Selected Problems of the European Protection of Human Rights

Edited by
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INTRODUCTION

Contemporary protection of human rights exceeds itself to a very large area. It is mainly because the sphere of human rights is extremely wide. It was K. Vasak, who had grouped individual's rights in generations. Originally, there were three of them, whereas now, more often, at least five generations of human right are being mentioned.

This wide variety makes it impossible to exhaustively deal with most of contemporary human rights in one publication. That is where a need of selection comes up. This book is a response to such needs. It does not only deal with civil and political rights, but also takes up important and practical issues concerning social, economic and cultural rights.

The protection of human rights, in words of European Court of Human Rights, must be practical and effective, not theoretical or illusory. The following publication seeks to satisfy this need, taking into consideration various practical aspects of selected individual's rights, such as right to life, right to respect for private and family life, home and correspondence, right to marry and to found a family and the rights of workers.

The authors are more than competent employees of various departments of Faculty of Law and Administration of University of Warmia and Mazury in Olsztyn (*Wydział Prawa i Administracji Uniwersytetu Warmińsko-Mazurskiego w Olsztynie*). Thanks to their effort it is possible to enjoy this publication. I may only personally hope, that this effort to take up various aspects of selected human rights would not be disposable, but that it would lead to further studies and more such publications, because there is definitely such need within the area of contemporary human rights.

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STATE'S POSITIVE OBLIGATIONS UNDER ARTICLE 2 OF THE ECHR. PART 1 – MATERIAL OBLIGATIONS

1. Introduction

State's positive obligations within particulars rights enshrined in European Convention on Human Rights differ from each other depending on the right (or freedom) protected. There are few models of positive obligations that should be mentioned here.

First of all, there are positive obligations protecting the most fundamental rights, which are essential to guaranteeing other ones. These are right to life, enshrined in art. 2 of the Convention, prohibition of torture, inhuman or degrading treatment or punishment (article 3) and – since Cases *Siliadin*[1] *v. France* and *Rantsev* v. *Cyprus and Russia*[2] – also article 4 of the Covention, which provides freedom from slavery, forced or compulsory labour.

These are most fundamental right which cannot be derogated in any circumstances under article 15 of the Convention (Art. 4 can't be derogated only when concerning slavery or servitude). These rights

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[1] ECHR judgment *Siliadin v. France*, 26.07.2005, appl. no. 73316/01.

[2] ECHR judgment *Rantsev v. Cyprus and Russia*, 7.01.2010, appl. no. 25965/04.

are of paramount importance and they are the fundamental values of the democratic societies making up the Council of Europe.[3]

J.P. Costa underlines that these articles (mostly bearing in mind articles 2 and 3 of the Convention) express the most fundamental values of human civilization – the right to life and the absolute protection of the physical and mental integrity of the person. It is therefore in these two areas that the case-law has gone furthest in clarifying the positive obligations of the State. In contrast, to art. 8, for example, where the existence and scope of a positive obligation in a given set of circumstances will be determined by several variables, the case-law under articles 2 and 3 is clear and concrete.[4]

State's positive obligations within articles 2, 3 and 4 of the Convention are formulated in full and exhaustive manner. Of course, this is because of the paramount character of these rights and protection of other individual's rights, which is guaranteed by proper safeguarding of right to life and freedom from torture.

Another model of positive obligations had been constructed in Court's case-law on the basis of article 8 of the Convention, which guarantees right to respect for one's private and family life, home and correspondence. It protects very wide range or rights. Judge Costa states that the provision of article 8 looms large in any discussion of positive obligations.[5]

It is also important that art. 8 forms the "right to respect for". In Court's opinion the object of art. 8 is "essentially" that of protecting the individual against arbitrary interference by the public authorities. Nevertheless, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking,

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[3] For example ECHR judgment *Soering v. U.K*, 7.07.1989, appl. no. 14038/88, § 88; ECHR judgment *McCann and Others v. U.K*, 27.09.1995, appl. no. 18984/91, § 147.

[4] J.P. Costa, *The European Court of Human Rights: Consistency of its Case-Law and Positive Obligations, Speech at Leiden University 30.5.2008*, Netherlands Quarterly of Human Rights, Vol. 26/3 2008, p. 452-453.

[5] *Ibidem*, p. 453.

there may be positive obligations inherent in an effective "respect" for family life.[6]

Right to privacy protected in art. 8 of the Convention does not lend itself an exhaustive set of positive obligations. In comparison to positive obligations under art. 2 and 3 of the Convention its boundaries are difficult to set. It is based mostly on the very character of this right and the need of flexibility in deciding whether such positive obligation exists or not. Judges are very often divided, when it comes to deciding about the existence of positive obligations in the sphere of article 8.

However, the Court can't construct such precise positive obligations as those concerning articles 2 and 3. That's why ECHR very often leaves it to the discretion of the State Party, granting a margin of appreciation to the state. Also, the Court takes under consideration each case separately, bearing in mind its particular character and material facts concerning every case.

Third set of positive obligations concerns "procedural rights": right to liberty and security (art. 5) and right to a fair trial (art. 6). These rights provide very essential protection. They are formulated in a positive matter, which makes them different from many first generation human rights. Their positive aspect is visible in their very text. For example art. 6 par 3 states:

3. *Everyone charged with a criminal offence has the following minimum rights:*
   a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
   b) *to have adequate time and facilities for the preparation of his defence;*
   c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
   d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under*

[6] ECHR judgment *Marckx v. Belgium*, 13.06.1979, appl. no 6833/74, § 31.

the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The above clearly shows that art. 6 par. 3 consists of positive obligations of procedural character, which are expressed clearly and explicitly. The positive obligations constructed within the sphere of "procedural rights" do not leave much place for further discussion or interpretation. In this aspect they are more likely to be compared with obligations under articles 2, 3 and 4 of the Convention than with those under article 8.

The fourth model of positive obligations exists within freedoms expressed in first section of the Convention, such as freedom of thought, conscience and religion (art. 9), freedom of expression (art. 10) or freedom of assembly and association (art. 11). This sphere of positive obligations concerns very delicate matter. It is, extremely difficult do construct the only standard of state's actions, because every case must be analyzed according to its individual features. That's why the Court is "unwilling" to find state's positive obligations under articles 9, 10 or 11. Of course, it doesn't mean that ECHR doesn't make such discoveries.

State's positive obligations concerning freedoms may be different, depending on particular cases and the legitimate aim pursued. Also in this respect the state is granted a margin of appreciation.

The above models of positive obligations constructed under the Convention, do not fully show all the positive obligations constructed by the Court. For example, article 12 also requires some positive obligations to guarantee its effectiveness. Also, there are some rights in section 1 of the Convention, which require positive obligations, but the scope of these obligations has not been defined in ECHR case-law.

The main concept and aim of this article is to focus on positive obligations constructed under article 2 of the Convention and their paramount meaning to the proper protection of the right to life.

2. The right to life and its main aspects

The right to life is one of the most important, if not the most important, right protected in the Convention. It is fundamental and it is absolutely basic, when it comes to guaranteeing other first, and second generation human rights. It is the foundation for the protection of human rights. That's the reason why the right to life is always set as the one opening the catalogue of rights protected in particular human rights treaties[7].

In the case *Pretty v. The United Kingdom*, ECHR underlined the rule of sanctity of life, which is protected in the Convention.[8] The Court also stated that art. 2 safeguards the right to life, without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory.[9] This is an undeniable fact, because it would be impossible to guarantee proper and effective protection of, for example, right to respect for private life, or any other rights, without effective protection of right to life. Such protection would have been just a mere illusion. It had been also stressed in various political documents of Council of Europe and summed up in preamble of Additional Protocol No. 13 to the Convention, which states that everyone's right to life is a basic value in a democratic society[10].

The right to life can't be derogated under art. 15 of the Convention. Article 2 is mentioned as the first one in the catalogue of rights that can't be derogated. Art. 2 may not be limited by any limitation clause.

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[7] For example art. 6 of the International Covenant on Civil and Political Rights, art. 4 of the American Convention of Human Rights, art. 4 of the African Charter on Human and People's Rights, and naturally, art. 2 of the European Convention on Human Rights.

