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RADCA PRAWNY, ANALITYK W INSTYTUCIE NA RZECZ KULTURY PRAWNEJ ORDO IURIS. ABSOLWENT STUDIÓW PRAWNICZYCH NA WYDZIALE PRAWA I ADMINISTRACJI UNIWERSYTETU MARII CURIE-SKŁODOWSKIEJ. PRACOWNIK NAUKOWO-DYDAKTYCZNY W KATEDRZE PRAWA RZYMSKIEGO UMCS. W TRAKCIE PRZYGOTOWYWANIA ROZPRAWY DOKTORSKIEJ W ZAKRESIE PRAWA RZYMSKIEGO. AUTOR PUBLIKACJI Z ZAKRESU PRAWA RZYMSKIEGO ORAZ HISTORII PRAWA. ZAINTERESOWANIA ZAWODOWE DOTYCZĄCE PRAWA WSPÓŁCZESNEGO KONCENTRUJĄ SIĘ WOKÓŁ KOMPARATYSTYKI PRAWNICZEJ, PRAWA CYWILNEGO I ADMINISTRACYJNEGO ORAZ PRAW CZŁOWIEKA.

Conceived child as a subject of right to life

1. INTRODUCTORY REMARKS

Human dignity and human life are the most precious treasures that State should protect. The obligation of public authorities, but also the state understood as political community of citizens (*civitas*), to protect those treasures results from the objective natural order, which should be respected and affirmed by positive legislation[1]. Their importance was emphasised also in the Polish Constitution of 1997, which, in Article 30, provides that: "Inherent and inalienable human dignity is the source of freedoms and rights of human being and of citizen. It is irrevocable; therefore, respecting and protecting that dignity is the duty of public authorities." Article 38 of the Constitution provides that: "The Republic of Poland ensures that each person's life is protected." The mutual relation between human dignity and the legal protection of human life was noted by the Constitutional Tribunal, which stated: "a characteristic consequence of Article 30 is Article 38 of the Constitution, according to which «the Republic of Poland ensures that each person's life is protected.» It is particularly important and as such bears certain consequences for positive legislation. […] We cannot speak of human dignity if there is no sufficient basis for the protection of human life"[2].

1 The term "objective natural order" can be interpreted for the purposes of this paper as equivalent to "objective system of values", as stipulated in the Judgement of the Constitutional Tribunal of 23 March 1999, K 2/98, OTK ZU 1999/3/38, point III. In the above judgement, the Constitutional Tribunal stated: "As a whole, the constitution reflects a certain objective system of values, which should be supported by a system of interpretations and application of constitutional provisions. A key role in defining this system of values is ascribed to the provisions on rights and freedoms of an individual, stipulated in particular in Chapter II of the constitution. Among these provisions, the pivotal one focuses around the principle of inherent and inalienable human dignity. Respecting and protecting the right to live is one of the fundamental manifestations of this principle." On the sideline of the quoted judgement, it must be noted that the Constitution "reflects the objective system of values", i.e. is based on such a system, and transposes that system to positive law. The right to life is most certainly rooted in such law, which is confirmed not only in the judicial decisions but also in the literature, e.g. J. Herrnaz, *Niezbywalne prawo człowieka do życia,* „Studia nad Rodziną" 4/2 (2000), pp. 63-84. On the relation between abortion and natural law interpreted in Thomsitic view, cf. U.Y. Altbregen, *Abortion: The Conflict of Positive Law with Natural Law and Aquinas,* „Ave Maria International Law Journal" (Spring 2016), pp. 66-95.

2 Judgement of the Constitutional Tribunal of 27 January 2004, K 14/03, OTK ZU 2004/1A/1, point III.4.1.

Protection of human life should be consequent and it should encompass the entire period of human existence. Human life should, therefore, be protected from its beginning, i.e. from the fusion of male and female gametes (karyogamy) to the natural termination of all functions of the organism (natural death). Although the issue seems *prima facie* obvious, it is still an object of heated debates and arguments concerning the initial moment from which the protection of human life should come into force as well as the scope and intensity of this protection. It is first of all connected with the acceptability of abortion, i.e. killing of conceived child, by means of surgical intervention or the use of pharmacological substances. Other important issues include the acceptability of euthanasia and prohibition of the death penalty; these relate to termination of life in the post-natal stage of existence. Obviously, such a short paper cannot fully refer to all questions regarding the consequences of legal protection of life. We must, therefore, restrict ourselves to the issue arising most disputes. It is **defining the initial moment for the protection of human life.** That problem is connected with the necessity to answer three fundamental questions:

1) is conceived child a subject of law or only an entity under legal protection?

2) if conceived child is a subject of law, does it mean that it has the right for its life to be protected?

3) what circumstances may influence the restriction of the exercise of the right of conceived child for its life to be protected?

