



*Teresa Mróz**University of Bialystok* 0000-0002-8242-0919*Andrzej Proniewski**University of Bialystok* 0000-0003-0382-3646

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## The Protection of Human Dignity in Selected Norms of Civil Law and in Theology

The dignity of the human person is a basic element of humanity, and at the same time a determinant of the moral value of human action. Human rights and personal rights derive from it and are protected by law. Dignity is sheltered by public and private law. In practice, civil law protection of human dignity is of great importance. There is consensus that the dignity of every human being is protected, even those deprived of consciousness. However, the problem arises when it comes to determining from what moment the protection of dignity is granted, whether from the moment of birth or earlier. The issue of the victim's contribution to the harm caused to him is discussed. It can be noticed that in the science of law and in the jurisprudence of Polish courts, the influence of the teachings of Pope John Paul II on the interpretation of the provisions on the protection of human dignity can be observed.

**Key words:** human dignity, ethics of John Paul II, legal protection of dignity, personal rights, harm, financial responsibility for damages.

### Introductory remarks

Human dignity is the basic concept, however, various fields of science which deal with this issue do not always identify its nature in the same way. Philosophers have argued over the sources of dignity

and over the ways to protect it since the ancient times<sup>1</sup>. Saint Thomas Aquinas' philosophy<sup>2</sup>. contains various reflections on dignity.

In the teaching of the Catholic Church it is generally assumed that human dignity derives from the fact that man is created by God and redeemed by Christ. Dignity (*dignitas*) is present in every human being, it makes man always "somebody" and never "something". Therefore, every man/woman has the inalienable human dignity which is a particular value<sup>3</sup>. It is independent from the race, religion, education or wealth<sup>4</sup>.

The Church has always insisted in his teaching on the inalienable dignity of every human person. Dignity is the foundation of the equality of all human beings. In the twentieth century, marked by armed conflicts on a global scale, questions concerning respect for human dignity began to resonate more strongly than usual in the Church's teaching. Successive popes in their teaching have strongly emphasized the right of man/woman to equal treatment on the grounds that he/she is a human being and possesses inalienable dignity<sup>5</sup>. Pointing to the documents of the Church's Magisterium that emphasize the dignity of the human person, one cannot ignore the teaching of the Second Vatican Council and the Constitution on the Church in the Modern World, *Gaudium et Spes*<sup>6</sup>.

In the teaching of the Council, the International Theological Commission points to two distinct aspects of human dignity that complement

<sup>1</sup> K. Wojtyła, *Osoba i czyn oraz inne studia antropologiczne*, Lublin 2011, p. 213; also T. Chauvin, *Homo iuridicus. Człowiek jako podmiot prawa publicznego*, Warszawa 2014 p. 391 and the quoted literature. The idea of dignity was distinguished by Stoics as well as by Sophists. See e.g. W. Finkentscher, *Methoden des Rechts in vergleichender Darstellung*, "American Journal of Comparative Law" 1993, Vol. 41(1), pp. 266, 274 and 281; M. Forschner, *Marktpreis und Würde. Ethische Aspekte der Globalisierung*, in: *Ethische Grenzen einer globalisierten Welt*, ed. H. Neuhaus, 2003 pp. 33-48.

<sup>2</sup> R. Plich, *O godności osoby ludzkiej w ujęciu św. Tomasza z Akwinu*, "Przegląd Tomistyczny" 2021, No. XXVII, pp. 205-270.

<sup>3</sup> P. Duchliński, *Godność osoby w ujęciu Karola Wojtyły i jego uczniów*, in: P. Duchliński, G. Hołub, *Ku rozumieniu godności człowieka*, Kraków 2008, pp. 23-24.

<sup>4</sup> Z. Cholewiński, Z. Zaleski, in: *Encyklopedia Katolicka*, Vol. V, Lublin 1989, p. 1231.

<sup>5</sup> Above all, John XXIII and the Encyclical *Pacem in Terris* can be mentioned; Paul VI and the Encyclical *Populorum Progressio*; John Paul II and the Encyclical *Redemptor Hominis*; *Dives in Misericordia*; *Laborem exercens*.

<sup>6</sup> In particular, No. 12 et seq. and No. 41 take up a systematic approach to human rights.

each other. The first of these can be called “ascent”. It concerns the natural law, which is based on rational arguments, but is confirmed by Revelation. Man/woman is endowed with a soul, reason, conscience and a sense of responsibility. In the light of Revelation, he interprets his vocation to life in society. Each member of the community, therefore, being aware of his dignity, should respect others<sup>7</sup>. The Commission describes the second aspect of human dignity as “descent”. Through the Paschal Mystery, man/woman is endowed with the dignity of a child of God. This awareness gives rise to the principle of reciprocity in the view of human dignity. In the teaching of Jesus Christ, it is given, in the words: “Be merciful, as your Father is merciful (...) As you would have people do to you, do so to them” (Lk 6:36 and 31)<sup>8</sup>.

In the light of salvation history, human dignity rests on the foundation of God’s creation of human being. He is not only a corporeal being, but also has a soul and the faculty of reasoning. His nature is rational. In this way, he interprets his vocation to create and live in a community. He also develops his dignity by using his own intelligence

<sup>7</sup> “In today’s apostolic preaching two main and complementary lines appear. The first, which may be called a line of ascent, belongs to the natural law of peoples, buttressed by reasoning and debate but confirmed and raised to a higher level by Divine Revelation, thanks to the Gospel. Here man appears not as an object and instrument to be used but as an intermediate end in himself, whose welfare both personal and ultimately as a being for God must be our aim. Man enjoys a spiritual soul, reason, freedom, conscience, responsibility, an active role in society. All interpersonal relationships between people must be conducted in such a way that this fundamental human dignity be given full honor, that justice and kindness be fully observed, and the needs of all be fulfilled to the best of our ability”, International Theological Commission, *The Dignity and Rights of the Human Person* (1983), [https://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_cti\\_1983\\_dignita-diritti\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1983_dignita-diritti_en.html) (accessed: 9.12.2023)