[8] ECHR judgment *Pretty v. U.K.*, 29.04.2002, appl. no. 2346/02, § 65.

[9] *Ibidem*, § 37.

[10] Additional Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, 3.05.2002; also L. Garlicki (ed.) *Konwencja o ochronie praw człowieka i podstawowych wolności. Tom I. Komentarz do artykułów 1-18*, Warszawa 2010, p. 65.

This guarantees the proper protection of individual from arbitrary interference of state.[11]

The above underlines the paramount importance of this provision. As the Court rightfully stated: It must be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed.[12]

It does not mean that right to life is an absolute right. ICCPR permits ex definitione exceptions concerning death penalty.[13] European Convention on Human Rights provides *ex definitione* exceptions to art. 2 in its second paragraph. It concerns deprivation of life which is followed by the "absolutely necessary" use of force. It doesn't mean that state is entitled to legal deprivation of life. Art. 2 para 2 introduces the possibilities in which state may use "absolutely necessary" force, which may, in some situations, result in deprivation of individual's life. The Court stated that the exceptions delineated in paragraph 2 indicate that art. 2 extends to, but is not concerned exclusively with, intentional killing. The text of art. 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c).[14]

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[11] T. Jasudowicz, *Prawo do życia*, B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Prawa człowieka i ich ochrona*, Toruń 2010, p. 270.

[12] *McCann and Others v. U.K*, § 147; also *Soering v. U.K*, § 88.

[13] Art. 6, par 2-6 of the ICCPR.

[14] *McCann and Others v. U.K*, § 148; also ECHR judgment *Solomou and others v. Turkey*, 24.06.2008, appl. no. 36832/97, § 64.

3. The prohibition of deprivation of life

Second sentence of article 2 para 1 states that: *No one shall be deprived of his life intentionally* (…). This clearly shows that the protection of the right to life is founded on negative obligations, because the very obligation: "not to deprive of one's life" is purely negative.

At this point, short explanation should be made. The right to life, just like all first generation rights, at the very beginning of protection of human rights was mostly connected to negative obligations. It means that the main idea of protection guaranteed by the right to life was not to deprive of one's life. Of course, such protection would be very one-sided and very ineffective. That is the reason why, there is a necessity to back up the negative obligation of prohibition of deprivation of life with state's positive obligations in this respect.

The prohibition of deprivation of life is addressed not only to the governments, but also to private persons.[15] This prohibition may be invoked in Strasbourg when it concerns acts or omissions for which the state bears responsibility. It also implies the duty to abstain from acts which needlessly endanger life.[16]

The right to life, enshrined in article 2 of the Convention, read in conjunction with art. 1, (*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*) together create a positive obligation. According to this obligation, the state may be required to take certain measures in order to secure an effective enjoyment of the right to life.[17] This means also taking appropriate measures in order to protect individuals from deprivation of their lives, irrespective from whom, a state or a private person.

[15] P. van Dijk, G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Deventer-Boston 1990, p. 217; also F.G. Jacobs, *The European Convention on Human Rights*, Oxford 1975, p. 21.

[16] *Ibidem*.

[17] A.R. Mowbray, *The Development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford-Portland Oregon, 2004, p. 12.

As the Court stated in numerous cases, the first sentence of Article 2 para 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. In this respect the Court's task is, therefore, to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk.[18]

3.1. The standard of "absolutely necessary" use of force

Article 2 par 2 states: *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*

a) in defence of any person from unlawful violence;
b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c) in action lawfully taken for the purpose of quelling a riot or insurrection.[19]

In all of the above contexts the legality test arises. All of the above situations of deprivation of life require also a more compelling test – the "use of force absolutely necessary". In this respect the use of the term "absolutely necessary" in article 2 para. 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub paragraphs 2 (a), (b) and (c) of Article 2.[20]

Most of the situations concerning the use of art. 2 para 2 concerns acts of self-defence (a), in wide ECHR's case law it also

[18] For example ECHR judgment *L.C.B. v. U.K.*, 9.06.1998, appl. no. 23413/94, § 36.

[19] Article 2 para 2 of the Convention.

[20] *McCann and Others v. U.K*, § 149.

concerns the actions of state's forces (for example police officers, soldiers etc.) (b and c). These situations of use of force absolutely necessary doesn't raise any doubt in democratic society. However there may be some situations in which the use of force exceeds the real necessity for it. This may lead to abuse of article 2 para 2. That's why a more compelling test must be made.[21]

The standard of use of force "absolutely necessary" also enjoins the control of – not only the use of force itself – but also all the circumstances of the situation or – police (or military) operation. In keeping with the importance of the provision of art. 2 in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.[22]

Apart from the above, the Court stated that circumstances in which deprivation of life may be justified must be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also require that Article 2 be interpreted and applied so as to make its safeguards practical and effective.[23] In particular, the Court held that the opening of fire should, whenever possible, be preceded by warning shots.[24]

The Court stated that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of art 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid

[21] T. Jasudowicz, *Prawo do życia…*, p. 274.

[22] *McCann and Others v. U.K*, § 150.

[23] See *Solomou and others v. Turkey*, § 63.

[24] ECHR judgment *Kallis and Androulla Panayi v. Turkey*, 27.10.2009, appl. no. 45388/99, § 62; see also United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held from 27.10.1990 to 7.09.1990, para 10.

at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.[25]

When called upon to examine whether the use of lethal force was legitimate, the Court, detached from the events at issue, cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life.[26]

The lack of proper organization and planning of such action, may leave too wide opportunity for the initiative of officers taking part in the operation. It may also include a state's violation of the requirements of the "absolutely necessary use of force" standards. It is particularly important that the officer's actions should be planned and not chaotic. It's also essential to have a clear chain of command.[27]

In some cases when a necessity to get hold of individuals subjected to detention arises, the obligation to protect the right to life and respect to this priority may mean even the resignation from catching an individual, if this would mean deprivation of his (or her) life. As the Court stated in *Nachova and Others v. Bulgaria*, balanced against the imperative need to preserve life as a fundamental value, the legitimate aim of effecting a lawful arrest cannot justify putting human life at risk where the fugitive has committed a non-violent offence and does not pose a threat to anyone. Any other approach would be incompatible with the basic principles of democratic societies, as universally accepted today.[28]

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[25] *McCann and Others v. U.K.*, § 200; ECHR judgment *Andronicou and Constantinou v. Cyprus*, 09.10.1997, appl. no. 25052/94, § 192.

[26] ECHR judgment *Bubbins v. U.K.*, 17.03.2005, appl. no. 50196/99, § 139; also ECHR judgment *Giuliani and Gaggio v. Italy* (Grand Chamber), 24.03.2011, appl. no. 23458/02, § 179.

[27] See ECHR judgment *Makaratzis v. Greece*, 20.12.2004, appl. no. 50385/99 § 67-71.

[28] *Nachova and Others v. Bulgaria*, 26.02.2004, appl. no. 43577/98, 43579/98, § 103; see also United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para 67-70; also T. Jasudowicz, *Prawo do życia*...,

The case of accidental death of third party during police or military action is also subjected to ECHR's careful scrutiny. In *Ergi v. Turkey* the Court underlined that art. 2 of the Convention, read in conjunction with art. 1, may require state to take certain measures in order to "secure" an effective enjoyment of the right to life. In situation when military clash with rebels comes into place, the state should protect nearby civilians. The Court stated that the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the state has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life. Thus, even though it has not been established beyond reasonable doubt that the bullet which killed Havva Ergi had been fired by the security forces, the Court must consider whether the security forces' operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush.[29]

In situation where an imminent threat to life from another individual is concerned, the standard of necessity will mean an obligation to take all the necessary and reasonable steps to prevent from taking one's life. It includes an obligation to negotiate (using professionally trained negotiators) with potential killer, in order to prevent him from depriving of individual's life. Of course police and professional forces should have properly trained psychologists.[30]

In some cases, it becomes necessary to resort to "absolutely necessary" use of force. It may happen in situation of terrorist threat. It may also concern the necessity of self-defence of state agents.

In *Giuliani and Gaggio v. Italy* the Court found that a state agent (*carabiniere*) honestly believed that his life was in danger,

p. 276-277.