2. CONCEIVED CHILD AS A SUBJECT OF LAW

The history of law teaches us about numerous legal systems functioning in the past, under which entire groups of people were deprived of legal capacity. An example in this context can be the Roman Empire, in which slaves were not legal subjects[3]. The scope of legal subjectivity ascribed to in a given legal system determines its entire character, and in consequence allows to indicate the extent to which that legal system is compatible with natural law[4]. The Romans themselves knew very well that slavery is contradictory to natural law[5], nevertheless the accepted the status quo, probably for pragmatic reasons.

Is, then, conceived child a subject of law? Or is it, like slaves in ancient Rome, only an entity covered by legal protection, which depends on the will of the positive legislator? The Constitution provides no clear answer to that question[6]. However, the phrase "each human" in Article 38 should unequivocally indicate that if conceived child is human, then it must be also covered by the protection under that provision.

3 P. Bonfante, *Corso di diritto romano,* v. I, *Diritto di famiglia,* Roma 1925, p. 143. See also: A. Wolter, *Prawo cywilne. Zarys części ogólnej,* Warsaw 2001, p. 157; M. Pazdan, [in:] *System prawa prywatnego*, v. I, [ed.] M. Safjan, Warsaw 2012, p. 1046.

4 The similarity between the debate on abortion and the past debate on abolishing slavery is noted by R.P. George: *In Defense of Natural Law,* Oxford – New York 2004, p. 196.

5 Treść przypisu znajduje się na końcu artykułu na str. 56.

6 It must be noted, however, that attempt at amending Article 38 of the Constitution to extend human life under protection to the moment of conception, was made at the turn of 2006 and 2007; it failed but bore fruit in an important paper titled: „Przed pierwszym czytaniem" 3 (2007), *Konstytucyjna formuła ochrony życia. Druk sejmowy nr 993*, M. Królikowski *et al*., Bureau of Research, Chancellery of the Sejm.

7 Judgement of the Constitutional Tribunal of 28 May 1997, K 26/96, point 4.4.

8 he Tribunal analysed the compliance of Article 4a(1)(4) of the Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and Conditions of Pregnancy Termination (Journal of Laws No. 17 item 78, as amended) with the constitutional provisions that remained in force pursuant to Article 77 of the Constitutional Law of 17 October 1992 on mutual relations between legislative and executive authorities of the Republic of Poland and on local authorities (Journal of Laws No. 84, item 426, as amended) The legal protection of *nasciturus* was also derived from the maternity protection principle: "Other regulation under which the life of conceived child may be deemed constitutional value is Article 79(1) of the constitutional provisions, indicating the duty to protect maternity and family. It is reasonable to believe that maternity protection is not limited to the interests of pregnant woman and mother. The use of a noun expression by the constitutional provisions indicates a certain relationship between woman and child, which also includes newly conceived children. The entirety of that relationship under Article 79(1) of the constitutional provisions can be construed as constitutional value, including the life of foetus, without which the maternity relationship would become discontinued. Therefore, the protection of maternity cannot be understood as protection exercised only from the perspective of the interests of mother/pregnant woman" - Judgement of the Constitutional Tribunal of 28 May 1997, K 26/96, point 3.

The issue in question is also explained in one of the most significant judgements of the Constitutional Tribunal, issued on 28 May 1997. Referring to the incapacity of *nasciturus* under Polish Civil Code (repeal of Article 8(2) of the Polish Civil Code), the Tribunal represented that: "The capacity provided for in the regulations of the Civil Code, is of functional nature, and refers exclusively to civil law. In particular, the capacity provided for in Article 8 of the Civil Code cannot be associated with being the subject of law under the whole legal system. Being the subject of law is attributable to all human beings"[7]. One should note that the Tribunal reached that conclusion not on the basis of Article 38 of the currently applicable Constitution, but on the rule of law principle [8].

The quoted fragment of the judgement of the Constitutional Tribunal of 1997 must lead to the conclusion that this is a separate legal subjectivity from that in the Civil Code. Both before and after the development of the current Civil Code, the question of legal subjectivity of *nasciturus* was extensively discussed by legal scholars[9]. One of the authors of the Civil Code, A. Wolter treated the legal capacity and being subject of law as equal terms[10]. Although this stand is still present in civil law literature[11], the secondary and technical character of the "legal capacity" category is emphasised more and more often, along with the increasing acceptance of the legal subjectivity of *nasciturus*[12]. It has to be agreed that the opinion of P. Księżak: "There is no doubt that *nasciturus*, a living organism of human genome, is a human, therefore a subject of law, however that does not necessarily mean that it possesses legal capacity. Therefore, a human – and therefore an subject – acquires legal capacity only at a certain stage of its existence, i.e. in the moment of birth"[13]. In this context there is an obvious need to clearly distinguish between the notions of legal capacity and being the subject of law. According to the cited statement of the Constitutional Tribunal, the notion of conceived child being a subject of law should not be examined exclusively from the point of view of civil law and therefore it has to be assumed that it does not involve only the personality in relation to civil-law property relationships. The notion of *nasciturus* being a subject of law should manifest itself primarily in terms of protection of its personal interests, in particular those which are reflected in constitutional legislation (mainly the right to legal protection of life and health care)[14].