<sup>8</sup> “The second line of today’s apostolic preaching on man’s rights may be called a line of descent. It shows the basis and demands of human rights in the light of the Word of God coming down to share the human condition and in the paschal sacrifice, so that all men should be endowed with the dignity of God’s adopted sons and both benefit from and contribute to a deeper justice and charity. In the course of propositions still to come, this Christological foundation for human rights will get very special attention when considered in the light and grace of the theology of salvation history. At this point all that needs to be noted is that the principle of reciprocity, affirmed by so many religions and philosophies as the foundation of human rights, should find a Christological meaning in the preaching of Christ: ‘Therefore be merciful as your heavenly Father is merciful... Do to men as you would wish them to do to you’ (Lk 6:36.31)”, International Theological Commission, *The Dignity and Rights of the Human Person* (1983), [https://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_cti\\_1983\\_dignita-diritti\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1983_dignita-diritti_en.html) (accessed: 9.12.2023).

to create and “subdue the earth”<sup>9</sup>. Man/woman, created in the image and likeness of God, did not lose his dignity even when he committed sin. He could still “subdue the earth”, and when he was redeemed by Christ, he was given new life as a gift and his lost dignity as a child of God was restored<sup>10</sup>.

The subject of the dignity of the human person was strongly developed by Pope John Paul II. During his pontificate, he took up this issue both in official documents and in statements at international forums.

Undoubtedly, human dignity is the prerequisite of John Paul II's ethics as he defines it as the basic element of humanity and, at the same time, as the indicator of the moral value of human activity.

Dignity is a particularly important issue in Pope John Paul II's speeches. He devoted to it his first encyclical *Redemptor hominis* from 1979. He emphasised that all human rights derive from dignity, namely: the right to live, to freedom and to the good name. Certainly, due to the Polish Pope's activity, the secular legal science in Poland is clearly under the influence of the social doctrine of the Church as far as human dignity is perceived. The scholarly texts underline that human dignity is a value immanently inscribed into the essence of humanity, it defines human nature, it is independent of his will, it is constant, it is possible to concretize and objectify it<sup>11</sup>.

Only after specifying that, we can recall human rights, citizen's right, the rights of minorities or of other social groups. Essentially,

<sup>9</sup> Cf. International Theological Commission, *The Dignity and Rights of the Human Person* (1983), [https://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_cti\\_1983\\_dignita-diritti\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1983_dignita-diritti_en.html) (accessed: 9.12.2023).

<sup>10</sup> “In that way in heart and action, every follower of Christ must shape himself in terms of the demands of the new life and act according to *Christian dignity*. He will be particularly sensitive to honoring the rights of all (Rom 13:8-10). Following the law of Christ (Gal 6:2) and the new Commandment of charity (cf. Jn 13:34), he will not be selfish or insistent on what is his (cf. 1 Cor 13:5)”, International Theological Commission, *The Dignity and Rights of the Human Person* (1983), [https://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_cti\\_1983\\_dignita-diritti\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1983_dignita-diritti_en.html) (accessed: 9.12.2023).

<sup>11</sup> L. Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*. Warszawa 2012, p. 335; J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010, p. 105; J. Haberkowicz, *Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych*, Warszawa 2010, p. 43 and next; J. Mrozek, *Godność osoby ludzkiej jako źródło praw człowieka i obywatela*, “Civitas et Lex” 2014, No. 1, p. 43.

nobody today questions the overriding nature of dignity among the other human rights<sup>12</sup>.

Society does not bestow dignity upon man but it is obliged to respect and protect dignity<sup>13</sup>. Despite the fact that respecting human rights (which derive from dignity) does not only mean protecting them on the legal level but it should also involve all the aspects which result from the concept of human dignity as the basis of all rights. However in everyday life the legal protection of human dignity is a tool which directly affects the infringer. What is more, it has the preventative function and it provides a sense of security for the society. Although no one can be deprived of this dignity, while humiliating somebody's dignity we can cause weakening of somebody's subjective sense of self-dignity or ever deprive someone of it. As such, dignity is an inner value of every man, which outranks other values, and therefore it demands respect. It must not be violated in the name of realizing other values, therefore it constitutes an important moral criterion for judging human deeds and attitudes<sup>14</sup>. Thus, although neither the society as such nor any social groups or individuals have the right to determine human dignity, they are obliged by the law to protect it.

Assuming that in the Polish law the norms of the Constitution of the Republic of Poland are of greatest importance, it is stated that at the legal level the effective and comprehensive protection of human dignity is possible when art. 30 of the Constitution of the Republic of Poland will be treated as an independent legal norm that is one having legal independent meaning according to this regulation. The inborn and inalienable human dignity constitutes the source of freedom and rights of man and of a citizen. From the constitutional perspective, dignity is an inalienable value and the public authorities are obliged to respect and protect it. This superior value is reinforced by the preamble to the Fundamental Law with the calling to "preserve the innate human dignity" with the application of the regulations of the Constitution. Moreover, it must be emphasised that this constitutional norm is the source of these freedoms and of human and citizen rights which have no separate basis in the Constitution of the Republic of

<sup>12</sup> F.J. Mazurek, *Godność osoby ludzkiej podstawą praw człowieka*, Lublin 2001, p. 17.

<sup>13</sup> J. W. Gałkowski, *Jan Paweł II o godności człowieka*. in: *Zagadnienia godności człowieka*, ed. J. Czerkawski, Lublin 1994, pp. 103-112; L. Bosek, *Gwarancje godności ludzkiej...*, p. 47.

<sup>14</sup> R. Plich, *O godności osoby ludzkiej...*, p. 207.