[29] ECHR judgment *Ergi v. Turkey*, 28.07.1998, appl. no. 23818/94, § 79.

[30] T. Jasudowicz, *Prawo do życia*..., p. 277; also *Andronicou and Constantinou v. Cyprus*, § 175, 183.

and considered that he used his weapon as a means of defence against the attack targeting the jeep's occupants, including himself, perceiving a direct threat to his own person. However, it goes without saying that a balance must exist between the aim and the means. In that context the Court must examine whether the use of lethal force was legitimate. In doing so it cannot, detached from the events at issue, substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life.[31]

Deprivation of individual's life by state officer may happen only for protection of a "person", so deprivation of life in order to protect one's property can't be justified. The ECHR in the case concerning shots on Berlin wall, decided that protection of a border don't justify deprivation of life. The Court underlined that the deaths of the fugitives were in no sense the result of a use of force which was "absolutely necessary". German Democratic Republic's practice did not protect anyone against unlawful violence, was not pursued in order to make any arrest that could be described as "lawful" according to the law of the GDR, and had nothing to do with the quelling of a riot or insurrection, as the fugitives' only aim was to leave the country.[32]

Such actions of state agents should always be backed up by the existence of imminent threat to their lives. It goes without saying that in such extreme cases it may be necessary to use such force and "shoot to kill". However, the Court's case law in this sphere is very strict and all such cases are subjected to careful scrutiny.[33]

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[31] ECHR judgment *Giuliani and Gaggio v. Italy* (Chamber), 25.08.2009, appl. no. 23458/02, § 224.

[32] ECHR judgment *Streletz, Kessler and Krenz v. Germany*, 22.03.2001, appl. no. 34044/96, 35532/97, 44801/98, § 96.

[33] T. Jasudowicz, *Prawo do życia…*, p. 277, see also L. Garlicki, *op. cit.*, p. 73-77.

3.2. Article 2 of the Convention and the issue of death penalty

The ICCPR system clearly states that there is a possibility to resort to capital punishment.[34] The System of the ECHR mentions death penalty even in the very text of art. 2. Art. 2 para 1 states: *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*. In this context article 2 may seem to allow death penalty. But does it really?

First of all, is should be stressed that the text of the Convention had been adopted over 60 years ago and there was a huge evolution of state's attitude towards capital punishment. This evolution became particularly visible after adoption of 6th Additional Protocol to the Convention[35]. Article 1 of Protocol No. 6 states: *The death penalty shall be abolished. No-one shall be condemned to such penalty or executed*. This protocol had been followed by numerous ratifications. Today, only Russia didn't ratify 6th protocol. Almost full ratification may give very optimistic prospects as to the future of abolishing death penalty in Europe.

Sixth protocol hadn't clearly resolved the issue of death penalty *durante bello*. That was the reason for adoption protocol No 13 to the Convention[36]. Ratification of this Protocol isn't as full as ratification of 6th protocol. There are still 5 states that didn't ratify Protocol No 13.

The issue of death penalty had also been taken up by The Court in its case-law. In early judgment *Soering v The United Kingdom*, The Court had taken up the issue of death penalty and death row phenomenon. ECHR stated that The Convention is to be

[34] Art. 6, par 2-6 of the ICCPR.

[35] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, 24.04.1983.

[36] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, 3.05.2002.

read as a whole and art. 3 should therefore be construed in harmony with the provisions of art. 2. On this basis art. 3 evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of art. 2 para 1.[37]

That does not mean however that circumstances relating to a death sentence can never give rise to an issue under art. 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under art. 3. Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.[38]

The above attitude towards interpretation of article 3 evolved in ECHR's case-law. So did the wide ratification of protocols 6 and 13. The Court stated that although there is no full ratification of protocols 6 and 13, there exists a consensus between States-Parties concerning abolition of death penalty. In *Öcalan v. Turkey*, the ECHR stated that, by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances, the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. This final step towards complete abolition of the death penalty – that is to say both in times of peace and in times of war – can be seen as confirmation of the abolitionist trend in the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.[39]

The above had been explained as contradictory to the rights protected in art. 2 and 3 of the Convention. The Court stated that the fact that there is still a large number of States who have yet to

[37] ECHR judgment *Soering v. U.K.*, 7.07.1989, appl. no. 14038/88, § 103.

[38] *Ibidem*, § 104.

[39] ECHR judgment *Öcalan v. Turkey*, 12.05.2005, appl. no. 46221/99, § 164.

sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war. However, the Grand Chamber agrees with the Chamber that it is not necessary for the Court to reach any firm conclusion on these points since, for the following reasons, it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.[40]

In *Al-Saadoon and Mufdhi v. U.K.* the Court's case law has gone even further. ECHR underlined that the Grand Chamber in *Öcalan* did not exclude that Article 2 had already been amended so as to remove the exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 para 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty.[41]

The above initiative of the Court, should be regarded as positive one, when concerning the important issue of abolition of capital punishment. However, when concerning the methods of interpretation of the Convention, some questions may arise. The Court's judgment in *Al-Saadoon and Mufdhi* may be criticized as premature or too hasty. It should be stressed, however, that it is an important step towards abolition of death penalty in Europe and it creates new standards in this respect. The Court's future case-law will probably confirm this

[40] *Ibidem*, § 165.

[41] ECHR judgment *Al-Saadoon and Mufdhi v. U.K.*, 2.03.2010, appl. no. 61498/08, § 120.

standard, which will possibly allow to speak about the issue of capital punishment in Europe in past tense.

4. Obligation to protect life

States are obliged to protect the right to life under first sentence of art. 2. It states that: *Everyone's right to life shall be protected by law*. In contradiction to clearly negative wording of prohibition of deprivation of life, obligation to protect the right to life is formulated in a clearly positive way. This positive obligation, interpreted in connection with prohibition of deprivation of life, creates a fundamental element of the right to rife.

First sentence of article 2 may suggest that this obligation extends to a very large sphere. So, what does this obligation imply? Is a state in default under this provision for deaths in car accidents? Fawcett rightly states that it is not life, but the right to life, which is protected by law.[42]

Also, the Court's case-law shows clearly, that the obligation to protect life isn't indefinite. It has its reasonable boundaries. In numerous cases, Strasbourg organs stated that: The first sentence of Article 2 imposes a broader obligation on the state than that contained in the second sentence. The concept that "everyone's life shall be protected by law" enjoins the state not only to refrain from taking a person's life "intentionally" but also to take appropriate steps to safeguard life.[43] Case *Association X v. U.K.* confirms this interpretation. Commission stated that according to first sentence of article 2 states are obliged to undertake adequate measures to protect life.[44]

The express positive obligation to take appropriate steps

[42] J.E.S. Fawcett, *The Application of the European Convention on Human Rights*, Oxford, 1987, p. 37.

[43] European Commission on Human Rights decision *Naddaf v. German Federal Republic*, 10.10.1986, appl. no. 11604/85, § 1.

[44] EcomHR decision *Association X v. U.K.*, 12.07.1978, appl. no 7154/75, p. 31.

to protect the lives of individuals within its jurisdiction. This positive obligation had been expressed for the first time in case *L.C.B v. U.K. ECHR* stated that the Court considers that the first sentence of Article 2 § 1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.[45]

This obligation had been extended in an important judgment *Osman v. U.K.* In *Osman*, the Court recalled its previous interpretation expressed in *L.C.B.* case. The Court noted that the first sentence of Article 2 § 1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[46]

In this respect, ECHR imposed on states few sets of positive obligations:

- legislative obligations;
- procedural obligations;
- preventive obligations.

Some of the above positive obligations will be subjected to a further study in second part of this article, fully dedicated to state's procedural obligation under article 2 of the Convention.

It is essential to underline that state's positive obligations in *Osman* case, do have their boundaries. The Court has to bear in mind the difficulties involved in policing modern societies, the

[45] *L.C.B. v. U.K.*, § 36.

