was adopted on the basis of Article 100a of the EC Treaty (now, after amendment, Article 95 EC), and its purpose was to oblige the Member States, through their patent laws, to protect biotechnological inventions while complying with their international obligations.

The applicant contended that the patentability of isolated parts of the human body provided for by Article 5(2) of the Directive 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. According to the ECJ, 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. However, the ECJ did not in this case find a violaton of human dignity.

In its famous Omega case (C-36/02.), the Luxembourg Court made some crucial statements regarding human dignity and its role in the legal order of the Community.

Omega, a German company, had been, since 1 August, 1994, operating an installation known as a 'laserdrome', normally used for the practice of 'laser sport' in Germany. The installation continued to be used after 14 September, 1994, Omega having obtained an authorisation to continue its use on a provisional basis by an order of the Verwaltungsgericht Köln (Cologne Administrative Court) of 18 November, 1994. The equipment used by Omega in its establishment, which included sub-machine-gun-type laser targeting devices and sensory tags fixed either in the firing corridors or to jackets worn by players, was initially developed from a children's toy freely available on the market. That equipment having proved technically inadequate, Omega turned, from a date not specified but later than 2 December, 1994, to equipment supplied by British company Pulsar International Ltd (which subsequently became Pulsar Advanced Games Systems Ltd, hereinafter referred to as 'Pulsar').

Even before the public opening of the 'laserdrome', a part of the population manifested its opposition to the project. At the beginning of 1994, the Bonn police authority ordered Omega to supply it with a precise description of the working of the game intended to be played in the 'laserdrome' and, by letter of 22 February, 1994, warned it of its intention to issue a prohibition order in the event of it being possible to 'play at killing' people there. Omega replied, on 18 March, 1994, that the game merely involved hitting fixed sensory tags installed in the firing corridors.

Having noticed that the object of the game played in the 'laserdrome' also included hitting sensory tags placed on the jackets worn by players, the Bonn police authority issued an order against Omega on 14 September, 1994, forbidding it from 'facilitating or allowing in its […] establishment games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), thereby, by recording shots hitting their targets, 'playing at killing' people', thus risking a DEM 10 000 fine for each game played in breach of the order.

According to the Bundesverwaltungsgericht, the Oberverwaltungsgericht was right to hold that the commercial exploitation of a 'killing game' in Omega's 'laserdrome' constituted an affront to human dignity, a concept established in the first sentence of Paragraph 1(1) of the German Basic (Constitutional) Law.

The referring German court stated that human dignity is a constitutional principle which may be infringed either by the degrading treatment of an adversary, which is not the case here, or by the awakening or strengthening in the player of an attitude denying the fundamental right of each person to be acknowledged and respected, such as the representation, as in this case, of fictitious acts of violence for the purposes of a game. It states that a cardinal constitutional principle such as human dignity cannot be waived in the context of an entertainment, and that, in national law, the fundamental rights invoked by Omega cannot alter that assessment.

Concerning the application of Community law, the referring court considered that the contested order infringes the freedom to provide services under Article 49 EC. Omega concluded a franchising agreement with a British company, which is being prevented from providing services to its German customer, whereas it supplies comparable services in the Member State where it is established. There might also be an infringement of the free movement of goods under Article 28 EC, in so far as Omega wishes to acquire in the United Kingdom goods to equip its 'laserdrome', particularly laser targeting devices.

The national court also considered that the case in the main proceedings gives an opportunity to spell out in greater detail the conditions which Community law places on the restriction of a certain category of supplies of services or the importation of certain goods. It point out that, under the case law of the Court of Justice, obstacles to freedom to provide services arising from national measures which are applicable without distinction are permissible only if those measures are justified by overriding reasons relating to the public interest, are such as to guarantee the achievement of the intended aim and do not go beyond what is necessary in order to achieve it. It is immaterial, for the purposes of assessing the need for and the proportionality of those measures, that another Member State may have taken different protection measures (Case C-124/97 *Läärä and Others* [1999] ECR

I-6067, paragraphs 31, 35 and 36; Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraphs 29, 33 and 34).