Argument regarding a conceived child as a subject of law – although not directly – is also justified on the basis of the judgement of the Constitutional Tribunal of 15 October 2002, in which it was stated that: "under Article. 30 of the constitution, a situation in which a human would become only an object of actions taken by the authorities, he/she would be a «substitutable volume», and his/her role would be limited to purely instrumental or the allegation

9 See examples: B. Walaszek, *Nasciturus w prawie cywilnym,* "Państwo i Prawo" 7 (1956), p. 121 et seq.; S. Chrempiński, *Czy dziecko poczęte powinno być uznane za podmiot prawa?,* "Nowe Prawo" 2 (1958), p. 81 et seq.; J. Mazurkiewicz, *Nasciturus w prawie cywilnym i karnym,* "Palestra" 17/11 (1973), p. 37 et seq.

10 A. Wolter, *op. cit.,* p. 158. By analysing the legal situation of a conceived child in light of the Polish civil law, the author came to a conclusion that if *nasciturus* is treated as if it was a subject whenever its interests are considered, then the notion whether it is entitled to conditional legal capacity (and on what clause – suspending or resolutive) is a matter of secondary nature - *ibidem,* pp. 160-161.

11 See M. Gutowski, commentary to Article. 8, [in:] *Kodeks cywilny,* vol. I, *Komentarz do artykułów 1-352,* Warsaw 2018, Section No. 1-2 and 23.

12 See R. Majda, commentary to Article. 8, [in:] *Kodeks cywilny. Komentarz. Część ogólna,* [ed.] P. Księżak, M. Pyziak-Szafnicka, LEX 2014, note 2; P. Księżak, commentary to Article. 8, [in:] *Kodeks cywilny. Komentarz,* [eds.] K. Osajda, Warsaw 2019, note 6; M. Pazdan, [in:] *System...,* p. 1053-1054; J. Haberko, *Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych,* Oficyna 2010, LEX, Section III, point 3.4.1.

13 P. Księżak, *op. cit.,* note 6.

14 In the order of the Constitutional Tribunal of 18 April 2018, S 2/18, OTK-A 2018/20, the Court stated that "the right of the embryo to life" belongs among the principles of the legal system of the Republic of Poland, expressed in the Constitution and state legislation and in binding international agreements with the Republic of Poland. In this context the Tribunal also mentions: "health, good and rights of the child, including its right to family life". In the property context, the interests of *nasciturus* are protected by specific provisions (Article No. 4461 of the Civil Code; Article No. 927 § 2 of the Civil Code). Cf. also: J. Roszkiewicz, *Prawo nasciturusa do życia w prawie konstytucyjnym i prawie międzynarodowym*, "Forum Prawnicze" 4/42 (2017), p. 100.

of «statutory desubjectification-reification» – may be recognised as, in principle, violation of dignity"[15]. The notion was expressed more clearly by the Tribunal in the order of 18 April 2018, in which the court of the law appealed also to the regulations of international law: "It is important to not lose sight of the rights of the child under the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations of 20 November 1989 [...], which are not opposed by any «right to a child». The concept assuming the existence of a «right of a woman to an embryo» infringes the constitutionally protected dignity (Article 30 of the Constitution) granted to every person, including a conceived child. The recognition that a human (a child, regardless of its development stage) may be a subject of an individual right of another human (mother) is equivalent to treating it as an object. However, a human cannot be treated as a means to an end for another persons. He/she cannot be treated as a «thing» nor can he/she be *jus disponendi* by another human"[16].

The notion was expressed in a similar vein also by the Court of Justice of the European Union in a judgement of 18 October 2011.[17] On that day, the Grand Chamber of the Court concluded that the human embryo – 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 – due to its inherent dignity, is excluded from patentability (cannot become a subject of a patent)[18]. Of course the context of the discussions was relatively narrow, yet, it is difficult to accept that under one branch of law *nasciturus* is granted inherent dignity and under another it is not[19].