Poland<sup>15</sup>. The principle expressed in art. 30 of the Constitution of the Republic of Poland should therefore protect man regardless of whether he is protected by any other legal regulations. Otherwise the constitutional protection of dignity would not be absolute and it would cause a paradoxical situation of weaker protection of dignity than in case of the application of the usual rights and freedoms. Art. 30 of the Constitution of the Republic of Poland states that apart from the legal “dignity protection by the public authorities”, the emphasis was placed on “the legal respect for the dignity by the public authorities”, on “prohibition of dignity violation” as well as on the obligation of the systemic interpretation of this guarantee with regard to the regulation on freedoms and human rights<sup>16</sup>. The Constitutional Court in the judgement from April 4<sup>th</sup> 2001 stated that human dignity has constitutional meaning, it constitutes the basis for the system of values on which the Constitution was built and it is the foundation of the whole legal system of the country<sup>17</sup>.

Human dignity is also guaranteed by other regulations in the Constitution e.g. art. 40, 41 and by the so called ordinary acts which belong to the public law and to the private law. So, in principle, on the basis of the applicable legal order, human dignity is subject to the broadest protection, both with the means provided by the public law, (especially the penal law) and with the ones assumed by the private law, and here prevails the compensatory liability for the damage to property or for non-material damage (injury). Besides, it is worth to mention that the concept of dignity in the penal code<sup>18</sup> is mentioned numerously e.g. in art. 25 § 5, in art. 115 § 22 pt. 6 and in art. 124 § 1. Among the groups of regulations in which the violated good is connected to the concept of dignity there are those which regard the offence of insult (art. 216 of the Penalty Code), violation of bodily integrity (art. 217) and human trafficking (art. 189a). The regulation of the respect for dignity is clearly present in the international law<sup>19</sup>.

<sup>15</sup> Such as e.g. the verdict of the Constitutional Court from February 7<sup>th</sup> 2006, SK 45/04, “Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy” 2006, no. 2, item 5; the Verdict from October 2<sup>nd</sup> 2007, CSK 269/07, “Orzecznictwo Sądu Najwyższego Izba Cywilna – Zeszyty Dodatkowe” 2008, no. 3, item 75.

<sup>16</sup> L. Bosek, *Gwarancje godności ludzkiej i ich...*, p. 18.

<sup>17</sup> The verdict of the Constitutional Court from April 4<sup>th</sup> 2001, K 11/00, “Orzecznictwo Trybunału Konstytucyjnego 2001, no. 3, item 54, LEX nr 46869.

<sup>18</sup> The act from June 6<sup>th</sup> 1997, the Penal Code. Journal of Laws 1997 r., no. 88, item 553 with numerous subsequent amendments .

<sup>19</sup> E.g. art. 5 of the Universal Declaration of Human Rights; the Convention against torture and any other cruel, inhuman and degrading treatment or punishing



As far as the sphere of the private law is concerned, it should be noted that the Civil Code<sup>20</sup> has the particular meaning in the system of the personal interests protection. The personal interests are defined in the literary sources in various ways, however, as a rule, the fact that they are inalienable and result from each person's dignity is never questioned. These are the interests objectively verifiable, inseparable from man, they cannot be expressed in any amount of money (although making financial amends can directly affect the economic condition of a person). The issue of personal interests has been widely discussed in a variety of scientific comments and judicial rulings. In the judicial practice of the Supreme Court the personal interests were defined as non-material values which are strongly connected with man, which determine his existence, his position in the society and which at the same time are the expression of physical and mental individuality as well as of the creative potential, commonly regarded by the society and accepted by the legal system<sup>21</sup>. The personal interest is a value immanently connected with the essence of humanity and with the human nature, which is independent from his will, which is constant, inalienable and which lasts for the lifetime. Personal interests of man should therefore be separated from the concept of human dignity, every born human being is entitled to them and some of them even concern the unborn one (*nasciturus*).

## Human dignity in the Constitution of the Republic of Poland and in the Civil Code

The previously recalled statement that the legal, effective and comprehensive protection of human dignity is possible when art. 30

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adopted by the United Nations Organization on December 10<sup>th</sup>, 1984, ratified by Poland in 1989. Dz.U. 1989, no. 63, item 378; the Charter of the United Nations adopted on June 26<sup>th</sup> 1945. The Journal of Laws 1947, no. 23, item 90 with amendments. See more: J. Zajadło, *Godność jednostki w aktach międzynarodowej ochrony praw człowieka*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1989, Vol. 51(2), pp. 104-105; art. 1-4 the Charter of Fundamental Rights of the European Union from March 30<sup>th</sup> 2010 the Official Journal. UE C Nr 83/02; A. Wojcieszak, *O poszanowaniu godności człowieka na przykładzie polskich gwarancji i jej ochrony oraz orzecznictwa Sądu Najwyższego Stanów Zjednoczonych Ameryki*, "Studia Iuridica Lublinensia" 2021, vol. 30(5), p. 703 and the quoted literary sources.

<sup>20</sup> The act from April 23<sup>rd</sup>, 1964, the Journal of Laws 1964, no. 16, item 93 with numerous subsequent amendments.