In its referral, the German court asked, first, whether the prohibition of an economic activity for reasons arising from the protection of fundamental values laid down by the national constitution, such as, in this case, human dignity, is compatible with Community law. And, second, whether the ability which Member States have, for such reasons, to restrict fundamental freedoms guaranteed by the Treaty, namely the freedom to provide services and the free movement of goods, is subject, as the judgment in *Schindler* might suggest, to the condition that that restriction be based on a legal conception that is common to all Member States.

As a preliminary issue, what had to be determined was to what extent the restriction which the referring court has found to exist was capable of affecting the freedom to provide services and the free movement of goods, which are governed by different Treaty provisions.

In that respect, the ECJ found that the contested order, by prohibiting Omega from operating its 'laserdrome' in accordance with the form of the game developed by Pulsar and lawfully marketed by it in the United Kingdom, particularly under the franchising system, affects the freedom to provide services which Article 49 EC guarantees both to providers and to the persons receiving those services established in another Member State. Moreover, in so far as use of the form of the game developed by Pulsar involves the use of specific equipment, which is also lawfully marketed in the United Kingdom, the prohibition imposed on Omega is likely to deter it from acquiring the equipment in question, thereby infringing the free movement of goods ensured by Article 28 EC.

In this case, the competent authorities took the view that the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity. According to the Bundesverwaltungsgericht, the national courts which heard the case shared and confirmed the conception of the requirements for protecting human dignity on which the contested order is based, that conception therefore having to be regarded as in accordance with the stipulations of the German Basic Law.

According to the ECJ, it should be recalled in that context that, according to settled case law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71).

The ECJ emphasized that, as the Advocate General argued in her Opinion, 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.

Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even on a fundamental freedom guaranteed by the Treaty such as the freedom to provide services. However – according to the ECJ - measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.

In this case, the ECJ noted, first, that according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. The Luxembourg Court also noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.

In those circumstances, - according to the ECJ's opinion - the order of 14 September, 1994, cannot be regarded as a measure unjustifiably undermining the freedom to provide services.

In the light of the above considerations, the ECJ's answer to the question is that Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.

Ad c)

COUNCIL DIRECTIVE 2004/113/EC of 13 December, 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services, declares human dignity to be a value that needs comprehensive protection. COUNCIL RECOMMENDATION of 27 July, 1992, on the convergence of social protection objectives and policies (92/442/EEC) suggests that, taking into account the availability of funds, priorities and balances within social protection systems, and according to those systems' own organizational and funding procedures, social protection should attempt to fulfill the following task, in conformity with the principles enunciated in Council Recommendation of 24 June, 1992, on common criteria concerning sufficient resources and social assistance in social protection systems (4): to guarantee a level of resources in keeping with human dignity.

As a consequence, Community law endeavors to protect human dignity by bailing from the constitutional legacy of the Member States or occasionaly from the rules of international law. A strenghtening of the institution-protection side can generally be observed, as is exemplified – besides secondary norms of Community law – by the ECJ's Omega decision. It is a crucial point that in this case, a national constitutional principle of a Member State attained superiority above one of the fundamental freedoms of the European Union, thus putting a limit to that freedom. It will be the task of the Luxembourg Court in the future to define priciples as to the role human dignity should play in the Community's legal order. Moreover, it will also have the task to appraise and derive concrete rights from the concept of human dignity at the Community level (Similarly to the methods used by the Member States' constitutional courts).

CONCLUSION

In the 21st century, we have reached an era in which constitutional principles have to be substantiated on a European level. This is especially true regarding human rights which, as values, require respect both at national and supranational level. However, for the concepts of fundamental rights and human dignity to be applicable in a supranational legal order, different standars and criteria need to be determined. The difficulty of the task lies in the fact that the interpretation of rights is influenced by value judgments that differ in the light of the underlying philosophical, cultural, or religious concepts. The challenge in front of us is therefore to make the concept of human dignity acceptable to different philosophical and

religious movements, thus making it function as a source of common values and principles. As such, it could then serve as the basis of a system of rights and duties acceptable to all.

Regarding the European Union, respect for human dignity is a fundamental principle both in the institutional system of the European Union and in that of its Member States. In the interpretation of the ECJ, the protection granted to human dignity is one of the general principles of Commmunity law. However, the different ideas and concepts of human dignity – neither of which are unified on a European level – result in the challenge not merely 'to find unity in diversity' in the European union, but also to define a stable concept of human dignity as a founding concept of human rights. This is a crucial condition for the successful development of European constitutional law.

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