It should therefore be assumed that a conceived child is a subject of law. The argument that a conceived child is only covered by legal protection as some sort of legal good (e.g. the legal protection is granted to the welfare of a conceived child), would inevitably lead to the denial of its human dignity. A different opinion was presented by the European Court of Human Rights, which, in the case of *Vo v France*, adopted an object-oriented concept of the protection of the dignity of a conceived child: "it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person […] require protection in the name of human dignity […]"[20]. The argumentation presented by the European Court of Human Rights was not convincing. If we assume that a conceived child belongs to the human race, we should therefore assume it as a being bearing human dignity [21]. It is in turn the source of all freedoms and rights. It matters not whether a conceived child feels pain or whether it is a sentient being. Persons

15 Judgement of the Constitutional Tribunal of 15 October 2002, SK 6/02, point III.6.1.

16 Judgement of the Constitutional Tribunal of 18 April 2018, K 50/16, point. I.4.5.

17 The judgement of the Grand Chamber of the Court of 18 October 2018 in case of *Oliver Brüstle against Greenpeace eV.,* C-34/10.

18 *Ibidem,* § 32-34 and 38.

19 The subject of the proceedings by CJEU involved questions referred for a preliminary ruling in relation with the Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on legal protection of biotechnological inventions (O. J. EU L 213 of 30 July 1998, pp. 13-21). The questions dealt primarily with the interpretation of the term of a human embryo and the "use of human embryos for industrial or commercial purposes". Commenting on the judgement of CJEU, J. Maśnicki focused on its ambiguity. However, in the conclusions of his argument the Author stated that: "At the level of not only the directive but indirectly also the Charter of Fundamental Rights of the European Union a significant barrier for further development of commercial use of research on embryonic stem cells was placed, recognising their potential for becoming a human being as a sufficient hindrance for their industrial destruction. Therefore, the concept of dignity allowing instrumental treatment of a human person's integrity was ruled out. However, the matter of establishing clear distinction and making ethical choices remains unresolved as it constantly requires addressing by the judges and legislators concerned with not only national constitutions but also the transnational law of the European Union. The dilemma caused by the development of modern science concerns the choice between integral understanding of human life encompassing all phases of its development and the concept of an individual as a product of technical possibilities" – J. Maśnicki, *Godność człowieka w świetle orzeczenia Oliver Brüstle przeciwko Greenpeace eV (C-34/10),* "Zeszyty Prawnicze" 13/4 (2013), p. 209.

20 Judgement of the Grand Chamber of the European Court of Human Rights of 8 July 2004, *Vo v France,* 2004/16, No. 53924/00, § 84.

21 Dignity stems from the very essence of humanity because a human is a "goal in itself", which is described in literature as autoteleology of a human person – W. Granat, *Personalizm chrześcijański,* Poznań 1985, p. 570.

in vegetative state are also not being denied their inherent dignity, therefore it is clear that the circumstances are completely indifferent to determining whether *nasciturus* is a subject of law.

Therefore, an argument about the necessity of legal protection of a conceived child "in the name of human dignity", i.e. for purely humanitarian reasons, should by ruled out. A child – including the one in prenatal development stage – is granted a **right** for that protection stemming from its inherent dignity and ensuring them is the duty of public authorities and not an expression of their good will, humanism, etc.

3. THE RIGHT OF AN UNBORN CHILD TO LIFE

If an unborn child is to be regarded as a subject of law due to its inherent dignity, this gives rise to the question whether the rights of such child include the right to life i.e. its legal protection. It is confirmed by Article 38 of the Constitution, and namely by the textual interpretation of this provision. In no way does it indicate the point from which human life is to be protected. Consequently, every person may effectively demand such protection from public authorities, also at the prenatal stage of development. In the case of an unborn child, of course, if there is a need to take specific steps connected with the execution of rights related to such protection, it is the parents that should be entrusted with the execution of these rights on the grounds of parental authority vested in them from the moment of conception, or, alternatively, a third party (*curator ventris*)[22].

Article 38 of the Constitution should be interpreted taking into account the *in dubio pro vita humana* principle[23]. This means that any emerging concerns as to the interpretation must be settled "in favour of human life". An interpretation of legal provisions which would result in restricting the legal protection of human life in any aspect (as a subject or object of law) would thus prove unacceptable. In fact, however, the principle indicated should be of auxiliary nature only, as the current state of medical knowledge allows us to state clearly that an unborn child is a human (a living creature equipped with the human genome). There are, therefore, hardly any doubts in this matter.

Similar conclusions can be derived from the case law of the Constitutional Tribunal. It stated namely that the "Value of human life as a good legally protected by the constitution, including the life at the prenatal phase, may not be differentiated, as there are no sufficiently precise and justified criteria which would allow for such differentiation depending on the development phase of human life. Since its conception, human life is a value protected by the Constitution. This also applies to the prenatal stage"[24]. The Tribunal has adopted the interpretation of the primary responsibility of the public authorities arising