<sup>21</sup> The verdict of the Supreme Court from May 6<sup>th</sup>, 2010, II CSK 640/09, "Palestra" 2010, no. 7-8, item 261.

of the Constitution of the Republic of Poland will be treated as an independent legal norm which has an independent normative meaning, requires clarification. This problem is connected with the broader issue of the direct application of constitutional norms (“self-reliance”) – that is without the need to develop them with lower rank acts. With regard to that, we can indicate a few directions of interpretation of the relations of provisions of the Constitution to other legal regulations and evolution of views and the output of the jurisprudence. It was previously assumed that the provision of the Constitution of the Republic of Poland is only a declaration, a general principle which constitutes the basis for changing the interpretation of the provisions that is: the application of that is not possible mainly because of the lack of concreteness. Following this way of thinking we should assume that the content of art. 30 of the Constitution of the Republic of Poland does not lead to the spontaneous claim with regard to the dignity protection, independently from specific provisions. Thus it only indicates the way of interpreting other regulations. This direction of the interpretation of the constitutional provisions with regard to the so called ordinary legislation also appeared in the jurisprudence of the Supreme Court. In this approach the constitutional provision can be interpreted only as a benchmark for the assessment whether the regulations of ordinary provisions remain in accordance with the Constitution. It is a fact that without referring to the ordinary prerequisites regulated in the acts, which condition liability for damages such as: specification of the incident causing the damage, of the person who is responsible for the damage, the concept of damage, the cause-and-effect relationship between the incident and the damage, the limitation period for claims resulting from prohibited deeds, it is difficult to rule on the responsibility for the personal interests violation including human dignity<sup>22</sup>.

The dispute concerning this issue led to seemingly accurate consensual arrangements, it was concluded that the direct application of the Constitution results from the situation in which the norms of the Constitution are in force in the legal transactions directly – that is without the need to be developed with the lower legal acts, however

<sup>22</sup> According to the justification of the Supreme Court from March 3<sup>rd</sup> 2004 V CK 376/03, LEX no. 183799. The notion of the lack of basis for independent application of art. 77 of the Constitution was expressed both in the jurisprudence of the Constitutional Court and of the Supreme Court, for instance see the verdict of the Constitutional Court from January 20<sup>th</sup>, 2004, SK 26/03, “Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy” 2004/1, item 3 and the verdict of the Supreme Court from May 30<sup>th</sup>, 2003, III CZP 34/03, “Prokuratura i Prawo” 2004, no. 2, p. 30.



as for the sphere of the direct application of the Constitution it is involved into the co-application of the Constitution which consists in the simultaneous application of its norms and the statutory standards. This means that the subject applying the law should take into account the superior legal validity of the Constitution in the legal system, give priority to such solutions which would best implement the provisions of the Constitution<sup>23</sup>. With regard to that we can formulate a conclusion that art. 30 of the Constitution constitutes the starting point for any consideration concerning civil-law aspects of the responsibility for the damage which involves the violation of human dignity. It is so because the law is constitutional due to its fundamental meaning, it obtains its concretization in the legislation which belongs to various spheres of the law including the provisions classified as the civil law. Only in the sphere of the civil-law regulations it becomes the subjective right which results in the claim for repairing the damage<sup>24</sup>. Justifying this position we should notice that art. 30 of the Constitution does not refer to the civil-law terminology that is to the concepts applied in the civil law and constituting its conceptual grid. Thus for the functioning of this norm in practice it is essential to refer to the civil law which regulates the general rules, prerequisites for liability of the damage and the way of the compensation for the damage (especially art. 361-363 of the Civil Code).

Analysing the constitutional law for the repair of the damage caused by the violation of human dignity in the way of the civil-law claims we must notice that the provision of art. 30 of the Constitution of the Republic of Poland should be connected to the civil-law regime of liability from prohibited deeds, and the law expressed in it is the non-property law, out of which we can formulate both the claims of non-property nature or of the property nature. So causing damage is an act of violation of human dignity so it is the liability *ex delicto*, an event which results in giving rise to an obligation which consists in the responsibility to repair the damage. Qualifying the liability for human dignity violation as the liability for damage we should recall its rules. Literary sources often mention the following rules of liability: of guilt, of illegality, of risk, absolute and of validity<sup>25</sup>. A. Śmieja while

<sup>23</sup> B. Banaszak, *Zakres podmiotów uprawnionych do dochodzenia wynagrodzenia szkody wyrządzonej przez niezgodne z prawem działania organu władzy publicznej (art. 77 ust. 1 Konstytucji RP)*, "Monitor Prawniczy" 2011, no. 1, p. 9.

<sup>24</sup> Z. Banaszczyk, *Odpowiedzialność za szkody wyrządzone przy wykonywaniu władzy publicznej*, Warsaw 2015, p. XVII.

<sup>25</sup> M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2008, p. 94.

disputing over the rules of liability arising from the prohibited deeds indicates the liability which is completely detached from guilt and from the guiding principle of guilt<sup>26</sup>. In both regimes of liability (*ex delicto*, *ex contractu*), the existence and realization of the compensation claim is unconditionally dependent from complying of the conditions which are determined by the legislation. They condition not only the rise of the compensation liability but also influence the scope of the compensation obligation. Dignity is considered to be the most important because it is the source and foundation of all individual rights and freedoms, including personal interests.

According to art. 23 of the Civil Code the personal interests of man, particularly health freedom, honour, freedom of conscience, surname or nickname, image, the secrecy of correspondence, inviolability of the home, scientific work or artistic work, inventive work and rationalization works remain protected by the civil law regardless of the protection provided by other regulations. It is characteristic for this regulation that it does not contain the fundamental good that is the human life which actually is the source and the basis for any other goods and for human dignity. Although the Author used the expression “in particular”, which indicates that we are dealing with exemplary enumeration, but the absolutely basic meaning of life as the condition for the rise of other personal interest would indicate that it deserves to be placed in art. 23 of the Civil Code. Article 24 of the Civil Code indicates the liability not only for the personal interest violation but even for the threat of violating them. The one whose personal interest is threatened by other’s activity can demand abandoning this activity unless it is legal. In case of the violation the claimant can demand that the person who breached him must make up for that and remove the effects, particularly that he should declare his guilt properly and in a proper form. According to the regulations contained in the code the claimant can also demand the financial compensation for himself or the payment of a proper amount of money for the indicated charity<sup>27</sup>. In the case of a bodily injury or a disturbance of health, legal protection is stronger, it contains an element of repression, as the art. 448 § 2 of the Civil Code makes it possible to claim both of these performances (accumulation of performances). If the violation of the personal interest resulted in the property damage, the claimant can demand the

<sup>26</sup> The interesting scientific characteristic of prohibited deeds was collected by A. Śmieja, in: *System Prawa Prywatnego. Tom 6. Prawo zobowiązań – część ogólna*, ed. A. Olejniczak, Warszawa 2018, p. 386.