[46] ECHR judgment *Osman v. U.K.*, 28.10.1998, appl. no. 23452/94, § 115.

unpredictability of human conduct and the operational choices, which must be made in terms of priorities and resources. According to that, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.[47]

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[48]

The ECHR, initially, constructed this standard on a basis of article 1 (the obligation of Contracting States to secure the practical and effective protection of the rights and freedoms), read together with article 2. In this context for the Court, having regard to the nature of the right protected by art. 2, a right fundamental in the scheme of the Convention, it became sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.[49]

It should be noted, that the above obligation had been

[47] *Ibidem*, § 116.

[48] *Ibidem*.

[49] *Ibidem.*

constructed under article 2, read together with article 1 of the Convention. In the evolution of Court's case-law, The ECHR decided that this obligation arises solely on the grounds of art. 2 and there is no need for joint interpretation of art. 2 para. 1 with art. 1, because the positive obligation to protect individuals from a real and immediate risk to their lives, that state knew or ought to have known, arises from article 2 itself. This issue will also be subjected to further inquiry.

Positive obligation to take measures "within the scope of state's powers which, judged reasonably, might have been expected to avoid the risk, about which authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life"[50], formulated in *Osman* case seems to be a very wide obligation. The scope of this obligation isn't limitless, however judging after the development of the Strasbourg case-law, it seems to be evolving and widening its scope.

First of all, as the ECHR stated, for the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.[51]

The Court, taking the above into consideration, discovered an important difference between the *Osman* case and the case *Mastromatteo v. Italy*. In this case applicant's son had been killed by M.R. and G.M, two convicts searched by the law, who at the time were free due to resocialisation programme. In this case, the Court underlined that it differs from Osman case and that it is not a question of determining whether the responsibility of the authorities is engaged for failing to provide personal protection to A. Mastromatteo. The main issue is the

[50] *Ibidem.*

[51] *Ibidem*, also ECHR judgment *Kiliç v. Turkey*, 28.03.2000, appl. no. 22492/93, § 63.

obligation to afford general protection to society against the potential acts of one or of several persons serving a prison sentence for a violent crime and the determination of the scope of that protection.[52]

In this case it became clear that if M.R. and G.M. had been in prison, A. Mastromatteo would not have been murdered by them. However, a mere condition *sine qua non* does not suffice to engage the responsibility of the State under the Convention. The Court decided, that it must be shown that the death of A. Mastromatteo resulted from a failure on the part of the national authorities to "do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge". The relevant risk in the present case was a risk to life for members of the public at large rather than for one or more identified individuals.[53] Consequently, ECHR decided that there was no breach of article 2 in this case.

In various cases, the Court consequently formulated this obligation on a basis of real necessity to guarantee protection to an individual. In *Akkoc v. Turkey*, ECHR stated, that the scope of this positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life therefore can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[54]

The above clearly shows, that the boundaries crossed by the Court within the positive obligation to protect life are clear and can't impose disproportionate burden on a state.

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[52] ECHR judgment *Mastromatteo v. Italy*, 24.10.2002, appl. no. 37703/97, § 69.

[53] *Ibidem*, § 74.

[54] ECHR judgment *Akkoc v. Turkey*, 10.10.2000, appl. no. 22947/93, 22948/93, § 78.

5. Legislative positive obligations concerning article 2

As it was stressed above, the right to life is mostly expressed in a negative way. However, even in this respect there is a positive obligation, that may be regarded as a positive one in its very text. First sentence of art. 2 shows that: *Everyone's right to life shall be protected by law*. This can be read as implying positive obligation on States-Parties and an express form of positive obligation to provide effective protection of the right to life through appropriate legislative actions.

The obligation to undertake legislative actions was initially expressed by the Court as connected to obligation deriving from article 1 of the Convention. In *Young, James and Webster v. U.K.*, the Court stated that under art. 1 of the Convention, each state "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention". If a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged.[55]

The legislative positive obligation concerning the right to life had been formulated on the basis of article 2 read together with article 1. In *Osman* case the Court reminded that the first sentence of Article 2 § 1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person.[56]

The above also clearly shows that the essential importance in the protection of the right to life is based on the foundation of criminal law. In *Mahmut Kaya v. Turkey*, the Court recalled its statement enshrined in *Osman* case and underlined that this involves a primary duty on the state to secure the right to life by putting in place effective

[55] ECHR judgment *Young, James and Webster v. U.K.*, 13.08.1981, appl. no. 601/76, 7806/77, § 49.

[56] *Osman v. U.K.*, § 115.

criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual.[57]

The legislative positive obligation should be interpreted as a part of greater mechanism. The Court explains that putting in place effective criminal-law provisions is not everything that state is obliged to do to guarantee proper realization of this standard. The legal provisions that are solely formulated and exist only on paper, do not fulfill this obligation. That's why ECHR underlines the necessity of baking them up with mechanisms that can guarantee the realization of criminal-law provisions in practice.

These contain preventive measures undertaken by forces, and mechanisms for prevention, suppression and punishment of breaches of such provisions. In the sphere of criminal-law the state is also obliged to provide adequate and effective official investigation. According to ECHR case-law independent and impartial official investigation should satisfy certain minimum standards regarding its effectiveness. Accordingly, the competent authorities must act with exemplary diligence and promptness, and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the state officials or authorities involved.[58]

However, due to paramount importance of the obligation to provide adequate and effective investigation and other procedural positive obligations, they will be subjected to further study separately in the part dedicated to procedural obligations arising from art. 2.

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[57] ECHR judgment *Mahmut Kaya v. Turkey*, 28.03.2000, appl. no. 22535/93, § 85.

[58] ECHR judgment *Kats and Others v. Ukraine*, 18.12.2008, appl. no. 29971/04, § 116.

The Court in many cases stressed the necessity to guarantee criminal-law protection that is "practical and effective" not only "theoretical or illusory". This also requires procedural guarantees.[59] In some turkish cases, the Court stated that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces discloses particular characteristics in the south-east region in this period. The offences were committed by state officials in certain circumstances, the competence to investigate was removed from the public prosecutor in favour of administrative councils which took the decision whether to prosecute. These councils were made up of civil servants, under the orders of the governor, who was himself responsible for the security forces whose conduct was in issue. The investigations which they instigated were often carried out by gendarmes linked hierarchically to the units concerned in the incident.[60] Also, the cases examined by the Convention organs concerning the region at this time have produced a series of findings of failure by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under art. 2 of the Convention and the requirement for effective remedies imposed by art. 13.[61]

This positive legislative obligation also comes to life in the sphere of medical care. In *Calvelli and Ciglio v. Italy* the Court stated that those principles apply in the public-health sphere too. The aforementioned positive obligations therefore require states to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession,

[59] T. Jasudowicz, *Kryminalistyczne aspekty prawa do życia w świetle orzecznictwa strasburskiego*, A. Bulsiewicz, A. Marek, V. Kwiatkowska-Danel (ed.), *Doctrina multiplex veritas una. Księga jubileuszowa ofiarowana profesorowi Mariuszowi Kulickiemu*, Toruń 2004, p. 217.

[60] ECHR judgment *Kiliç v. Turkey*, 28.03.2000,appl. no. 22492/93, § 72; also ECHR judgment *Güleç v. Turkey*, 27.07.1998, appl. no. 21593/93, § 77-82.

[61] *Ibidem*, § 73.

whether in the public or the private sector, can be determined and those responsible made accountable.[62]

It is obvious that this obligation should also be backed up by procedural and institutional positive obligations. In this case, the Court added, that even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said on a number of occasions that the effective judicial system required by art. 2 may, and under certain circumstances must, include recourse to the criminal law.[63]

The Court has also presented the boundaries of such obligation explaining that the positive obligation to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.[64]

The issue of positive legislative state's obligations was taken up by the ECHR in the case *Öneryildiz v. Turkey*. This judgment was related to a alleged violation of article 2 by the hazardous immissions from the nearby rubbish tip. The Court underlined that state's legislative obligation also entails that relevant regulations must also provide appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels.[65]

ECHR also stated that where lives have been lost in circumstances potentially engaging the responsibility of the state, that provision entails a duty for the state to ensure, by all means at its

[62] ECHR judgment *Calvelli and Ciglio v. Italy*, 17.1.2002, appl. no. 32967/96, § 49.

[63] *Ibidem*, § 51.