22 In accordance with Article 92 of the Law of 25 February 1964 – The Family and Guardianship Code (consolidated text: Journal of Laws of 2017, item 682, as amended), "Until reaching the age of majority, a child is under parental responsibility". Unfortunately, the view whereby the parental authority is established only at the birth of the child is still predominant in the literature. Many scholars, however, do acknowledge that there are compelling arguments in favour of changing the status quo, e.g. J. Strzebinczyk, (in:) *System prawa prywatnego,* vol. 12 [ed.] T. Smyczyński, Warszawa 2011, p. 243-244 including the references. At the same time, the abovementioned author suggests that the parents of an unborn child should be granted the status of its legal guardians in order to protect its rights (*ibid.,* p. 244-245). Article 182 of the Code provides for the establishment of the legal guardianship "should it be necessary to safeguard the future rights of the child". Following a pro-constitutional interpretation of these provisions, however, a legal guardian appointed for the purpose of safeguarding the "future" rights should protect the rights of the child at the prenatal stage already. It should be therefore proposed *de lege ferenda* to amend the substance of this provision by extending the responsibility of the legal guardian to include safeguarding the current and future rights of an unborn child. Yet it must be noted that the idea of establishing a legal guardian in every case seems to be artificial and threatens the rights of the mother, whose health is closely connected with the health of the child. This is why T. Sokołowski indicated that there is an urgent need for legislator's intervention in this respect, whereas the provisions regarding the parental responsibility in relation to the unborn child should be currently applied by way of analogy (T. Sokołowski, commentary on Article 92, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz,* [eds.] H. Dolecki, T. Sokołowski, LEX 2013, remark 2-3. J. Haberko stresses in turn that the core function of the legal guardian of an unborn child is to safeguard the property interests and not the personal interests of an unborn child (J. Haberko, *op. cit.,* Section III, point 3.4.3). The easiest solution by far would be to adopt the pro-constitutional interpretation of Article 92 of the Code, whereby the parents have parental responsibility from the moment when the child is conceived.

23 Judgement of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK ZU 2004/1A/1, point III 4.1; T. Sroka, commentary on Article 38, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* [eds.] L. Bosek, M. Safjan, Warszawa 2016, Section No. 104; J. Roszkiewicz, *op. cit.,* p. 105.

24 udgement of the Constitutional Tribunal of 28 May 1997, K 26/96, point 3.

from the principle of the democratic rule of law. This interpretation should be currently viewed in the context of the current Constitution, in particular Articles 30 and 38. In the light of the Constitution of 1997, the life of an unborn child is not only a legally important value. The right of an unborn child to have its life legally protected is a basic legal right of an unborn child regarded as a subject of law.

The views of legal academics and commentators as well as judicial decisions are not so clear in this matter. Referring to the subjective scope of application of Article 38 of the Constitution, Bogusław Banaszak noted that the "legal protection of life does not mean the protection of human life from the moment of conception"[25]. W. Skrzydło was even stricter in saying that "Article 38 safeguards the protection of the life of a person, that is an individual who has been born and not merely conceived. This is how this term is understood in medicine and law, in contrast to the wider term «human being» which is not the term used in the said provision"[26]. Although the notion of a "human being" does not appear in the Polish Constitution at all, it is employed in the international law. W. Lang also claimed that protecting an unborn child pursuant to Article 38 is not valid, whereas interpreting it otherwise is *contra legem*[27]. However, he interpreted the constitutional notion of a human by reference to provisions of acts, while it is the provisions of acts and international agreements that should be interpreted in accordance with the Constitution and not conversely.

The position of T. Sroka was substantially different: "The constitutional notion of a «person» used both in Article 38 and in Article 30 of the Constitution of the Republic of Poland refers to any being having human genome, at any stage of development […]. In view of the above, the constitutional concept of an «person» or «every person» encompasses all human beings at every stage of development, including the prenatal stage"[28]. Several authors expressed similar opinions, including: A. Zoll[29], M. Masternak-Kubiak[30], M. Granat[31], L. Bosek[32], D. Dudek[33], M. Olszówka[34] or P. Jaros[35]. This position is therefore predominant in the literature, much as it is not, in fact, common.

The right to life is formulated explicitly in numerous acts of international law. A particularly important act is the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989[36] (hereafter: The Convention on the Rights of the Child or CRC). The CRC preamble referred to the content of the Declaration of the Rights of the Child of 1959 in stating that every person can benefit from the rights stipulated by the Universal Declaration of Human Rights[37] and the International Covenants on Human Rights[38] regardless of any differences arising from the circumstances of their birth. A child, however, due to its physical and mental immaturity, requires special care and concern, including appropriate

25 B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Warszawa 2012, commentary on Article 38, Note 1.

26 W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Commentary,* Lex 2013, commentary to Article 38.

27 W. Lang, *Opinia w sprawie zgodności z Konstytucją projektu ustawy o świadomym rodzicielstwie*, "Przegląd Sejmowy" 6/65 (2004), p. 116.