<sup>27</sup> Dz.U. 2023, item 1615.

repair according to the general rules. The legislator also added that these regulations do not violate the privileges mentioned in other regulations, particularly concerning the artistic work and in the inventive work. In practice it would concern the use of penal legislation. Human dignity and other personal interests are therefore protected by the regulations of the private law in a property and non-property way.

## The personal scope – directions for the interpretation of art. 23 and 24 of the Civil Code

According to art. 8 § 1 of the Civil Code every man since the moment of birth is bestowed with the legal capacity. When a child has been born it shall be presumed to have been born alive (art. 9 of the Civil Code). However, there is art. 446<sup>1</sup> of the Civil Code which contains unequivocal statement that while the child is born he or she can claim for repairing the damage which he or she had suffered before the birth. It is mainly about the prenatal damages e.g. injuries to the child's body and various disabilities that is injury. We can divide them into those which were caused as a result of the impact on the mother's body and those which were caused directly on the unborn child. The provision of art. 446<sup>1</sup> of the Civil Code constitutes the basis of the child's claim to the person who is responsible for the harmful occurrence, for repairing all the damages which were caused by the occurrence directly towards the child or his mother. This causes the problem with interpreting the regulations or the necessity to change them because in the literature of the civil law there is the statement that art. 446<sup>1</sup> of the Civil Code and art. 8-9 of the Civil Code do not determine the legal subjectivity of the *nasctiturus*. However, we cannot deny that the legislator allows for the claims for damages which happened before the child's birth (art. 446<sup>1</sup> of the Civil Code). Indicating, on the one hand, the lack of the clear legal basis to give the *nasctiturus* legal subjectivity, and, on the other hand, the acceptability of the claim for repairing the damage caused before the child's birth to claim the damages caused before his birth, it was considered that the child is entitled to the conditional legal capacity under the condition that he or she is born alive<sup>28</sup>. It is worth to remember that the provision of art. 446<sup>1</sup> of the Civil Code with the amendment – the provision from January 7<sup>th</sup>, 1993 on family planning, on the foetus protection and on the conditions which permit for the pregnancy termination and then its wording were established in the

<sup>28</sup> M. Wałachowska, in: *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353-534)*, eds. M. Habdas, M. Frasz, Warszawa 2018, p. 706.

amendment to this provision on December 4<sup>th</sup>, 1996<sup>29</sup>. In the previous legal status that is 20 years earlier, the compensation for the damage caused to the unborn child was admissible on the basis of art. 415 of the Civil Code with regard to art. 444-446 of the Civil Code (mainly due to the interpretation of the regulations by the court). It is therefore possible to claim the refund for the treatment, pension, financial compensation or the claims regarding the death of a close person – if on the day of the death of a person who was directly the victim, the child was conceived. The Supreme Court adopted the position that a conceived child is bestowed with the legal capacity, however, he or she acquires the property rights and obligations under the condition that he or she is born alive<sup>30</sup>. Moreover, it is worth noticing that the justification of the Constitutional Court's verdict stated that: "Human life in every phase of its development constitutes a constitutional value which is to be protected, which, however, does not mean that the intensity of this protection in every phase of life and in any circumstances should be the same"<sup>31</sup>. It is worth adding that many years ago, in 1966, the Supreme Court expressed the opinion that the correct interpretation of the law, consistent with the spirit of humanism, implies that a conceived child should be treated equally with a child already born, if their spheres of rights overlap. Therefore, it can be stated that the currently applicable art. 446<sup>1</sup> of the Civil Code mainly constitutes the line of the judicial practice<sup>32</sup>.

The science of the private law in Poland states its notion which goes even further in the sphere of the legal capacity of the *nasctiturus*. According to J. Haberko the fact of acknowledging the full (or even conditioned) scope of capacity for the legal action as well as the fact of gaining the awareness of violation of one's personal interest are of no importance for providing protection for the personal interests. It

<sup>29</sup> The Journal of Laws 1993, item 78, and the Journal of Laws 1996, item 646.

<sup>30</sup> The verdict of the Supreme Court from September 26<sup>th</sup>, 1996, file reference number: III ARN 40/96 <http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20ARN%2040-96.pdf> (accessed: 28.08.2023).

<sup>31</sup> The verdict of the Constitutional Court from May 28<sup>th</sup>, 1997, K 26/96 "Orzecznictwo Trybunału Konstytucyjnego" 1997, no. 2, item 19, LEX no. 29143.

<sup>32</sup> See e.g. the resolution of the complete team of Izba Pracy i Ubezpieczeń Społecznych SN from November 30<sup>th</sup>, 1987, III PZP 36/87, "Orzecznictwo Sądu Najwyższego. Izba Cywilna" 1988, no. 2-3, item 23; the Verdict from October 7<sup>th</sup>, 1997, III CRN 255/7, "Orzecznictwo Sądu Najwyższego. Izba Cywilna" 1972, fasc. 3, item 59, Z. Strus, in: *Komentarz do kodeksu cywilnego – Księga trzecia Zobowiązania*, Vol 2, ed. G. Bieniek, Warszawa 2005, p. 185 and next; II RP 139/66, OSNC 1966, no. 9, item 158.

is worth noticing that *nasciturus* should be granted a certain scope of the general absolute legal capacity regardless of the conditional granting a range of legal capacity in the regulations of the Civil Code<sup>33</sup>. Therefore a question about the personal interests in the phase of the prenatal life of man arises as these require protection by the law due to the possibility of violation.

