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THE IMPACT OF HUMAN DIGNITY ON THE PRINCIPLES OF CRIMINAL LIABILITY. THE EXAMPLE OF GUILT[1]

1. HUMAN DIGNITY

Human dignity is a well-known concept among Western countries since after World War II, when states, in an effort to create a new platform of cooperation with a view to guaranteeing peace, were looking for an axiological foundation of the new order. United Nations perceived human dignity as the real source of human rights and freedoms, independent from the will of states and legislatures. This phenomenon became a basis for the entire catalogue of human rights and freedoms. What is really crucial, and sometimes forgotten, is that the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on December 10, 1948, was named "declaration" instead of "covenant", "convention", "agreement"[2]. It cannot be understood as an irrelevant choice of words, arbitrarily determined by the assembly. To declare human rights means proclaiming rights that belong to a human being, regardless of the will of the state. These fundamental rights need not be passed in a legislative process because their validity and claim for obedience are derived from the nature of a human being, particularly from human dignity[3]. Yet at the very beginning of the declaration, in the first sentence of the preamble, we read: "Whereas 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 General Assembly recognized the inherence of dignity, therefore its axiological basis is free from

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[2] It presupposes the semantics used to describe the phenomenon of human rights declared by the United Nations Assembly in 1948. These rights should not be referred to as "established", "constructed", "enacted", since they are construed from an anthropological – in a philosophical sense – vision of the person, independent from the dynamic approach of a legislature.

[3] M. Piechowiak, *Human rights: How to Understand Them*?, (in:) P. Morales (ed.), *Towards Global Human Rights*, Tilburg 1996, pp. 25–26.

the legislature's will. Later in the text, in article 1, it is declared 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". This reasoning validates a conclusion that the human dignity principle is the very foundation of the human rights order[4].

A growing role of human dignity in international law has not remained without influence on national legislation, especially on constitutions passed either after World War II or after the collapse of communism in Central and Eastern Europe. One of the best examples, doubtless constituting a role model for other modern democracies revising their axiological foundations after totalitarian experiences, is the Basic Law for the Federal Republic of Germany, which in its article 1(1) declares: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority"[5]. Article 30 of the Constitution of the Republic of Poland should be mentioned as well: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities"[6].

The human dignity principle can be found in many other basic laws, particularly in Western countries. In the preamble to the Fundamental Law of Hungary it is declared that human dignity is the foundation of human existence. This is elaborated upon in article II of the chapter entitled "Freedom and responsibility", where dignity is stipulated to be inviolable. Every person is granted a right to life and respect for their dignity[7]. Dignity is also recognized in art. 10(1) of the Spanish Constitution, which sees it – together with inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights

[4] It does not imply the claim that all of the provisions currently grouped in the human rights aggregation are – so to say – mechanically destined to have roots in human dignity. Some time after the proclamation of the Universal Declaration of Human Rights the emphasis shifted from mere recognition of human rights to enacting human rights, based more on the current wishes of the states and their citizens than on deep reasoning regarding the status of a person and conclusions derived therefrom. Nevertheless, criticism addressed at the modern method of establishing human rights should not be understood as a view which excludes any role of positivistic laws with regard to human rights. The obligation of a legislature, when human rights are considered, is to protect them by enacting proper laws. *Cf.* M. Piechowiak, *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*, Lublin 1999, pp. 124–126.

[5] An English version of the Basic Law for the Federal Republic of Germany is available on the following website: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0012 (visited August 9, 2016).

[6] An English version of the Constitution of the Republic of Poland is available on the website of the Polish Sejm: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (visited August 9, 2016).

[7] An English version of the Fundamental Law of Hungary is available on the following website: http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf (visited August 9, 2016).

of others – as a foundation of political order and social peace[8]. In the Constitution of Portugal, similarly to the German Constitution, a reference to dignity appears in art. 1, pursuant to which dignity underpins the whole structure of the state and its engagement in building a free, just and solidary society[9]. Article 23 of the Constitution of Federal Belgium guarantees to everybody the right to conduct their lives in accordance with the requirements of human dignity[10].

That the principle of dignity is not explicitly embraced in other constitutions need not necessarily mean that they reject it. Instead, it suggests that those legal systems are rooted in dignity in an indirect way[11]. For example, art. 2(1) of the Constitution of Greece declares respect for a person and protection of their values as the most important duty of the state[12]. The French Constitution does not refer directly to the notion of dignity, however the courts in their judgments often cite it as a fundamental value and take it into account in making decisions[13]. To add more, not only do European constitutions refer to the human dignity category. The Constitution of the Republic of South Africa proclaims in art. 1 that the Republic of South Africa is one, sovereign, democratic state founded on – among other values – "Human dignity, the achievement of equality and the advancement of human rights and freedoms"[14]. A similar approach to the relation between a state and the human dignity can be found in art. 1 of the Constitution of the Federative Republic of Brazil, which indicates that it is a legal democratic state founded on several principles, human dignity being one of them. All these examples prove the weight accorded to human dignity by legal systems. Human dignity is included in the most important parts of constitutions, either among provisions proclaiming the foundations of the state or as the starting point of a human rights catalogue.

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[8] An English version of the Spanish Constitution is available on the following website: http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf (visited August 9, 2016).

[9] An English version of the Constitution of the Portuguese Republic is available on the following website: http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf (visited August 9, 2016).

[10] An English version of the Constitution of the Federal Belgium is available on the following website: http://www.const-court.be/en/basic_text/basic_text_constitution.html (visited August 9, 2016).

[11] P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności*, Warszawa 2003, p. 106.