28 T. Sroka, *op. cit.,* Section No. 98.

29 A. Zoll, *Opinia prawna w sprawie oceny konstrukcji i skutków projektu zmiany art. 30 i 38 Konstytucji RP,* [in:] "Przed pierwszym czytaniem" 3 (2007), *Konstytucyjna formuła ochrony życia…*, p. 103.

30 M. Masternak-Kubiak, *Opinia w sprawie zgodności z Konstytucją projektu ustawy o świadomym rodzicielstwie*, "Przegląd Sejmowy" 6/65 (2004), p. 119-121.

31 M. Granat, *Opinia w sprawie zgodności z Konstytucją projektu ustawy o świadomym rodzicielstwie*, "Przegląd Sejmowy" 6/65 (2004), p. 142.

32 L. Bosek, *Opinia prawna w sprawie struktury normatywnej i konsekwencji prawnych propozycji poprawki do projektu ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej,* [in:] "Przed pierwszym czytaniem" 3 (2007), *Konstytucyjna formuła ochrony życia…*, p. 77; *idem, Opinia w sprawie projektu nowelizacji art. 30 i art. 38 Konstytucji i zgodności z Konstytucją RP projektu ustawy z dnia 30 marca 2004 r. o świadomym rodzicielstwie,* "Przegląd Sejmowy" 3/80 (2007), p. 141.

33 D. Dudek, *Opinia w sprawie poselskich poprawek do projektu nowelizacji art. 38 oraz projektu nowego art. 236a Konstytucji RP,* "Przegląd Sejmowy" 3/80 (2007), p. 130-131.

34 M. Olszówka, *Początek człowieka a początek życia ludzkiego w orzecznictwie Trybunału Konstytucyjnego i Sądu Najwyższego,* [in:] *Współczesne wyzwania bioetyczne,* [eds.] L. Bosek, M. Królikowski, Warszawa 2010, p. 216-217.

35 P. Jaros, *Prawne aspekty ochrony dziecka przed urodzeniem,* [in:] *Aborcja. Przyczyny, następstwa, terapia,* [eds.] B. Chazan, W. Simon, Wrocław 2009, p. 17.

36 UNTS vol. 1577, New York 1999, No. 27531 (1990), p. 3-178; Journal of Laws of 1991, No. 120, item 526 as amended.

37 he Declaration was adopted in the form of the Resolution 217/III and adopted by the United Nations General Assembly on 10 December 1948. The original text of the declaration is available on http://www.un.org/en/universal-declaration-human-rights/ (accessed 10 December 2018).

38 For the purpose of these considerations, it is primarily the International Covenant on Civil and Political Rights that is of importance: UNTS vol. 999, New York 1983, No. 14668 (1976), p. 171-348; Journal of Laws of 1977, No. 38, item 167.

legal protection, both before and after birth. It is important that the Convention on the Rights of the Child defines a child as "every human being below the age of eighteen years" (Article 1 of the Convention). The Universal Declaration of Human Rights, International Covenants on Human Rights and the Convention on the Rights of the Child all provide directly for the right to life, without limiting the subjective scope of this right in any way[39].

The Convention for the Protection of Human Rights and Fundamental Freedoms (so-called the European Convention of Human Rights; hereafter: the ECHR)[40] calls for particular attention. Article 2 of this Convention stipulates that: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." The second sentence of the provision quoted expired with adopting Protocol No. 6 to the Convention 1983[41] which introduced the absolute prohibition on the use of capital punishment in peacetime[42] as well as Protocol No. 13 which banned its application completely[43]. Both protocols entered into force in Poland on 1 November 2000 and 1 September 2014 respectively[44].

It is worth noting that an increasing number of newly prepared documents such as recommendations of various international bodies, in particular the Committee on the Elimination of Discrimination Against Women and of the UN Committee on the Rights of the Child (*sic*!) seek to exert pressure on individual states as to ensuring a wide "access to abortion"[45]. It must be emphasised that this type of documents and opinions are not sources of applicable law[46], but rather belong to the group of acts referred to as *soft law* which is not binding for the states parties to international agreements and may not change their provisions in any way[47]. Their effects should be considered in terms of political pressure and not legal commitments adopted by the states. At this point it must be stated that no act of international law binding for the Republic of Poland imposes the obligation to reduce the standard of protection of life in the Polish legislation. The contrary is true – both the international law and the Polish Constitution protect unborn children[48].

4. RESTRICTIONS OF THE RIGHT OF AN UNBORN CHILD TO LIFE

Despite the close link between the duty to ensure that the life of every person is legally protected as a natural freedom from external interference resulting in cessation of all biological functions and the obligation to respect human dignity, the two notions are significantly different. Human life is not an absolute value and therefore the protection of human life may be limited, unless it can be proved that there

39 he right to life is formulated explicitly in the acts cited. Pursuant to Article 6 (1) of the Convention on the Rights of the Child, "States Parties recognize that every child has the inherent right to life." Article 6 (1) of the International Covenant on Civil and Political Rights states as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 3 of the Universal Declaration, in turn, provides that "everyone has the right to life, liberty and security of person."