J. Haberko tries to find the bases of the accuracy of the presented thesis recognising the absolute nature of the capacity regarding the protection of physical and mental integrity of a conceived child in the provisions of art. 23 and 24 of the Civil Code. The legislator assumes there that personal interests of man, which are given as random examples in the content of the regulation, are protected by the civil law. On the basis of the currently applicable legal regulation it is not possible to unequivocally state whether the legislator, while using the term “man” in the content of the provision of art. 23 of the Civil Code and in art. 24 of the Civil Code – as, “the one whose personal interest is threatened”, was going to separate the protection granted by the civil law from the obligation of the formal legal capacity, or through departing from using the term, natural person” (which unequivocally combines the scope of the protection of personal interests regardless of the protection provided in other cases in the civil law. At the same time placing the regulation in section I: “Natural persons” of the book I of the Civil Code seem to prejudge the legislator’s intentions that it concerns a live born person. However, not using the term “natural person” in the content of the mentioned provisions may lead the interpretation process towards justification of specific exception, which was intended by the legislator and through using the term “man” and “the one whose personal interest is threatened” he decide to protect personal interest of all people thus including the conceived child<sup>34</sup>.

In the contemporary scientific output we must recall the statement of M. Sobas, who considers at what point the principle of human dignity protection begins to function, as she rightly observed that dignity is the privilege of man from his prenatal life<sup>35</sup>. Otherwise in the prevailing context in the doctrine of consent, as for the fact that dignity constitutes the source of all other rights and freedoms – we can come to the

<sup>33</sup> J. Haberko, *Udostępnianie i publikowanie wizerunku nastiturusa, noworodka i małego dziecka w świetle zasady dobra dziecka*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2013, Vol 75(3), pp. 61, 71.

<sup>34</sup> Ibidem.

<sup>35</sup> M. Sobas, *Odpowiedzialność cywilnoprawna za szkody doznane przed urodzeniem*, doctoral thesis, Katowice 2021, p. 61 and next and the quoted literary sources.

conclusion that health is not subject to protection. In case of accepting the other thesis the *nasciturus* would not be subject to treatment e.g. in case of detecting abnormalities in his development. Consistently the child would not be entitled to claim damage resulting from art. 446<sup>1</sup> of the Civil Code if he was injured before being born, which would be justified with the lack of protection of such values as his life and health. In case of adopting the opinion according to which the development of the *nasciturus* is connected with assuming that the growing foetus is a human being, it is proper to regard this foetus to possess certain rights and freedoms, which are rooted in dignity; the fact is confirmed not only in literature but also in the international jurisprudence<sup>36</sup>.

### The principles of repairing damage caused by dignity violation

The provisions of the Civil Code do not contain any regulations with regard to the principles and ways of repairing the damage caused as a result of personal interests violation which involves dignity. In these circumstances we should assume that the provision based on the assumption that in case when there are no proper regulations, any damage should be repaired according to the particular principles contained in art. 361-363 of the Civil Code. As a result of dignity violation, the damage on a person could be classified as material (e.g. the costs of treatment, of rehabilitation) or non-material (injury). The direct legal basis for the claim for damage repair in case of the violation of personal interests is contained in the regulations in art. 24 i 445, 448 of the Civil Code while the art. 444 of the Civil Code indicates the way and range of repairing the damage (Relation of art. 445 of the Civil Code and the art. 448 of the Civil Code is a separate legal issue)<sup>37</sup>.

The claimant whose personal interests were violated or whose material property was damaged can claim the damage repair. In case when there are no particular regulations (or the agreements of the parties concerning the legal status), in case of material damage, the repair includes the loss and the lost benefits (art. 361 § 2 of the Civil Code – *damnum emergens* and *lucrum cessans*). A particular attention should

<sup>36</sup> W. Jedlecka, *Godność człowieka jako podstawa aksjologiczna porządku prawa Unii Europejskiej*, in: *Współczesne koncepcje ochrony wolności i praw podstawowych*, eds. M. Maciejewski, K. Wójtowicz, A. Bator, M. Jabłoński, Wrocław 2013, p. 168 and next.

<sup>37</sup> M. Safjan, *Nowy kształt instytucji zadośćuczynienia pieniężnego*, in: *Księga pamiątkowa ku czci Profesora Leopolda Steckiego*, ed. M. Bączyk, Toruń 1997, p. 227.



be paid to the issue of non-material damage (injustice, moral injustice) and the range of making up for them<sup>38</sup>. Many years ago Z. Radawański called the moral injustice “(...) a certain injury which concerns the subjective sphere of human personality which do not concern the experience of the claimant”<sup>39</sup>. With regard to the injustice, the non-material damage is the result of the violation and not the violation itself<sup>40</sup>. It should also be noticed that the concept of non-material injustice is dynamic, which has become the object of research and which resulted in creating a rich literary output<sup>41</sup>, what is more, the jurisprudence output concerning this issue is also broad<sup>42</sup>. In judicial practice it is usually indicated that the injustice is meant as “the mental pain and suffering”. This definition differentiates two types of injustice. The pain is the result of the damage to the nervous system or of stimulation of pain receptors which are placed in various parts of the body. Despite the fact that pain, which has not been comprehensively or objectively examined yet, can be detected on the basis of bodily reactions, life experience and medical knowledge. A greater problem appears in case of the second type of injustice, that is mental suffering. In the full and well-known dimension this injustice can only be experienced by the people of formed and healthy psyche. People who are mentally handicapped to a greater extent are not able to emotionally process

<sup>38</sup> According to J. Matys to the introduction of art. 446 § 4 of the Civil Code and the lack of unequivocal connection between compensation with the violation of personal interests, separating the concept of damage from non-material damage is not justified. See J. Matys, *Model zadośćuczynienia...*, p. 199.