[12] An English version of the Constitution of Greece is available on the following website: http://www.cecl.gr/RigasNetwork/databank/Constitutions/Greece.html (visited August 9, 2016); *cf.* S. Retter, *Pojęcie godności w obowiązującym i przyszłym prawie wspólnotowym*, (in:) K. Complak (ed.), *Godność człowieka jako kategoria prawa*, Wrocław 2001, p. 91.

[13] N. Rao, *On the Use and Abuse of Dignity in Constitutional Law*, "Columbia Journal of European Law" 2008, issue 14, p. 217.

[14] An English version of the Constitution of the Republic of South Africa is available on the following website: http://www.gov.za/documents/constitution-republic-south-africa-1996 (visited August 9, 2016).

Both approaches should compel us to consider what implications are triggered by such an important position of this basic principle in legal texts. The reasoning underlying this importance should exert effects to be found in criminal law, which, although recognized as the last resort, interferes deeply with basic human rights. Consequently, the assumption that human dignity seems to have an impact on criminal law, particularly on rules of responsibility, is justified[15].

2. CONTENT OF THE PRINCIPLE

Above all, before trying to interpret relations between human dignity and rules of criminal responsibility, it is necessary to make an effort to recognize the content of the principle discussed here. An attempt to discern the content of human dignity and presumptions derived from it is really complicated and demands subtle reasoning, but above all necessitate research on the philosophical context in which this concept entered into the legal system. Such a necessity arises most strikingly when we compare the European, at least German and Polish, approach to human dignity with the Anglo-American approach, mostly seen in the United States. Whilst in Poland and Germany a really important part of reasoning about the sanctity of human life is rooted in human dignity, in the United States it is rather seen as a justification for such values as equality and freedom of speech[16]. Differences are not so fundamental that it would not be possible to find any common denominator. Both systems seem to emphasize the autonomy of a person as a necessary implication of human dignity[17].

Every reflection on the manner of expression of the human dignity principle in a constitution must be finally challenged by the question on the philosophical

[15] Another area where human dignity plays an important role is the making of decisions with regard to criminalization and construction of criminal norms. This angle of the concept will not be discussed at length here, as it has been analysed in: K. Szczucki, *Wykładnia prokonstytucyjna prawa karnego*, Warszawa 2015 (Polish edition) and K. Szczucki, *Proconstitutional Interpretation of Criminal Law*, Lanham, Boulder, New York, London 2016.

[16] V. C. Jackson, *Constitutional Dialogue and Human Dignity: State and Transnational Constitutional Discourse*, "Montana Law Review" 2004, p. 21 *et seqq*.; F. Schauer, *Speaking of Dignity*, (in:) M. J. Meyer, W. A. Parent (eds.), *The Constitution of Rights. Human Dignity and American Values*, Ithaca, London 1992, p. 179; R. G. Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, "San Diego Law Review" 2006, Vol. 43, p. 530 *et seqq*. An example of a difference between approaches to human dignity in Poland and the U.S. is the debate on abortion and arguments used therein. In Poland, most supporters of the pro-life position use the argument from human dignity of an unborn child, whereas in the U.S. it is rather common to defend the pro-choice position by reference to human dignity of the woman.

[17] M. Dan-Cohen, *Harmful Thoughts. Essays on Law, Self, and Morality*, Princeton 2002, p. 135; D. Luban, *Legal Ethics and Human Dignity*, Cambridge 2007, pp. 74–75.

source of the understanding of this concept. Since there are so many available interpretations of human dignity, it is almost impossible to point to a universal one. Within the bounds of legal reasoning it is more useful to find out what the concrete philosophical context accompanying the decision of enshrining dignity in a constitution was. With regard to the Polish Constitution, it is rightly argued that the object of protection in art. 30 has its source in personalist philosophy[18]. However, the legacies of stoicism[19], medieval philosophy (particularly Saint Thomas Aquinas)[20] and Immanuel Kant[21] are also relevant. An advantage of personalism, worth noticing in this context, is that this philosophical current grows out of various philosophical traditions mentioned above. With some caution, personalism might be interpreted as a response to the dialogue between Thomism and Kantianism. Although explanations of the human dignity concept located in the German Basic Law are much more Kantian than Thomist[22], we can try to discuss it from the same perspective as the Polish Constitution, at least when legal methods are used instead of pure philosophical reasoning[23]. The personalist approach to dignity may be – for the purposes of this analysis – boiled down to stating that the nature of a human being expresses through one's inside. Every

[18] L. Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*, Warszawa 2012, p. 21. *Cf.* also O. Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy*, Warszawa 2011, p. 415.

[19] L. Bosek, *Gwarancje godności*..., p. 31. *Cf.* also H. Izdebski, *Godność i prawa człowieka w nauczaniu Jana Pawła II*, "Studia Iuridica" 2006, issue 45, p. 299 *et seqq*.

[20] Unfortunately, it happens so that the earliest and the main philosophical source of human dignity is found in I. Kant's scholarship. Sometimes it is attributed to Cicero, however very rarely to St. Thomas Aquinas' writings. See W. Arndt, *Godność człowieka jako istotny element racji stanu*, (in:) A. Krzynówek-Arndt (ed.), *Kryterium etyczne w koncepcji racji stanu*, Kraków 2013, p. 65; M. Piechowiak, *Tomasza z Akwinu koncepcja godności osoby ludzkiej jako podstawy prawa. Komentarz do rozdziałów 111–113 księgi III Tomasza z Akwinu "Summa contra gentiles"*, "Poznańskie Studia Teologiczne" 2003, issue 14, *passim*; M. Piechowiak, *Klasyczna koncepcja osoby jako podstawa pojmowania praw człowieka. Wokół św. Tomasza z Akwinu i Immanuela Kanta propozycji ugruntowania godności człowieka*, (in:) P. Dardziński, F. Longchamps de Bérier, K. Szczucki (eds.), *Prawo naturalne – natura prawa*, Warszawa 2011, p. 3 *et seqq*.