40 ETS No.005; Journal of Laws of 1993, No. 61, item 284 as amended.

41 ETS No. 114.

42 According to Article 1 of the Protocol No. 6 to ECHR: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Pursuant to Article 2 of this Protocol, "A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law."

43 Article 1 of Protocol No. 13 to ECHR is a repetition of Article 1 of Protocol No. 6: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." There are, however, no exceptions in this respect. Yet it is possible to limit the application of the Protocol to a particular location (Article 4).

44 Journal of Laws of 2001, No. 23, item 266; Journal of Laws of 2014, item 1155.

45 Committee on the Rights of the Child: General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Art. 24), 2013, CRC/C/GC/15, http://www.refworld.org/docid/51ef9e134.html (accessed: 12 December 2018), in particular § 31, 54, 70; *Statement of the Committee on the Elimination of Discrimination against Woman on sexual and reproductive health and rights*, Fifty-seventh session, 10-28 February 2014;, https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf (accessed: 12 December 2018). Cf. J. Adolphe, *"New Rights" in Public International Family Law? What International Law Actually Says,* «Ave Maria Law Review» 10/1 (2011), pp. 149.

46 J. Adolphe, *op. cit.,* p. 152-153.

47 f. G. Weeks, *Soft Law and Public Authorities. Remedies and Reform,* Oxford 2016, p. 15. There is a risk that these could lead to the adoption of international acts which might be binding for states parties in future – cf. M. Shaw, *International Law,* Cambridge 2008, p. 117-118.

48 Cf. P. Jaros, *op. cit.,* p. 15-16. Also in relation to CRC – T. Sroka, *op. cit.,* Section No. 47-48.

is a good which would justify sacrificing it. Human dignity must be respected in all circumstances as it does not constitute any law nor constitutional freedom but it is the source of all rights and freedoms. Therefore, protection of human dignity may never be limited, suspended or waived.

This can be derived directly from Article 31(3) of the Constitution of the Republic of Poland. It stipulates that "The restrictions on the use of constitutional rights and freedoms may be established by law and only if they are necessary for the security or public order of a democratic state, or for the protection of the environment, health and public morality, or rights and freedoms of others. These restrictions may not affect the substance of the rights and freedoms in question."

It must be noted, however, that the Constitutional Tribunal regards the legal protection of human life as a priority and there are few values surpassing it. This may be concluded from the judgement of the Tribunal of 30 September 2008 which stipulates the following: "in a democratic state which follows the rule of law, social justice and integrity, and which protects the life and the inherent dignity of a person, it is totally unacceptable to reduce the legal protection of human life for the purpose of protecting values which rank lower in the constitutional hierarchy, such as ownership and other property rights, public morality, environmental protection or even the health of other people"[49].

Abortion of an unborn child in Poland is admissible in three circumstances: (1) when the woman's life or health is endangered by the continuation of pregnancy, (2) when there is high probability of a serious and irreversible impairment of a child or a disease that threatens his or her life, or (3) when there is a suspicion that the pregnancy is a result of a criminal act[50]. In this regard, A. Zoll noted: "As it has already been mentioned, life is not an absolute value. It may be sacrificed for the sake of a good which is at least as valuable. […] From this point of view, there is no doubt as to the first of these circumstances (when the woman's life is in jeopardy – B.Z.). As to the second case (health hazard to the mother – B.Z.), however, doubts arise in respect of the undefined risks to the health of women. The present wording of this condition does not adequately safeguard the life of an unborn child. From the point of view of the protection of life of an unborn child, the remaining premises raise substantial doubts"[51].

Each of the reasons above deserves greater deliberation, as do the "substantial" doubts mentioned by A. Zoll. Yet the only value equivalent to the life of a person may be the life of another person, as postulated in the judgement of the Constitutional Tribunal of 2008. Given such a dramatic dilemma, it can be expected that both will be rescued as long as possible, while sacrificing one of them will be the last resort.

49 Judgement of the Constitutional Tribunal of 30 September 2008, K 44/07, point III.7.5.

50 ee Article 4a(1) (1) to (3) of the Act of 7 January 1993 Act on Family Planning, Protection of the Human Foetus and Conditions of Pregnancy Termination (Journal of Laws No. 17, item 78, as amended)

51 A. Zoll, *op. cit.*, p. 104.

From the point of view of the Polish Constitution, it may be thus assumed that it is only the situation of immediate danger to the life of the mother that can justify taking the life of her unborn child.