[64] *Ibidem.*

[65] ECHR judgment *Öneryildiz v. Turkey*, 30.11.2004, appl. no. 48939/99, § 90.

disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished. If the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an "effective judicial system" does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims.[66]

In the case of *Budayeva and others v. Russia*, The Court examined the case of mudslide and alleged violation of article 2 in this respect as a violation of state's positive obligations in the sphere of protecting life. The Court reminded that art. 2 does not solely concern deaths resulting from the use of force by agents of the state but also, in the first sentence of its first paragraph, lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction.[67] This positive obligation entails above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. This obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake. In particular, it applies to the sphere of industrial risks, or "dangerous activities", such as the operation of waste collection sites in the case of *Öneryıldız*.[68]

It is apparent that this obligation can't be effective without its procedural guarantees. However, ECHR underlines that it includes, both substantive and procedural aspects, notably a positive obligation to take regulatory measures and to adequately inform the public about any life-threatening emergency, and to ensure that any occasion of the deaths caused thereby would be followed by a judicial enquiry.[69]

[66] *Ibidem*, § 91-92.

[67] ECHR judgment *Budayeva and others v. Russia*, 20.03.2008, appl. no. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, § 128.

[68] *Ibidem*, § 129-130.

[69] *Ibidem*, § 131.

The substantive aspect, in the particular context of dangerous activities the Court has found that special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels.[70]

The substantive obligation in this respect should always be completed by procedural obligations concerning particular provisions directed to relevant authorities. The legislative positive obligations also concern forensic obligations, which will be presented in the part dedicated to procedural obligation within art. 2.

6. The state's positive substantive obligations in the sphere of biomedicine

Article 2 of the Convention does not mention biomedical rights literally. However, due to important discoveries and devolopment in this sphere, The ECHR case-law takes up this subject.

First important question concerning the right to life and biomedicine concerns the beginning and the end of life. The Convention doesn't clearly explain when the life begins or when it ends.

As to the beginning of "life", the Commission stated that The term "everyone's" seems not to be applicable to an unborn child. Assuming that the right to life is secured to a foetus from the beginning

[70] *Ibidem*, § 132; also *Öneryildiz v. Turkey*, § 89-90.

of pregnancy, this right is subject to an implied limitation allowing pregnancy to be terminated in order to protect the mother's life or health.[71]

In the case *X. v. U.K.*, the Commision concluded that the abortion law of States-Parties has so far been the subject of several applications under Article 25. The applicants either alleged that the legislation concerned violated the (unborn child's) right to life (Article 2) or they claimed that it constituted an unjustified interference with the (parents') right to respect for private life (Article 8). Two applications invoking Article 2 were declared inadmissible by the Commission on the ground that the applicants – in the absence of any measure of abortion affecting them by reason of a close link with the foetus-could not claim to be "victims" of the abortion laws complained of. One application (No. 6959/75 – *Brüggemann and Scheuten v. the Federal Republic of Germany*), invoking Article 8, was declared admissible by the Commission, insofar as it had been brought by two women. The Commission, and subsequently the Committee of Ministers, concluded that there was no breach of Article 8 (Decisions and Reports 10. 100-122). That conclusion was based on an interpretation of Article 8 which, inter alia, took into account the High Contracting Parties' law on abortion as applied at the time when the Convention entered into force.[72]

Later, in *Vo v. France*, the Court stated that art. 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define "everyone" (toute personne) whose "life" is protected by the Convention. The Court has yet to determine the issue of the "beginning" of "everyone's right to life" within the meaning of this provision and whether the unborn child has such a right. To date it has been raised solely in connection with laws on abortion. Abortion does not constitute one of the exceptions expressly listed in paragraph 2 of Article 2, but the Commission has expressed the opinion that it is compatible with the first sentence of Article 2 § 1 in the interests of protecting the mother's life and health because

[71] EComHR decision *X. v. U.K.*, 13.05.1980, appl. no. 8416/79, p. 244.

[72] *Ibidem*, p. 248-249.

"if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the 'right to life' of the foetus."[73]

As to the issue of abortion under article 8, The ECHR recalled its previous case law and stated, that whenever a woman is pregnant her private life becomes closely connected with the developing foetus. However, it's necessary to decide, in this context, whether the unborn child is to be considered as "life" in the sense of Article 2 of the Convention, or whether it could be regarded as an entity which under Article 8 § 2 could justify an interference "for the protection of others"[74]

To sum up, according to the Court the unborn child is not regarded as a "person" directly protected by art. 2 of the Convention. If the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that "Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother."[75]

The above clearly shows that, in time, and after developing a consensus between State-Parties in their law systems, there may be a possibility to re-evaluate the meaning of article 2 in the sphere of foetus protection. This interpretation is also in conformity with European Boethical Convention, which takes under its protection "human being", which also means protection of the unborn child.

As it may seem, the Court does not impose positive obligations in the sphere of pre-natal phase of "life". However, the development of medicine and more often diversities between Stasbourg judges in their separate opinions may give rise to the assumption that it may

[73] ECHR judgment *Vo v. France*, 8.07.2004, appl. no. 53924/00, § 75.

[74] *Ibidem*, § 76.

[75] *Ibidem*, § 80.

change, after changing the interpretation of art. 2 by using the "living instrument" concept. However due to poor consensus between State-Parties, for the time being, such a change of line of interpretation of art. 2 might need the changes in its very text.

The Court had also taken up the subject of end of human life. Undeniable impact on the Court's case law had the case *Pretty v. U.K.* The case concerned a terminally ill woman, who wanted to commit assisted suicide (with a help of her husband). She wanted to prove the right to assisted suicide under the Convention.

In *Pretty* case, the Court recalled its case-law and reminded that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This obligation extends beyond a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions; it may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[76]

As to article 2 itself, the Court The underlined the put on the obligation of the state to protect life. The Court is not persuaded that "the right to life" guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example in the context of Article 11 of the Convention, the freedom of association has been found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise. Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from state interference, they may be reflected in the rights guaranteed

[76] ECHR judgment *Pretty v. U.K.*, 29.04.2002, appl. no. 2346/02, § 38.

by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.[77]

ECHR underlined that article 2 cannot guarantee an opposite right the right to death. The Court didn't find breach of art. 2 in this respect. Nor did in respect to alleged breach of art. 3, 8, 9 and 14.

Pretty case doesn't construct state's positive obligations to provide the right to euthanasia or assisted suicide. State's positive obligations in this respect are – in fact – in opposition to such obligations. As the Court stated in *Osman*, article 2 § 1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.[78] That's how state's positive obligation concerning assisted suicide or euthanasia is founded.

Such interpretation is confirmed in Council of Europe soft-law. Recommendation 779 (1976) clearly states that the doctor must make every effort to alleviate suffering, and that he has no right, even in cases which appear to him to be desperate, intentionally to hasten the natural course of death.[79] The above had also been stressed in Recommendation 1418 (1999).[80]

[77] *Ibidem*, § 39.

[78] *Osman v. U.K.*, § 115.

[79] Parliamentary Assembly (PA), *Reccomendation 779 (1976) on the rights of the sick and dying*, 28.01.1976, § 3.

[80] PA, *Recommendation 1418 (1999) Protection of the human rights and dignity of the terminally ill and the dying*, 25.06.1999, § 9 c) I-III.

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Zobowiązania pozytywne państwa dotyczące art. 2 EKPC. Część I – zobowiązania materialne

Koncepcja zobowiązań pozytywnych państwa w sferze praw człowieka pierwszej generacji za sprawą orzecznictwa Europejskiego Trybunału Praw Człowieka w ostatnich latach rozwinęła się jeszcze bardziej. Znaczenie zobowiązań pozytywnych państwa dla praktycznej ochrony praw człowieka oraz praktycznych działań Państwa-Strony w ramach systemu prawa krajowego staje się coraz bardziej widoczne, stąd konieczność odpowiednich badań.

Spośród wszystkich praw człowieka pierwszej generacji to w sferze prawa do życia wykształcił się najbardziej kompleksowy i wyczerpujący charakter zobowiązań pozytywnych Państwa-Strony. Jest to konsekwencją ogromnego wpływu ochrony prawa do życia na zapewnienie ochrony pozostałych praw i wolności jednostki.