[21] M. Dan-Cohen, *A Concept of Dignity*, "Israel Law Review" 2011, issue 44, p. 11; S. Hufnagel, *The impact of the German Human Dignity Principle on the Right to Life and the Right not to be Subject to Torture*, (in:) J. Bröhmer (ed.), *The German Constitution Turns 60. Basic Law and Commonwealth Constitution. German and Australian Perspectives*, Frankfurt am Main 2011, pp. 65–66.

[22] It does not mean that the German doctrine does not recognize other possible contexts of interpretation: R. Herzog, M. Herdegen, H. H. Klein, R. Scholz, *Grundgesetz. Kommentar*, München 2016, pp. 8–10.

[23] Ch. Starck notices both Christian and secular roots of the principle of human dignity, but he underlines that – bearing in mind a reference to God in the preamble to the German Basic Law – the Christian context shall not be put aside: Ch. Starck, *Art. 1 Abs. 1*, (in:) Ch. Starck (ed.), *Kommentar zum Grundgesetz*, München, 2010, pp. 30–31. In the literature, we can find even some attempts to construe the human dignity concept without any philosophical background. See D. Luban, *Legal Ethics*..., p. 66 *et. seqq.*

externalization, like acts, creativity, products, have their origin and cause in the inside of a human being. As noticed by Karol Wojtyła, the essence of this internal cause of human acts is reason and freedom. These elements of human nature constitute the basis of human dignity[24]. From the criminal law perspective, another remark of this author is crucial, namely that an act can be understood only as a conscious action of a human. No other action deserves this name[25]. When the "good" is understood as the end and motive of an action, it conduces to preserving the sovereignty of a person and simultaneously – secondarily to human – the sovereignty of the state[26].

The human dignity principle is a norm prescribes recognition of a person as a subject rather than as an object. Subjectivity of a person deserves absolute and equal protection in the legal system[27]. This argument, in favour of a special and unique status of a person, is rooted in the conviction that the human dignity principle embodies an axiom, according to which each person is possessed of internal value, regardless of any committed act or any other behaviour which may affect our opinion about the person[28]. Sybille Rolf claims that recognition of inner autonomy of a person, through human dignity, being a guarantee of voluntary and internal action, might be the only foundation of a universally valid morality[29]. The author, referring mostly to I. Kant, assumes that autonomy of a person should be treated as an absolute value, because it is what makes morality possible[30]. This inference, as a consequence, has to prove that not only is human dignity the groundwork of a legal system, but for morality also. Nevertheless, setting the relation between human dignity and morality aside, for us it is enough to notice the equal value of human dignity in every human being.

This means that when human dignity is considered, at least in the context present in the German Basic Law and in the Polish Constitution, it should be

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[24] K. Wojtyła, *Osoba i czyn oraz inne studia antropologiczne*, Lublin 1994, p. 418. See also: M. Szymonik, *Filozoficzne podstawy kategorii godności człowieka w ujęciu personalizmu szkoły lubelskiej*, Lublin 2015, pp. 212–213.

[25] K. Wojtyła, *Osoba i czyn*..., p. 73.

[26] M. Szymonik, *Filozoficzne podstawy kategorii godności człowieka*..., pp. 243–244. This push towards "good" and the role of different communities in human life, including family and the state, opens the human dignity principle to a close correlation with the principle of common good. Some characteristics of human dignity, similar to the reasoning from the common good principle, may be found in R. Bronsword's analysis. See R. Bronsword, *Human dignity from a legal perspective*, (in:) M. Düwell, J. Braarvig, R. Brownsword, D. Mieth, *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, Cambridge 2014, p. 10 *et seqq*. See also: M. Dan-Cohen, *Harmful Thoughts*..., p. 163.

[27] L. Bosek, *Komentarz do art. 30*, (in:) M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom 1. Komentarz do art. 1−86*, Warszawa 2016, p. 723.

[28] *Ibidem*.

[29] S. Rolf, *Humanity as an Object of Respect: Immanuel Kant's Anthropological Approach and the Foundation of Morality*, "The Heythrop Journal" 2009, Vol. 53, p. 597.

[30] *Ibidem*, p. 599.

understood as something internal, depending only on the human status of a person. This category shall not be confused with other interpretations of dignity, like honour, position, authority or whether a person is good or bad. As Marcus Düwell notes, there are several ways of conceptualizing human dignity: "rank, virtue and duty, dignity and religious status, the cosmological status of the human being, respect for the dignity of the individual human being"[31]. Evidently, rank, virtue, duty and other features of a person are important in our daily life, but these characteristics are not attributes that can embody the deepest value of a person, equal in case of every person, no matter what rank, position, virtue or vice may be assigned to him or her. A good illustration of the importance of the division proffered here might be the prohibition of tortures and cruel, inhuman, or degrading treatment or punishment. This absolute, exceptionless and universal prohibition is the consequence of human dignity belonging to every person. Proper law enforcement tools should be utilized with the same intensity against every possible risk of breaching the prohibition of torture recognized as a *iuris cogentis* norm in international law, regardless of how considerable the differences between potential victims are. An exceptionless prohibition of tortures excludes even torturing a person who tortured other people in the past. Should human dignity prohibiting tortures depend on some acquired features of a person, this would mean that different people can be protected from tortures with varying intensity and some of them may even be excluded from the protection altogether[32].