<sup>39</sup> Z. Radwański, *Zadośćuczynienie pieniężne za szkodę niemajątkową. Rozwój i funkcja społeczna*, Poznań 1956, p. 168; T. Mróz, *Odpowiedzialność cywilnoprawna (organu, funkcjonariusza i osób piastujących funkcje)*, in: *System Prawa samorządu terytorialnego. Samodzielność samorządu – granice i perspektywy*, vol. III, ed. I. Lipowicz, Warszawa 2023, p. 418.

<sup>40</sup> J. Matys, *Model zadośćuczynienia...*, p. 197.

<sup>41</sup> See e.g. A. Szpunar, *Zadośćuczynienie za szkodę niemajątkową*, Bydgoszcz 1999; ibidem: *Ochrona dóbr osobistych*, Warszawa 1975; M. Safjan, *Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych*, “Kwartalnik Prawa Prywatnego” 2002, No. 1; ibidem: *Ochrona majątkowa dóbr osobistych po zmianie przepisów Kodeksu cywilnego*, “Przegląd Prawa Handlowego” 1997, No. 1, pp. 10-14; M. Nesterowicz, *Zadośćuczynienie za krzywdę w procesach lekarskich*, “Państwo i Prawo” 2005, No. 3, p. 16; A. Mączyński, *Zadośćuczynienie pieniężne za krzywdę spowodowaną naruszeniem dobra osobistego. Geneza, charakterystyka i ocena obowiązującej regulacji*, in: *Księga pamiątkowa ku czci Profesora A. Szpunara*, ed. M. Pyziak-Szafnicka, Kraków 2004, p. 235.

<sup>42</sup> See the case law collected by J. Matys, *Model zadośćuczynienia...*, pp. 391-402; M. Wild, *Przestanki zadośćuczynienia pieniężnego za krzywdę w praktyce sądowej*, Warszawa 2010, p. 19 and next.

the burden of the evil that they suffered from, which is not connected with any physical ailment. It is the mental side of the injustice that is considered to be its essence, and the damage is usually reduced to only this aspect. It is worth to notice that the compensation for the injustice is granted to the people who are not able to feel it and this fact does not invoke any dilemmas among the theorists of the law neither any serious discrepancies in the jurisprudence<sup>43</sup>.

It should be noticed here that despite the statutory principles of the full compensation, the full reparation of the injustice is not usually possible due to its essence, although the legislator constituted the material compensation to be the property compensation for the injustice. Suffering cannot be expressed in any amount of money although indirectly it can influence the victim's economic condition. The occurrence of the damage in the form of an injustice is the basic condition for the responsibility and with regard to that, it is necessary to recognize it, although it is often difficult. The doctrine and the jurisprudence are helpful here because numerous resolutions indicate the circumstances which influence the range of negative perception of the victim. Taking into account the regulations of the Civil Code art. 444-445 we must notice that the victim can claim the financial compensation only under the conditions such as the personal injury or a health disorder. The personal injury or the health disorder can mean that it was the violation of the personal interests e.g. health (art. 23 of the Civil Code). In case of the violation of personal interests it should be indicated what particular interest was violated<sup>44</sup>. In case of causing a health disorder it is possible to connect the instruments of financial and non-financial protection of personal interests. The non-financial means can consist in e.g. submitting a declaration of a proper content and form, while the financial one give the opportunity to claim the financial compensation or the payment of a proper amount of money to a given charity according to the regulations contained in the Civil Code. If as a result

<sup>43</sup> D. Piasecka, *Problem zadośćuczynienia za krzywdę osobom niezdolnym do jej odczuwania*, "Przegląd Prawniczy Uniwersytetu Warszawskiego" 2016, No. 1, p. 62 and next.

<sup>44</sup> A. Mączyński, *Zadośćuczynienie pieniężne za krzywdę spowodowaną naruszeniem dobra osobistego. Geneza, charakterystyka i ocena obowiązującej regulacji*, in: *Księga pamiątkowa ku czci Profesora Adama Szpunara*, ed. M. Pyziak-Szafnicka, Kraków 2004, p. 324; L. Bosek, *Gwarancje godności ludzkiej...*, p. 331 and the literary sources and case law collected. B. Janiszewska, *Zadośćuczynienie za krzywdę w sprawach medycznych*, "Prawo i Medycyna" 2005, No. 2, p. 98; M. Nesterowicz, *Zadośćuczynienie pieniężne za doznaną krzywdę w procesach lekarskich*, "Państwo i Prawo" 2005, No. 3, pp. 16-17; A. Górski, J. Górski, *Zadośćuczynienie za naruszenie praw pacjenta*, "Palestra" 2005, No. 5-6, pp. 91-93.

of the violation of a personal interest a financial damage was caused, the claimant can claim the compensation on general terms (art. 24 § 3 of the Civil Code). Therefore, the regulations provide relatively broad opportunities to protect personal interests, even broader than in case of only a financial damage.

In practice the most emotional aspect is the amount of the compensation. Currently it is assumed that the amount of the compensation must not be symbolic but is supposed to be a significant economic contribution. The highest amounts of the compensation are awarded in case of violating personal interests enumerated in art. 444-445 of the Civil Code<sup>45</sup>, that is bodily injuries (or even death art. 446 of the Civil Code).

It should be emphasised that in case of a damage done to an unborn person the art. 362 of the Civil Code cannot be applied. According to this regulation if the claimant contributed to the occurrence of the injury or to increasing it, the obligation of compensation is reduced according to the circumstances, especially to the degree of the fault of both parties. It concerns the claimant's performance, and the claimant is the unborn child (the mother's conduct does not matter here). Implementing this legal construction would lead to the decrease of the obligation to compensate for the damage, both in the form of the natural restitution or the compensation, as well as the payment of a proper amount of money as a compensation. The provisions of the Civil Code provide the court with certain freedom for establishing the compensation or indemnity through the use of the accuracy rule (e.g. art. 440 of the Civil Code). Establishing what we mean by the term "contribution of the claimant to the occurrence or to increasing the damage" is a separate issue, described in detail in the jurisprudence and scientific publications<sup>46</sup>.