Jako, że prawo do życia jest prawem fundamentalnym i warunkiem korzystania z pozostałych praw, wymaga ono szczególnej ochrony. Zobowiązania pozytywne państwa w sferze prawa do życia stanowią odzwierciedlenie tej konieczności. Dzielą się na zobowiązania o charakterze materialnym i te o charakterze proceduralnym. Znaczny rozwój obu grup zobowiązań pozytywnych wymaga odrębnego zbadania, stąd też podział. Wspomniane rozważania dotyczą materialnych zobowiązań pozytywnych państwa i obejmują obowiązek prawnej ochrony życia, pozytywne aspekty zakazu pozbawiania życia oraz bioetyczne implikacje, jakie niesie ze sobą konieczność ochrony prawa do życia.

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LEGAL PROTECTION OF THE UNBORN CHILD

The human life is the great worth not only for the individual but also for the whole society. In the most up to date legal systems, it does not depend of cultural differences, it has the highest place in hierarchy of goods protected by law. The human life is the unique gift unreproduced and unrepeatable which belongs for everyone.[1] In the preamble to *Charter of the Rights of the Family* (1983) we can read: "(…) society, and in a particular manner the State and International Organizations, must protect the family through measures of a political, economic, social and juridical character, which aim at consolidating the unity and stability of the family so that it can exercise its specific function".[2]

The subject of cooperation between the State and the Church about legal protection of conceived child according to canonical law, international law and Polish law is still present. All the duties should approach to the aim which is respect and protection of rights stemming from human dignity. Such right law is the right to life. This right belongs to every human being, without any exceptions. The duty

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[1] J. Giezek, R. Kokot, *Granice ludzkiego życia a jego prawna ochrona*, B. Banaszek (ed.), A. Preisner (ed.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, p. 101-102.

[2] The Holy See, *Charter of the Rights of the Family*, 22.10.1983, preamble.

to save somebody's life is the task of every human being, never mind if the person is married or single, belongs to ecclesiastic or monastic state, or just being secular. The life is a gift from God and should be protected very carefully. Nobody has the right to kill another person. No nervous breakdown, abomination or other circumstances cannot be cause for the death of your neighbour. Killing the innocents, abortion, contraceptive, artificial techniques of reproduction, experiments on embryos are accepted as "laws", on the other hand "actions which were undivided considered as criminal and in general moral sense inadmissible, gain gradually social approval".[3]

Problem of the life protection on the legal ground is very wide. It appears in the different branches of law i.e. civil, penal, international, it reaches, as well, social legislation. Also the Catholic Church in its teaching touches upon the subject of life and permanently is of opinion that protection of life should be granted at its every stage.

1. Legal bases of cooperation between the State and the Church in Poland

Proclaimed by II Vatican Council *Pastoral Constitution on the Church in the modern World Gaudium et spes* the rules relation between the Church and the State have the quality of common postulates: "The Church and the political community in their own fields are autonomous and independent from each other. Yet both, under different titles, are devoted to the personal and social vocation of the same men. The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all".[4]

[3] John Paul II, *Apostolic exhortation on the role of the Christian family in the modern world* „Familiaris consortio", [FC], 22.11.1981, *Acts of the Apostolic See* 74 (1982) p. 81-191.

[4] II Vatican Council, *Pastoral constitution on the Church in the modern world*, „Gaudium et spes", [GS], 7.12.1965, *Acts of the Apostolic See* 58 (1966) p. 1025-1115.

Cooperation means actions in conjunction with the institutions which are independent of each other, realize on partner rules.

Binding in Poland *The Act on guarantees of freedom of conscience and religion of* May 17th 1989[5] in the article 16 proclaims: "The state cooperates with the Church and other religious unions in peace, shaping conditions for development of the country and combat against social pathology (…) to investigate problems connected with the development connections between the State and Churches and other religious unions, and different, also permanent, forms of cooperation can be set up. This regulation does not disturb adequacy of the State's organs and Churches' organs and other religious unions". The article 25 paragraph 3 *The Constitution of the Republic of Poland*[6] of April 2nd 1997 proclaims: "The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good". The range of this cooperation marks the constitutional order and rules of democratic state. That principle is connected with the article 1 of the *Polish Concordat*[7] of July 28th 1993, which says: "The Republic of Poland and the Holy See reaffirm that the State and the Catholic Church are, each in its own domain, independent and autonomous, and that they are fully committed to respecting this principle in all their mutual relations and in co-operating for the promotion of the benefit of humanity and the good of the community". Necessity of this cooperation is the result of auxiliary role of the Church and State in relation to the same people, who are members of these two communities.

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[5] *Ustawa* z 17.5.1989 *o gwarancjach wolności sumienia i wyznania*, Dziennik Ustaw of 1989 No. 29, item 155 (*The Act on guarantees of freedom of conscience and religion*).

[6] *Konstytucja Rzeczypospolitej Polskiej* z 2.4.1997, Dziennik Ustaw of 1997 No. 78, item 483 (*The Constitution of the Republic of Poland*).

[7] *Konkordat* z 28.7.1993 *między Stolicą Apostolską i Rzecząpospolitą Polską*, Dziennik Ustaw of 1998 No. 51, item 318 (*Concordat between the Holy See and the Republic of Poland*).

Constitutional description of mutual relation between organs and State's and Church's institutions is completed by the article 11 of the Polish Concordat, where the rule of cooperation to the purpose for the good of marriage and family was written: "The Contracting Parties declare their will to co-operate for the purposes of protecting and respecting the institution of marriage and the family, which are the foundation of society. They stress the value of the family and the Holy See, for its part, reaffirms Catholic doctrine of the dignity and indissolubility of marriage". There are also legal acts, which clearly show domains of cooperation between the State and religious organisations.

According to the article 1 paragraph 3 of *The Act of upbringing in sobriety and counteracting alcoholism* of October 26th 1982[8] government administration authorities and local government units shall also cooperate with the Catholic Church and other churches and religious associations within the scope of upbringing in sobriety and counteracting alcoholism.

On the other hand *Social Welfare Act* of March 12th 2004[9] in the article 2 paragraph 2 provides that social welfare is organized by the government and local governments cooperating on that area on the partnership principle with the Catholic Church, other Churches and religious associations. The field of cooperation is wide by reason of social welfare includes support for people and families mainly because of poverty, orphanhood, homelessness, unemployment, disability, long or serious disease, violence in the family, the need of protection human trade victims, the need to protect motherhood or numerous families, helplessness of educational-tutorial cases and housekeeping, especially in numerous or incomplete families, in the lack of ability to adaptation to life by young people who leave day and night tutorial institutions, difficulties in integration foreigners, who received in Polish Republic status of refugee or protection which completes

[8] Dziennik Ustaw of 2007 No. 70, item 473 with subsequent amendments (*The Act on upbringing in sobriety and counteracting alcoholism*).

[9] Dziennik Ustaw of 1998 No. 64, item 414 with subsequent amendments (*Social Welfare Act*).

difficulties in adaptation to living after leaving a prison, alcoholism or drug addiction, fate incident and critical situation, natural or ecological calamity.[10] The State and local governments may instruct Churches and other religious associations some task connected with the social welfare and support them financially.[11]

Very important area of cooperation between the Church and the State for the family is the respect for protection of human's life since the conception.

2. Protection of a conceived child in the general principles and teachings of the Church

As the basic good for human being the life is the most important worth and the right to life is the foundation for all the other rights.[12] Essential argument, on which teachings of the Church about the respect of the life of unborn children are based, is ascertainment that human life is the God's gift.[13] Human life since the conception until the last minute of it is saint. That means there is no human authority that could destroy it. It is inviolable, worth the best protection and every possible offering. God himself stands to protect saving "Don`t kill". Not only this suppress forbids intentional and immediate homicide of an innocent person, but does it call to be active in protection of people's lives.[14]

Protection of human's life ought to be secured by mother, who is the first person giving love and assuring her unborn child the right

[10] *Social Welfare Act*, the article 7.

[11] *Social Welfare Act*, the article 25 para. 1.

[12] R. Sztychmiler, *Stanowisko w sprawie ochrony rodziny*, „Biuletyn Rady ds. Rodzin Województwa Warmińsko-Mazurskiego" 3/8 (2001), p. 3-4.