As it was mentioned above, the wording of the Polish Constitution assumes that human dignity constitutes the source of freedoms and rights of persons and citizens. However, it should not prompt a conclusion that the content of human dignity can be reduced only to the source of rights and freedoms[33]. This would mean that this principle has no other content than that expressed in the constitutional catalogue of rights and freedoms. One, at least, remark seems to be necessary here. Not all rights and freedoms can be automatically included in the catalogue derived from the content of human dignity. We could not rule out that a legislature or the international community would accept such a right or freedom that could not be reconciled with the human dignity principle. With just this argument it might be proved that dignity must have its own content, which, in turn, facilitates verifying which of the projected provisions can be sourced in dignity and assigned thereto. The requirements of human dignity oblige everyone, not

[31] M. Düwell, *Human dignity: concepts, discussions, philosophical perspectives*, (in:) M. Düwell, J. Braarvig, R. Brownsword, D. Mieth, *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, Cambridge 2014, pp. 25–27.

[32] See an illuminating discussion about torture, especially in cases where many lives depend on the law enforcement's ability to extract information from an interrogated person: Y. Ginbar, *Why Not Torture Terrorists? Moral, practical, and legal aspects of the "ticking bomb" justification for torture*, Oxford 2008, *passim*.

[33] M. Safjan, *Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych*, "Kwartalnik Prawa Prywatnego" 2002, issue 1, p. 227.

only with regard to relations between people, but also legal entities and authorities in their dealings with people, to treat a person as a subject rather than as an object. Expression of human dignity in a constitution should be understood as a guarantee of one's subjective right to demand from the state protection from acts which may result in infringing human integrity and autonomy. Andrzej Zoll claims that the constitutional subjective right to human dignity shall be understood as a basic right[34]. An assumption that human dignity might be a constitutional subjective right may lead to a mistaken recognition of the source of human dignity. In both philosophical and legal contexts, underlying constitutional expressions of human dignity, particularly in Poland and Germany, dignity belongs to a person regardless of the will of the state. As mentioned above, institutions within constitutions have merely the status of declarations. They declare what can be derived from the ontological condition of the person. However, we cannot exclude that a literal expression of human dignity in a constitution may be needed by the state, which – founded on the positivistic approach – bases all of its activities on the written law, passed in a special legislative procedure.

3. THE SUBJECTIVE CRITERIA OF HUMAN DIGNITY

A lot about the characteristics of human dignity has been said above but still one gap has to be filled, namely the subjective criteria of human dignity. In other words, it is necessary to recognize the very first moment when human dignity and all claims derived therefrom has to be recognized in a human being. A very important legal argument helpful in delimiting the boundaries of the human dignity principle may be found in two verdicts of the Court of Justice of the European Union: the Judgment of the Court (Grand Chamber) of December 18, 2014, *International Stem Cell Corporation* v *Comptroller General of Patents, Designs and Trade Marks* and the Judgment of the Court (Grand Chamber) of October 18, 2011, *Oliver Brüstle* v *Greenpeace eV*. In these two judgments the Court, on the basis of the so called biotechnological directive, construed the "human embryo" term and declared that "any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo'"[35] and that "an unfertilised human

[34] A. Zoll, *Wymiar kary w aspekcie godności człowieka*, (in:) *Godność człowieka a prawa ekonomiczne i socjalne. Księga jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Warszawa, Łódź 2003, p. 173.

[35] Judgment of the Court of Justice of the European Union (Grand Chamber) of October 18, 2011, *Oliver Brüstle v Greenpeace eV*, C-34/10.

ovum whose division and further development have been stimulated by parthenogenesis does not constitute a 'human embryo'"[36]. That may trigger a conclusion that a human being, in other words: a person with human dignity, exists since conception or in some other cases even without conception. At the core of these judgments lays recital 16 to the Directive 98/44/EC of the European Parliament and of the Council of July 6, 1998 on the legal protection of biotechnological inventions[37]: "Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person; whereas it is important to assert the principle that the human body, at any stage in its formation or development, including germ cells, and the simple discovery of one of its elements or one of its products, including the sequence or partial sequence of a human gene, cannot be patented; whereas these principles are in line with the criteria of patentability proper to patent law, whereby a mere discovery cannot be patented". The relation between determining the meaning of "human embryo" and recognition of the beginning of a person with human dignity imposes itself when the Court noted: "The context and aim of the Directive thus show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. It follows that the concept of 'human embryo' within the meaning of Article 6(2)(c) of the Directive must be understood in a wide sense"[38]. There is no other possible interpretation than claiming that protection of human embryos necessitates, at the same time, protection of human dignity. It is true that the Court reserves that its task is not to broach questions of a medical or ethical nature, which means that the Court must restrict itself to a legal interpretation of the relevant provisions of the Directive. Although the Court's task is to construe the Directive, many academics have noted that these two judgments have much broader impact than only enforcing the Directive's provisions[39].

The issue of relation between terms like "person", "human being", "human dignity" and the matter of the beginning and the end of protection of dignity

[36] Judgment of the Court of Justice of the European Union (Grand Chamber) of December 18, 2014, *International Stem Cell Corporation* v *Comptroller General of Patents, Designs and Trade Marks*, C-364/13.

[37] Official Journal 1998 L 213, p. 13.

[38] Judgment of the Court of Justice of the European Union (Grand Chamber) of October 18, 2011, *Oliver Brüstle v Greenpeace eV*, C-34/10, 34.

[39] S. H. E. Harmon, G. Laurie, A. Courtney, *Dignity, Plurality and Patentability: the Unfinished Story of Brüstle v Greenpeace*, "European Law Review" 2013, Vol. 1, pp. 92–105; P. Łącki, *Ludzkie embriony i godność człowieka w świetle prawa patentowego. Wyrok Trybunału Sprawiedliwości Unii Europejskiej z dnia 19 października 2011 r. w sprawie Brüstle przeciwko Greenpeace*, "Przegląd Sejmowy" 2012, issue 4, pp. 33–54; A. Wnukiewicz-Kozłowska, *Zdolność patentowa embrionu ludzkiego w kontekście orzeczenia Trybunału Sprawiedliwości Unii Europejskiej z dnia 19 października 2011 r. w sprawie Brüstle przeciwko Greenpeace*, "Przegląd Sejmowy" 2012, No. 4, pp. 55–75.

is worth examining in a separate article. Only to conclude this part of reasoning, one more argument in favor of protecting the person from the moment of conception as a person with inherent dignity is a presumption in support of resolving any doubts in favor of protection appropriate to a human being. It is always less risky to protect a being, even when there are doubts regarding the status of a person, than to take a grievous burden and infringe the integrity of the being, particularly when the extent of this infringement consists of depriving someone of such a fundamental value as life[40].