5. SUMMARY

Both the Polish Constitution and the acts of international law which are binding for the Republic of Poland stipulate that the life of an unborn child should be legally protected. Yet the concept of the unborn child as a subject of law, found both in the case law and literature, whereby the life of an unborn child is a legally protected good, proves insufficient. It is also incongruous with modern medical knowledge, which clearly indicates that an unborn child is a human. Consequently, it should be recognised as a subject of law. Subjectivity as a passive feature does not require the individual in question to be involved by stating its will. It is rather a condition in which the entity has specific rights granted by virtue of its dignity as a person. Organisational units are considered as subjects of law on the grounds of the decision of the legislator, i.e. in an artificial way dependent on its will. The subjectivity of an individual, however, can be merely acknowledged by the legislator since it is justified by the natural state of things which should be reflected in the positive law.

PRZYPISY

[5] Inst. 1, 2, 2: *Ius autem gentium omni humano generi commune est. nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt: bella etenim orta sunt et captivitates secutae et servitutes, quae sunt iuri naturali contrariae (iure enim naturali ab initio omnes homines liberi nascebantur); ex hoc iure gentium et omnes paene contractus introducti sunt, ut emptio venditio, locatio conductio, societas, depositum, mutuum, et alii innumerabiles*. [Translation: "But the law of nations is common to the whole human race; for nations have settled certain things for themselves as occasion and the necessities of human life required. For instance, wars arose, and then followed captivity and slavery, which are contrary to the law of nature; for by the law of nature all men from the beginning were born free. The law of nations again is the source of almost all contracts; for instance, sale, hire, partnership, deposit, loan for consumption, and very many others" – *The Institutes of Justinian,* trans. J.B. Moyle, Oxford 1896, p. 4]D. 1, 1, 4: *Manumissiones quoque iuris gentium sunt. Est autem manumissio de manu missio, id est datio libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est, manumissus liberatur potestate. Quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi.* [Translation: "Manumissions are also comprised in the *ius gentium.* Manumission is the same as dismissal from *manus* (hand), in short the giving of liberty; as long as a man is in a state of slavery he is subject to *manus* and *potestas* (control), by manumission he is freed from control. All this had its origin in the *ius gentium,* seeing that by natural law all were born free, and manumission was not known, because slavery itself was unknown; but when slavery came in through the *ius gentium,* there followed the relief given by manumission; and whereas people where once simply called by the one natural name of 'man', by the *ius gentium* there came to be three divisions, first freeman, then, as contradistinguished from them, slaves, and then, in the third place, freedmen, that is persons who had ceased to be slaves" – *The Digest of Justinian,* trans. Ch.H. Monro, vol. 1, Cambridge 1904, p. 4] D. 1, 5, 4, 1: *Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.* [Translation: "Slavery is a creation of the *ius gentium,* by which a man is subjected, contrary to nature, to ownership on the part of another" – *ibidem,* p. 24]. Cf. also: B. Biondi, *Il diritto romano cristiano,* v. II, *La giustizia. Le persone,* Milano 1952, p. 385.

ABSTRAKT/ABSTRACT

The aim of this article is to outline the arguments in favour of acknowledging an unborn child as a subject of constitutional law with the right to life (Article 38 of the Constitution of the Republic of Poland). For this purpose, the article presents an overview of the case law of the Constitutional Tribunal as well as views of legal academics and commentators and judicial decisions concerning the right to life, the concept of subject of law, and the legal position of an unborn child. Furthermore, the article reviews the international law and the case law of international tribunals. Although the Constitutional Tribunal stipulates that every person, including an unborn child, is entitled to legal subjectivity (in the judgement on case No. K 26/96), it may seem that the reasoning in this judgement is still rejected in the literature regarding both constitutional and civil law.

Artykuł ma na celu zaprezentowanie zarysu argumentacji na rzecz uznania dziecka poczętego za podmiot konstytucyjnego prawa do ochrony życia (art. 38 Konstytucji RP). W tym celu dokonany został przegląd orzecznictwa Trybunału Konstytucyjnego oraz poglądów nauki prawa, dotyczących zagadnienia prawa do ochrony życia, pojęcia podmiotowości prawnej oraz pozycji prawnej nasciturusa. Subsydiarnie sięgnięto do aktów prawa międzynarodowego oraz orzecznictwa międzynarodowych trybunałów. Wydaje się bowiem, że wyartykułowana przez Trybunał Konstytucyjny w orzeczeniu wydanym w sprawie prowadzoną pod sygnaturą K 26/96 teza, że każdemu człowiekowi – w tym dziecku poczętemu – przysługuje podmiotowość prawna, jest wciąż marginalizowana w literaturze dotyczącej tak prawa konstytucyjnego, jak i prawa cywilnego.

SŁOWA KLUCZOWE/KEYWORDS

abortion, legal subjectivity, right to life, unborn child,

aborcja, dziecko poczęte, podmiotowość prawna, prawo do ochrony życia