[13] GS, No. 51; FC, No. 11, 14. J. Mazur, *Katolicka nauka społeczna*, Kraków 1992, p. 204-204.

[14] T. Borutka, *Społeczne nauczanie Kościoła. Teoria i zastosowanie*, Kraków 2004, p. 321-323.

to life.[15] This protection means to abstain from harmful condiments as alcohol, drugs, nicotine.[16] Since the very beginning in mother's pubes a real man is shaped. He or she has the same rules, they are protected by mother's aptitude, by parents' love, by God's rule and people's law.[17] It is a great misunderstanding that mother admits attempt on her child's life.[18]

Every person has its own rights to live, to know the world, to achieve the aim which was given by God.[19] All direct abortions, never mind if they are medical or criminal, are prohibited, it is just as a manslaughter.[20] Church's teaching about the abortion is clear and strong-minded.[21] Tradition of the Church (teaching of Fathers and Doctor of the Church, councilor and papal teaching) since the beginning considered the fight to live as the biggest gift from God, which no one has the right to deprive.

Deliberating in 1962-1965 II Vatican Council called abortion and infanticide "unspeakable crimes".[22] In the *Constitution Gaudium*

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[15] *Katechizm Kościoła Katolickiego*, [KKK], Pallottinum 1994, nr 2378 (*Catechism of the Catholic Church*). S. Jasionek, *Prawa człowieka*, Kraków 2004, p. 20.

[16] R. Sztychmiler, *Ochrona prawa do życia dziecka poczętego*, B. Sitek (ed.), M. Sitek (ed.), G. Dammacco (ed.), J. J. Szczerbowski (ed.), *Prawo do życia a jakość życia w wielokulturowej Europie. Materiały V Międzynarodowej Konferencji Praw Człowieka (Olsztyn, 30-31 maja 2005)*, Olsztyn 2007, p. 281-288.

[17] S. Wyszyński, *W obronie życia nienarodzonych*, Warszawa 1990, p. 7.

[18] W. Góralski, *Funkcja prokreacyjna rodziny w prawie kanonicznym*, J. Krukowski (ed.), T. Śliwowski (ed.), *Współdziałanie Kościoła i państwa na rzecz małżeństwa i rodziny. Materiały z ogólnopolskiej konferencji naukowej zorganizowanej przez Stowarzyszenie Kanonistów Polskich, Wydział Nauk Prawnych TN KUL i Diecezję Łomżyńską, Łomża 6-7 września 2004*, Łomża 2005, p. 55-68.

[19] *Prawa rodziny – prawa w rodzinie. Jan Paweł II o małżeństwie i rodzinie. Wypisy z nauczania Ojca Świętego*, T. Jasudowicz (ed.), Toruń 1999; S. Wyszyński, *op. cit.*, p. 8-9.

[20] K. Majdański, *Materiały duszpasterskie w zakresie zagadnienia obrony życia nienarodzonych*, Włocławek 1956, p. 5.

[21] R. Sztychmiler, *Prawo do życia w nauczaniu Jana Pawła II*, „Studia Warmińskie" 28 (1991), p. 95-108.

[22] GS, No. 51, *op. cit.*

et spes we can read: "in reality, respect for human life is called for from the time that the process of generation begins. From the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother, it is rather the life of a new human being with his own growth. It would never be made human if it were not human already".[23] The problem mentioned in *the Constitution* are current nowadays.

The Catholic Church, protecting a child particular care and worry, published several documents, which aim is to protect child's right. The Article 4 *of the Charter of the Rights of the Family* of the Apostolic See of 1983 regulates child's right saying: "Human life must be respected and protected absolutely from the moment of conception. Abortion is a direct violation of the fundamental right to life of the human being. Respect of the dignity of the human being excludes all experimental manipulation or exploitation of the human embryo. All interventions on the genetic heritage of the human person that are not aimed at correcting anomalies constitute a violation of the right to bodily integrity and contradict the good of the family. Children, both before and after birth, have the right to special protection and assistance (...)". *The Charter* is the foundation, on which countries should build their own laws about protection of child's right.

Great protectors of life's care were Popes. In *Encyclical Humanae vitae* of July 25th 1968 the Pope Paul VI[24] ascertains: "Therefore We base Our words on the first principles of a human and Christian doctrine of marriage when We are obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children".[25] All contraceptive devices are condemned by

[23] Congregation for the Doctrine of the Faith, *Declaration on procured abortion* „Quaestio de abortu", [QA], 18.11.1974, *Acts of the Apostolic See* 66 (1974) p. 730-747.

[24] Paul VI, *Encyclical letter on the regulation of birth* „Humanae vitae", [HV], 25.7.1968, *Acts of the Apostolic See* 60 (1968) p. 481-503.

[25] L. Pawlak, *Duchowość małżeńska w świetle encykliki Humanae vitae*, „Studia nad Rodziną" 2 (2002), p. 109-115; R. Kuczer, *Miłość – odpowiedzialność – rodzicielstwo:*

the Church, they make easier the way to matrimonial infidelity, sexual profligacy, they only lead to sexual satisfaction, they treat women as a device or a tool to indulge somebody's desire.[26]

The important place among church's documents, in which theme of worth of human life is described, is *Declaration of abortion Quaestio de abortu* of 1974[27] (approved by Paul VI, the Pope) and *Instruction Donum vitae* of 1987.[28] Human embryo since the conception has this same right as another man, it ought to be respected, receive dignity and be cared about its growth. Whereas prenatal diagnosis is allowed only when the decision how to treat ill embryo efficiently, but not eliminate the embryo.[29]

Church's teaching regarding abortion is recalled at the beginning of the pontificate of John Paul II in *Apostolic exhortation Familiaris consortio on the role of the Christian family in the modern world* of November 22nd 1981.[30] According to John Paul II, a care of a child, even before its birth, since its conception, is the first basic test of relation between two human beings.[31] In *Encyclical Veritatis splendor* of 1993[32] John Paul II claims that the commandment "You

profetyczny wymiar encykliki Pawła VI Humanae vitae, „Teologia i Moralność" 3 (2008), p. 29-44.

[26] M. Dziewiecki, *Humanae vitae, czyli miłość i seksualność*, „Zeszyty Formacji Katechetów" 9/2 (2009), p. 59-62.

[27] QA, *op. cit.*

[28] Congregation for the Doctrine of the Faith, *Instruction on respect for human life in its origin and on the dignity of procreation* „Donum vitae", [DV], 22.2.1987, *Acts of the Apostolic See* 80 (1988) p. 70-102.

[29] DV, I, op. cit.

[30] FC, No. 1, *op. cit.* B. Mierzwiński, *Familiaris consortio jako synteza doktrynalno-pastoralna nauczania Kościoła na temat małżeństwa i rodziny*, „Ateneum Kapłańskie" vol. 148 (2007), p. 214-221.

[31] FC, No. 26, *op. cit.*

[32] John Paul II, *Encyclical Letter* „Veritatis splendor" *regarding certain fundamental questions of the Church's moral teaching*, [VS], 6.8.1993, *Acts of the Apostolic See* 85 (1993) p. 1133-1228, No. 1-5.

shall not murder" becomes a call to an attentive love which protects and promotes the life of one's neighbour.

However in *Evangelium vitae* of 25th March 1995[33] he tells about nowadays "new scourges".[34] The Pope decidedly damns in behalf of all the Church crimes against people's lives, everything which encroaches on human's pride.[35] Nowadays we can face trampling basic rules to live for the weak and defenseless creatures, like unborn children. This Encyclical is the appeal addressed to the public and everybody: "respect, protect, love and serve life, every human life! Only in this direction will you find justice, development, true freedom, peace and happiness!".[36]

Pro-familiar teaching is continued by Benedict XVI, who in *Proclamation for XV International Day of Peace* of January 1st 2007 underlined that "in society: alongside the victims of armed conflicts, terrorism and the different forms of violence, there are the silent deaths caused by hunger, abortion, experimentation on human embryos and euthanasia. Abortion and embryonic experimentation constitute a direct denial of that attitude of acceptance of others which is indispensable for establishing lasting relationships of peace".[37]

Published in 1992 *Catechism of the Catholic Church* recollects the leading rule of esteem and protection of human life since the conception.[38] *From the first moment of his existence, a human being*

[33] John Paul II, *Encyclical Letter on the value and inviolability of human life* „Evangelium vitae", [EV], 25.3.1995, *Acts of the Apostolic See* 87 (1995) p. 401-522.