Before moving to the next part of this analysis, one more possible confusion should be mentioned. While conducting research focused on the human dignity concept, it is common to be confronted with an approach that differentiates – with reference to criminal law – between the concept of a person and human dignity[41]. It is a partly mistaken approach because it detaches the concept of a person from the concept of human dignity, whereas there is no person without dignity, and there is no dignity without a person. The mistake lies in the attempt to construe characteristics of a person without considering his or her dignity, which is the basic source of those characteristics.

4. THE IMPACT ON CRIMINAL LAW

Since we have realized that human dignity is one of the most important principles in the legal system, with non-positivistic roots, expressed in constitutions, we have to ask whether such a construct has any impact on criminal law, especially on the principles of liability. The process of criminalization is not discussed here[42]. With regard to criminalization, it is just worth mentioning here that human dignity might constitute a standalone basis for criminalization of given behaviour, without references to other values, which a government might need to protect, being necessary. Infliction of torture has already been mentioned. Even

[40] See more about the different approaches to human dignity: *Human Dignity and Bioethics Essays Commissioned by the President's Council on Bioethics*, March 2008. The Collection of essays is available on the website: https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/ (visited August 10, 2016).

[41] For example, G. Jakobs refers to the concept of a person and avoids the concept of human dignity. See G. Jakobs, *Zum Begriff der Person im Recht*, (in:) H. Koriath, R. Krack, H. Radtke, J.-M. Jehle (eds.), *Grundfragen des Strafrechts, Rechtsphilosophie und die Reform der Juristenausbildung*, Göttingen 2010, p. 69 *et seqq*.; G. Jakobs, *Zur Theorie des Feindstrafrechts*, (in:) H. Rosenau, S. Kim (eds.), *Straftheorie und Strafgerechtigkeit*, Frankfurt am Main 2010, p. 167 *et seqq*.

[42] K. Szczucki, *Wykładnia prokonstytucyjna...*, *passim* (Polish edition) and K. Szczucki, *Proconstitutional Interpretation...*

threatening someone to torture them and to treat or punish in a cruel, inhuman, or degrading manner shall be allocated to the set of "torture" and prohibited. The only justification needed claims that even mere threatening infringes human dignity, particularly the subjectivity of the person[43]. What is more, the closer the relation of particular value to human dignity is, the better protection it should receive from authorities[44]. The human dignity principle and its careful analysis lead to an important conclusion that a state has a strict obligation to criminalize behaviour that cannot be reconciled with the status of a person, in other words: with human dignity[45].

The very goal of this article is to verify the thesis that the human dignity principle affects principles of responsibility in criminal law. Horst Dreier writes that this branch of law has always been strongly influenced by the principle of human dignity. The author draws attention to the role of human dignity in perception of the nature of criminal punishment and the relationship between guilt and atonement[46]. Doubtless, the position of the principle both in the Polish and German basic laws cannot be without significance in criminal law, let alone with regard to the rules of responsibility. Having conducted the above analysis, we can point to basic elements describing human nature, derived from the human dignity principle: reason, freedom, consciousness and sovereignty. Presence of this elements in the content of principles of responsibility in criminal law would mean that without a doubt the human dignity principle affects rules of criminal responsibility.

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[43] L. Bosek, *Komentarz do art. 30…*, p. 743.

[44] The special role of dignity in the process of balancing principles when making a criminalizing decision was given effect to by the Polish Constitutional Court in its judgment dated October 30, 2006, where the Court, examining the constitutionality of art. 212 of the Criminal Code, remarked: "In those circumstances [prohibition on eliminating or limiting freedoms and rights which would lead to a violation of human dignity – author's note] it shall be held that the stronger the relation between a right or a freedom with the essence of human dignity, the better (the more effectively) it should be protected by public authorities. (...) Freedoms and rights which express the quintessence and constitutive an emanation of human dignity, including honour, reputation and privacy (protected under art. 47 of the Constitution), may deserve priority in case of a conflict with freedom of speech or freedom of the press and other media, and therefore trigger restrictions thereof, regardless of the fact that they have not only an individual, but also a public dimension, in being a guarantee of public debate necessary in a democratic state ruled by law".

[45] See examples from the judgments of the European Court for Human Rights: of April 29, 2002, *Pretty v The United Kingdom*, application No. 2346/02; of July 25, 2005, *Siliadin v France*, application No. 73316/01; of January 7, 2010, *Rantsev v Cyprus and Russia*, application No. 25965/04.

[46] H. Dreier, *Human dignity in German law*, (in:) M. Düwell, J. Braarvig, R. Brownsword, D. Mieth, *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, Cambridge 2014, pp. 381–382.

5. THE PRINCIPLE OF GUILT

According to art. 1(3) of the Polish Criminal Code: "The offender of a prohibited act does not commit an offence if no guilt can be attributed to him at that time". It is not the only condition which excludes the possibility of attributing liability to a perpetrator of a crime. Polish criminal law jurisprudence describes criminal law from the perspectives of a few accounts of the structure of a criminal offence[47]. According to the wording of the general part of the Polish criminal code it seems that the structure that fits best current Polish law is the five-elements theory which distinguishes such elements as: act, illegality, punishability, reprehensibility and guilt. This structure is logically ordered, which means that exclusion of the preceding element excludes the possibility to assign responsibility to the defendant. There is no need to consider culpability (guilt) when there was no act (e.g. due to *vis absoluta*) or when an act was not illegal nor punishable[48]. Attribution of guilt has two consequences. First of all, it means that the defendant committed an illegal and punishable act. However, culpability cannot be limited only to an assertion that an illegal and punishable act has been committed. Otherwise, it would have no content on its own and as such could not serve as an element of the structure of a crime.