## Concluding remarks

In general there is an agreement concerning the fact that human dignity is the source of all human freedoms and rights. However the science of the law still encounters certain discrepancies concerning the legal subjectivity of an unborn child in the sphere of his personal interests. As a result of the debate over the meaning and the legal

<sup>45</sup> J. Matys, *Model zadośćuczynienia...*, p. 296.

<sup>46</sup> T. Dybowski, *W sprawie przyczynienia się poszkodowanego do powstania szkody*, "Nowe Prawo" 1977, No. 6, p. 829; M. Kaliński, *Szkoda na mieniu i jej naprawienie...*, p. 551 and next and the case law and literary sources collected.

nature of art. 30 of the Constitution of the Republic of Poland and of the provisions of the Civil Code (especially art. 23, 24, 446<sup>1</sup> of the Civil Code) and of the jurisprudence of the Supreme Court, it appears that an unborn child is entitled to the so called conditional legal subjectivity. The provision of art. 30 of the Constitution guarantees the legal subjectivity only to the natural persons, which – as it seems – pre-determines the possibility to grant the *nasciturus* a conditional legal capacity on the basis of the Civil Code, and to the born child – the possibility to claim compensation on the basis of art. 446<sup>1</sup> of the Civil Code, regardless of his health condition, mental condition or life conditions. The provisions of the Civil Code which regulate the issues of personal interests do not use the concept of human dignity. We must bear in mind the fact that the majority of publications on personal interest was created in the socialist period which results in the need to further research into this matter.

There are various opinions which rightly emphasise that every man is bestowed with dignity even in the prenatal phase. The *nasciturus* should be granted a certain scope of general absolute legal capacity regardless of the conditional granting the scope of capabilities in the provisions.

It should be noticed that the interpretations of the provision which are carried out indicated the phenomenon of the cautious departure from the typical positivistic and formalistic understanding of the law and of values on which the law is based. Definitely the teaching of Pope John Paul II exerted a great impact on the changes of the political system and these changes were the starting point for the reforms of the law which had been based on the Soviet doctrine. Currently the adjudication of the court takes into account the ownership clauses<sup>47</sup>, or seeking the roots of the correctness as the leading principle of the private law<sup>48</sup>.

Despite the fact that injustice is a damage hard to make up for or even impossible for repair, the Polish private law suggests various material and non-material ways of making amends. Mainly in case of violation of personal interest, the court can grant compensation to the party whose personal interest was violated, a proper amount of money as the material compensation for the injustice or upon the claimant's request, the court can grant a proper sum of money to be given to the

<sup>47</sup> A. Górski, *Słuszność w orzekaniu sędziego cywilisty*, "Białostockie Studia Prawnicze" 2014, No. 17, p. 115.

<sup>48</sup> S. Prutis, *"Korzenie" słuszności jako zasady wiodącej prawa prywatnego*, "Białostockie Studia Prawnicze" 2014, No. 17, p. 207.

indicate charity regardless of any other means necessary to repair the results of the violation.

On the basis of the doctrine of the Church, human being acquires an inalienable dignity as a person from the moment of conception. The Church continues to proclaim this doctrine and opposes any action aimed at depriving an unborn person of the right to life. The source of human person's dignity from conception to natural death is his participation in the life of God to which he is called in the act of creation. This image of the human person, created in the image of God and redeemed by Christ, is the source of his dignity. John Paul II spoke about it in his speech to jurists and judges of the European Court<sup>49</sup>. The awareness of the dignity of every human being is confirmed in the pages of Sacred Scripture, which shows its great value<sup>50</sup>.

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<sup>49</sup> Cf. John Paul II, Speech to Jurists and Judges of the European Court (November 10, 1980), [https://www.vatican.va/content/john-paul-ii/it/speeches/1980/november/documents/hf\\_jp\\_ii\\_spe\\_19801110\\_corte-europea.html](https://www.vatican.va/content/john-paul-ii/it/speeches/1980/november/documents/hf_jp_ii_spe_19801110_corte-europea.html) (accessed: 9.12.2023).

<sup>50</sup> Pope Benedict XVI emphasised this in his message for the 2011 World Day of Peace: "Sacred Scripture, in harmony with our own experience, reveals the profound value of human dignity: "When I look at your heavens, the work of your fingers, the moon and the stars which you have established, what is man that you are mindful of him, and the son of man, that you care for him? Yet you have made him little less than God, and crowned him with glory and honour. You have given him dominion over the works of your hands; you have put all things under his feet" (Ps 8:3-6). Contemplating the sublime reality of human nature, we can experience the same amazement felt by the Psalmist. Our nature appears as openness to the Mystery, a capacity to ask deep questions about ourselves and the origin of the universe, and a profound echo of the supreme Love of God, the beginning and end of all things, of every person and people. The transcendent dignity of the person is an essential value of Judeo-Christian wisdom, yet thanks to the use of reason, it can be recognized by all. This dignity, understood as a capacity to transcend one's own materiality and to seek truth, must be acknowledged as a universal *good*, indispensable for the building of a society directed to human fulfilment. Respect for essential elements of human dignity, such as the right to life and the right to religious freedom, is a condition for the moral legitimacy of every social and legal norm", Benedict XVI, Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace 1 January 2011, [https://www.vatican.va/content/benedict-xvi/en/messages/peace/documents/hf\\_ben-xvi\\_mes\\_20101208\\_xliv-world-day-peace.html](https://www.vatican.va/content/benedict-xvi/en/messages/peace/documents/hf_ben-xvi_mes_20101208_xliv-world-day-peace.html) (accessed: 9.12.2023).

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