There are different definitions of guilt in the criminal law doctrine, but what seems to be the most significant here, from the human dignity perspective, is one's personal ability to bear responsibility for an illegal and punishable act. Culpability in this approach means that it is possible to charge someone with a crime. Since our task is to examine the influence of human dignity over the concept of culpability, it is justified to verify in the conditions of culpability the presence of elements derived from the dignity principle, namely reason, freedom, consciousness and sovereignty. When the ability of a person to be subjected to criminal liability is considered, the doctrine and the legislature cannot detach the principles of culpability from a person's reason, freedom, consciousness and sovereignty. Otherwise, guilt cannot be assigned, because the action in question was

[47] There are: three-element theories, which analyse the structure of a crime on three grounds, i.e. illegality, punishability and guilt; five-element theories, which analyse crimes on five grounds, i.e. act, illegality, punishability, reprehensibility and guilt; six-element theories, which differentiate six dimensions within the structure of a crime, i.e. act, social harmfulness, illegality, statutory elements, guilt and punishability; four-element, under which, in order for criminal liability to arise, a committed act must be: criminally illegal, socially dangerous (i.e. objectively antisocial and culpable), not insignificant (i.e. socially dangerous to a higher extent than insignificant). See Z. Jędrzejewski, *Bezprawność jako element przestępności czynu*, Warszawa 2009, pp. 23, 49–51; A. Zoll, *O normie prawnej z punktu widzenia prawa karnego*, "Krakowskie Studia Prawnicze" 1991, issue 23, pp. 93–94.

[48] See, in the German jurisprudence: M. Kremnitzer, T. Hörnle, *Human Dignity and the Principle of Culpability*, "Israel Law Review" 2011, Vol. 44, p. 115.

not self-determined by the perpetrator[49]. The principle of human dignity demands the imposition of liability on the defendant for their acts, but only if they were conscious. To be punished, a perpetrator should have wanted to infringe the law in the broad sense of that expression. The word "to want" shall not be limited only to the situation when an agent knows a criminal provision literally and then infringes it. Especially when crimes classified as *mala in se* are considered, the requirement resulting from the culpability principle is fulfilled when a perpetrator knows that they infringe protected values and engage in socially inadequate behaviour. The relation between the perpetrator and their act within the meaning of his intent (*mens rea*) is not an issue that should be solved in the frames of guilt. It is rather a problem discussed within the frames of illegality. The role of culpability as an element of the structure of a criminal offence is to find out whether a perpetrator has the ability to develop the will to infringe values protected by criminal law, even if that merely means acting recklessly or negligently. For instance, a child cannot – because of immaturity – act consciously and freely against the public order understood as values protected by the law. Even if a child acts knowingly, with an intent to kill, they are unable to bear criminal responsibility, because their process of education, particularly their secondary socialization, is not yet finished. A child cannot fully understand the consequences of their acts. Quite similar reasoning must be applied to insanity. Here, one's act is not caused by lacks in secondary socialization, but one's inability to recognize the significance of an act or to control one's actions due to a mental disease, mental deficiency or other mental disturbance. In these two cases, immaturity and insanity respectively, criminal acts are not committed by a person with an ability to exercise their reason, freedom, consciousness and sovereignty[50]. One may question whether there is any inconsistency between the features of a person derived from the principle of human dignity and the lack of ability to bear responsibility by children or insane people. If a child is gifted with human dignity and if human dignity means that a person is self-determined, reasonable, and acts consciously, should it not be said that a child can be criminally liable? Two comments are necessary here. The human dignity principle describes the nature of a person, which means that in some cases it may not be fully actualized. A child needs to grow biologically and develop psychologically in order to be able to use the full potential of their reason and sovereignty. An akin conclusion should be accepted in the case of an insane person. Because of his or her psychological disease they are not able to fully use the potential of consciousness, reasonability and

[49] M. Królikowski, *Komentarz do art. 1*, (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Vol. 1. Komentarz do artykułów 1–31*, Warszawa 2010, pp. 202–203.

[50] Insanity gives rise to more challenges. It is difficult to say whether an insane person has the ability to commit an act in itself, since the human act is understood as a conscious expression of the will. It is worth considering whether to relocate insanity to a logically earlier stage of criminal assessment, namely determination whether a criminal act actually occurred.

sovereignty. Secondly, by reference to human dignity, it may be said that liability shall be imposed proportionally to the ability of a person to use the potential of their consciousness, reason and sovereignty, no more and no less, exactly what they deserve and can be blamed for. In such cases one could deduce from the dignity principle that it is necessary to impose not an outright sanction (punishment), but an obligation to undergo psychiatric treatment or other social pressure. In a sense, it may be concluded that on the culpability level it is the general attitude to undertaking actions against the system of legally protected values that is verified, whereas on the *mens rea* level – in Poland classified as the illegality level – one's particular attitude to undertake an action aimed at a particular value is described[51].

The division between culpability and *mens rea* might be better understood and discerned by reference to the examples of mistake over the exclusion of illegality or guilt and mistake of law[52]. Someone who acts under a justified conviction that they are being attacked, who reacts in a typical self-defence manner, doubtless has an intent to infringe the integrity of the offender in order to protect their life and health. When there was only a mistaken conviction as to the propriety of self-defence, not only is it the case that illegality is not excluded, but also the goods of the purported attacker are violated. Nevertheless, if this mistake is justified, we cannot assign guilt to the man acting with a mistaken conviction, because his general approach towards the system of legally protected values cannot be judged as wrong. Should he have been really attacked, his reaction would have been proper. The perpetrator may be said to have acted with the

[51] It does not mean that these two levels are completely independent from each other, since together – with other elements – they make up one element of a crime. Mutual permeation of these two elements might be observed especially vividly when the issue of excluding illegality and culpability is analysed. For example, a 19-year-old man is going to have sexual intercourse with an almost 15-year-old girl. He does not know that she is under 15 and he does not want to sleep with a girl under 15. She lies to him and tells him that she is 17. His mistake seems to be justified which means that art. 28 of the Polish Criminal Code may be applied: "No offence is committed by anyone who is justly mistaken about the circumstances constituting a feature of a prohibited act". The age of the victim is one of the features of the crime of engaging in sexual intercourse with a minor: "Anyone who has sexual intercourse with a minor under the age of 15, or commits any other sexual act, or leads him or her to undergo such an act or to execute such an act, is liable to imprisonment from two to 12 years" (art. 200). In this example the man neither has an attitude to infringe the legal order in general by seducing a girl under 15, neither does he have an intention to sleep with the girl under 15 in this particular set of facts. Taking all this into consideration, he should not be found to have committed a criminal offence.

[52] A mistake over the exclusion of illegality or guilt: "No offence is committed by anyone who performs a prohibited act in the justified but mistaken conviction that there are circumstances excluding illegality or guilt; if the offender's mistake is unjustified, the court may apply an extraordinary mitigation of the penalty" (art. 29 of the Polish Criminal Code). A mistake of law: "No offence is committed by anyone who performs a prohibited act while being justifiably unaware of its illegality; if the offender's mistake is not justified, the court may apply an extraordinary mitigation of the penalty" (art. 30).

requisite intent because he wanted to attack the alleged assaulter, however guilt shall not be assigned to him, because he acted under a mistaken conviction. If he had not acted in a mistake, he would not have attacked the alleged assaulter. The same conclusion remains valid when a man acts with a mistaken but justified conviction that his act is legal, whereas it is illegal. If he is not mistaken, he does not commit an illegal act.

The analysis conducted above proves how important in establishing the structure of crime the principle of human dignity and basic features of the person derived from it are. Criminal law aims at punishing only those who consciously and self-determinedly infringe a system of legally protected values, either by direct trespassing or by violating precautionary rules of conduct. Human dignity provides for perceiving an individual as a moral agent who is able to distinguish between good and evil and between what is permitted and what is forbidden[53]. The bigger the guilt of a perpetrator is, the severer punishment he deserves. This concept finds its reflection in the set of general directives governing sentencing, where a relevant statute proclaims that – among other directives – the court passes a sentence at its own discretion, within limits prescribed by law, ensuring that the severity does not exceed the degree of guilt. A person endowed with human dignity, who has to be treated as an end and not a means of every act, should be punished exactly to the degree their guilt indicates[54].

A very good recapitulation of this part of the article may be offered by a quote from Germany's highest court in criminal matters: "Culpability means to be blameable. The blaming act which ascribes culpability reproaches the offender for the illegal act, for making a decision in favour of wrongdoing although he could have made a decision in favour of the law. The inner reason for the judgment of culpability is that human beings are capable to act in a free, responsible and moral way and thus capable to decide in favour of the law and against wrongdoing"[55].

6. THE ROLE OF HUMAN DIGNITY IN ASCRIBING GUILT

The above reasoning presents the crucial role of the principle of human dignity in criminal law, particularly in ascribing guilt to a perpetrator. To treat dignity as the foundation of a state system, or – at least – of a system of rights and freedoms of persons and citizens, and recognize a strong connection between human dignity and culpability, means to impose on the legislature an obligation

[53] M. Kremnitzer, T. Hörnle, *Human Dignity...*, p. 122.

[54] As M. Kremnitzer and T. Hörnle noticed, measurement of the degree of culpability is a complicated task. See M. Kremnitzer, T. Hörnle, *Human Dignity...*, p. 123.

[55] 2 BGHST 200, cited by: M. Kremnitzer, T. Hörnle, *Human Dignity...*, p. 128.

to tie every type of penal responsibility with the requirement of guilt[56]. The Polish traditional criminal law does not prescribe absolute liability offences. The *mens rea* and culpability requirements always have to be met. These observations are not final because there is still a growing body of administrative penal law[57]. Provisions of this branch of law are based on the principle of strict liability, where no guilt has to be proven. To illustrate some problems that this may give rise to, a relatively new law allows the police to seize one's driving license and to keep it for three months when a driver exceeds the speed limit by more than 50 km/h in a built-up area[58]. In practice, it means that by speeding 100 km/h in such an area one risks being deprived of one's driving license for three months. Although this sanction consists of a merely physical seizure of a license, with no court prohibition on driving, the effect is almost the same because driving without a license is illegal. On top of this administrative sanction, imposed by a policeman, a driver may still be punished by a criminal law sanction and a penal measure – a driving ban. A number of issues arises here, including, but not limited to, that of *ne bis in idem*[59]. Administrative penal law does not envisage any culpability requirement or exemptions from the liability. It is irrelevant whether an agent drives faster on a whim or because he has to get to the hospital as soon as possible. Examples can be multiplied. Usually, administrative penal law imposes financial penalties, which sometimes are really severe.

The motives behind espousing such a trend were – with no restraint – explained in the reasons attached to amendments to the Act on Protection of the Health of Animals: "it is assumed that administrative responsibility, which is characterized by automatically imposed sanctions for an objective infringement of the law, will be a more efficient, proportional and deterring reaction to an infringement of provisions regarding by-products of animal origin and derivatives thereof, in comparison to the current criminal responsibility regulations; most importantly, a significant increase in financial liability for such infringements will be observed,

[56] It is complicated to precisely define the boundaries of a "penal case" in order to designate cases which should be covered by guarantees typical in classical criminal law (e.g. *nullum crimen sine lege*, culpability and – from the procedural point of view – prohibition on demanding self-accusation).

[57] In Poland, a person can be punished within the frameworks of: criminal law, petty offences law and administrative penal law. See R. A. Stefański, *Odpowiedzialność administracyjna czy karna sensu largo?*, (in:) M. Kolendowska-Matejczuk, V. Vachev (eds.), *Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?*, Warszawa 2016, p. 10 *et seqq.*; P. Kardas, M. Sławiński, *Przenikanie się odpowiedzialności wykroczeniowej i administracyjnej – problem podwójnego karania*, (in:) M. Kolendowska-Matejczuk, V. Vachev (eds.), *Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?*, Warszawa 2016, p. 22 *et seqq.*

[58] Article 135 of the Road Traffic Act of June 20, 1997.

[59] Pursuant to relevant Polish law currently in force, a driver can be administratively punished by stripping them of a driving licence, only to be punished again as a result of ensuing criminal or misdemeanour proceedings. Some writers believe that this is an example of double punishing, however this view is not universally shared.

in comparison to the current legislative regime; it is assumed that a change will limit economical motivation to purposeful deeds; it should be also considered that under the current legislation criminal proceedings for crimes or petty offences where laws on by-products of animal origin and derivative products are infringed often end with an imposition of a mild sanction or even an acquittal because of insignificant social harmfulness; current criminal provisions do not perform a preventive function"[60]. This example shows how important the value of "trial's expeditiousness" is, so much so that it can even justify a shift from criminal law, full of guarantees addressed to the defendant as well as the victim, to administrative law. Doubtless, "trial's expeditiousness" is a value that should be seriously considered when a law is written, especially when a parliament passes procedural law, e.g. criminal procedure. However, its importance is limited, and respect for it should not lead to abridging other considerations. The attribute of absoluteness belongs to the human dignity principle. Consequently, expeditious handing down of punishments might be put into law only within the boundaries delimited by human dignity. In other words, the human dignity principle cannot be infringed, even if it was to be justified by the will to act quickly.

7. CONCLUSION

The analysis conducted above allows us to propose a few concluding remarks. The human dignity principle is one of the most important elements that should be taken into consideration in the legislative process. This proves particularly clear once the principle of dignity is recognized in the constitution of a given state. Even if this is not the case – also from a positivist perspective – the weight and significance of dignity find its grounding in UDHR, a foundation of the international order. This leads to a conclusion that the human dignity principle cannot be neglected by the legislature, particularly when passing criminal laws which have the ability to interfere with basic and intimate freedoms and rights of a person. Dignity of a person in the frames of criminal law shall be understood not only as a set of guidelines for designing a catalogue of punishments or methods of executing punishments provided for in the law. Since the human dignity principle is interpreted as a category that describes the nature of a person as conscious, reasonable, self-determining, it is difficult not to see some possible dependencies between the principle and rules of criminal liability. As noted above, the presence of the human dignity principle gives rise to a conclusion that there is no

[60] Reasons appended to a government bill amending the Act on the Protection of Animal Health and Combating Infectious Diseases of Animals and Several Other Acts (Sejm paper 1698, Archives of the Sejm of Poland (7th term)).

possibility to create any responsibility in the law without a requirement to verify whether any given act is culpable. It means that a legislative intention to bypass the standards typically connected with classical criminal law, i.e. by omitting the standard of culpability, and to transfer the administration of punishment to the executive branch cannot be approved. Although this was illustrated on the grounds of administrative penal law, similar conclusions are valid regarding the – constantly expanding – antiterrorist law.

The findings described in the article may serve to underpin the following notions, which have to be the object of further research on relations between the human dignity principle and rules of criminal liability, guilt in particular. First, the "guilt standard" is obligatory, whenever the state intends to punish a person. Second, punishment can be meted out only to an offender with an ability to bear responsibility. In other words, only a person whose characteristic derived from the principle of dignity is fully actualized can be punished. Third, punishing should be preceded by an analysis of the degree of guilt. The more eager the perpetrator was to act against the legal system and against values protected by it, the severer punishment should be meted out. Finally, law should provide for exclusion of culpability when the human dignity principle demands one to act in a manner that is outwardly criminal, but was committed due to a motivation that ought to be excused in the light of the dignity principle. Obviously, the culpability standard is not the only one to be expected from the human dignity perspective, nevertheless further aspects of the impact of the human dignity principle require separate writings.

Summary

Human dignity is a well-known concept among Western countries since after World War II, when states, in an effort to create a new platform of cooperation with a view to guaranteeing peace, were looking for an axiological foundation of the new order. The findings described in the article may serve to underpin the following notions, which have to be the object of further research on relations between the human dignity principle and rules of criminal liability, guilt in particular. First, the "guilt standard" is obligatory, whenever a state intends to punish a person. Second, punishment can be meted out only to an offender with an ability to bear responsibility. In other words, only a person whose characteristic derived from the principle of dignity is fully actualized can be punished. Third, punishing should be preceded by an analysis of the degree of guilt. The more eager the perpetrator was to act against the legal system and against the values protected by it, the severer punishment should be meted out. Finally, law should provide for exclusion of culpability when the human dignity principle demands one to act in a manner that is outwardly criminal, but was committed due to a motivation that ought to be excused in the light of the dignity principle.

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prawo karne, prawo konstytucyjne, godność człowieka, wina, zawinienie, odpowiedzialność karna