[34] EV, No. 3-4. J. Zabielski, *Współczesne zamachy na życie ludzkie*, „Ateneum Kapłańskie" vol. 130, (1998), p. 325-339.

[35] J. Szkodoń, *Obrona życia nienarodzonych w świetle encykliki Evangelium vitae*, „Analecta Cracoviensia" vol. 30-31 (1998/1999), p. 291-305; W. Bołoz, *Obrona i promocja życia w encyklice Evangelium vitae* , „Ateneum Kapłańskie" vol. 126/1 (1996), p. 86-99.

[36] M. Ozorowski, *Życie jako wartość w Evangelium vitae Jana Pawła II*, „Studia Teologiczne" vol. 17 (1999), p. 55-65.

[37] Benedict XVI, *Message for the celebration of the World Day of Peace*, 1.1.2007, „L'Osservatore Romano" 2 (2007), p. 5.

[38] W. Bołoz, *Życie w ludzkich rękach. Podstawowe zagadnienia bioetyczne*, Warszawa

must be recognized as having the rights of a person – among which is the inviolable right of every innocent being to life.[39] Abortion is accepted as the moral evil.[40] The Church impose the canonical penalty of excommunication on that crime, shows harm done to the innocent who is put to death, as well as to the parents and the whole of Society.[41] Canon law is the first system fully renouncing *nasciturus* subjectivity in relation to its own worth and dignity of the individual.[42] *Code of Canon Law by John Paul II* of 1983 containing the catalogue of offences against human life and freedom[43]; homicide (*homicidium*), injury (*mutilatio*) or serious wounds (*vulneratio*) mentions as well abortion (*procuratio abortus*)[44].

By abortion canon law (*Codex Iuris Canonici*) understands any surgical manipulation tending to remove from mother's body living embryo to kill it. To be a criminal action the embryo must be effectively taken away and it does not matter if the death of removing embryo was in the mother's body or outside it.[45] Under excommunication penalty are: 1) mother, who herself removed an embryo (using miscarriageous remedy or undergoing an operation), 2) all the others who use different remedies to do abortion, and never mind if they make it themselves or because others ordered them 3) partners (sending women to surgical

1997, p. 171.

[39] KKK, No. 2270.

[40] KKK, No. 2271.

[41] KKK, No. 2272.

[42] R. Sztychmiler, *Obowiązek ochrony życia dziecka poczętego*, „Chrześcijanin w świecie" 21/6 (1989), p. 34-44; idem, *Problem ochrony praw rodziny*, „Biuletyn Stowarzyszenia Kanonistów Polskich" 2/7 (1994), p. 42-52.

[43] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, [CIC], 25.1.1983, *Acts of the Apostolic See* 75 II (1983) 1-317 (*Code of Canon Law*).

[44] CIC, cann. 1397-1398.

[45] W. Wójcik, J. Krukowski, F. Lempa, *Komentarz do Kodeksu Prawa Kanonicznego z 1983*, Lublin 1987, p. 277-278.

manipulation, providing suitable medicine) who caused to killing or removing human's embryo from mother's pubes.[46]

The crime is, according to *Codex Iuris Canonici*, when abortion is effective (*effectu secuto*). If the crime is without any result, we call it attempt of committing the crime.[47] While the abortion is not effective because of impossibility committing deed, apart from an author, unsuccessful crime has place.[48] It is not a crime when abortion took place as a result of other actions, if it was incidental, unintentional or indirect, for example by hard work.[49]

Offence against abortion may be done only on purpose, in a conscious way.[50] However if any taken activities, which are not aimed against unborn child , although threat to bring out a miscarriage, will not be treated as an abortion crime.[51] Also abortion done by thoughtlessness or caressness is not a crime.[52] However even elevated purpose accompanied artificial abortion, i.e. saving mother`s life or health, cannot eliminate criminal moral nature of the act.[53]

Canon law entirely acknowledges subjectivity of an unborn child, that is why it is treated as a subject of law and duties since the moment of conception.[54] Canon 871 of *Codex Iuris Canonici* says

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[46] *Ibidem*, p. 279.

[47] *Ibidem*, p. 278.

[48] F. Lempa, *Ochrona poczętego życia ludzkiego w świetle doktryny i Kodeksu Prawa Kanonicznego z 1983 roku*, J. Krukowski (ed.), F. Mazurek (ed.), F. Lempa (ed.), *Kościół i prawo*, Lublin 1991, p. 262.

[49] T. Pawluk, *Prawo kanoniczne według kodeksu Jana Pawła II, vol. 4, Doczesne dobra Kościoła. Sankcje w Kościele. Procesy*, Olsztyn 1990, p. 153.

[50] P. Gajda, *Sankcje karne w Kościele w świetle Kodeksu Prawa Kanonicznego Jana Pawła II oraz późniejszych zmian i uzupełnień. Studium kanoniczno-pastoralne*, Tarnów 2008, p. 97.

[51] O. Nawrot, *Nienarodzony na ławie oskarżonych*, Toruń 2007, p. 182.

[52] P. Gajda, *op. cit.*, s. 97.

[53] W. Wójcik, J. Krukowski, F. Lempa, *op. cit.*, p. 278.

[54] L. Świto, *Osobowość prawna nasciturusa w prawie kanonicznym i polskim*, „Studia Warmińskie" 2 (1998), p. 398.

about it: *If aborted fetuses are alive, they are to be baptized insofar as possible*.[55] Christening is done by plunging in baptismal water and opening mucous membranes as water could drifts the current over the whole body of embryo.[56] Ability to be baptized is admitted to embryos as well as a born person.[57] That standpoint of church's lawmakers show esteem and care of abortive embryo.[58]

Spouses, whose attitude to conceived life is hostile, if during the act of contracting marriage they had unhesitating intention of opposing to give birth their offsprings, by killing them, just after procreation, cannot contract significant marriage. It is due to norms included in canon 1055 § l and canon 1101 § 2 *Codex Iuris Canonici*, i.e. calling in question essentials element of marriage – giving birth progeny.[59]

The subject of law protection in Catholic Church is newly created embryo as well.

3. Protection of the conceived child in international law

Moral rule of inviolability of human life since its conception has absolute character that is why must be protected by people's law. Positive State's law should enforce the law of that rule. All countries of the world own the same rule: "Don`t kill". Every child needs a special protection in the country`s law that ought to help their parents and protectors.

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[55] CIC, can. 871.

[56] M. Pastuszko, *Prawo o sakramentach świętych, vol. 1, Normy ogólne i sakrament chrztu*, Warszawa 1983, p. 165.

[57] L. Świto, *op. cit.*, s. 398.

[58] F. Lempa, *Ochrona poczętego życia…*, p. 257.

[59] R. Sztychmiler, *Wykluczenie potomstwa w świetle najnowszego orzecznictwa Roty Rzymskiej*, „Ius Matrimoniale" 5/11 (2000), p. 103-122; idem, *Doktryna Soboru Watykańskiego II o celach małżeństwa i jej recepcja w Kodeksie Prawa Kanonicznego z roku 1983*, Lublin 1993.

The first in human's history children's rights were described in *The Declaration of Geneva*, accepted by the League of Nations in 1924. The basic thesis, on which *The Declaration* is based, is saying in the Preamble that "mankind should give the child the best things they have". It means, that authors of Declaration believe that a child is the biggest good of every society, its future, that is why children on the first place may use all society property. The Declaration is the continuous teaching of Jesus, who said: "whatever you did for one of the least of these brothers and sisters of mine, you did for me".[60]

On 10th December 1948 The United Nations adopted *The Universal Declaration of Human Rights*, which in the article 3 says that everyone has the right to life, and in article 25 paragraph 2 is said that motherhood and childhood are entitled to special care and assistance.

Convention for the Protection of Human Rights and Fundamental Freedoms[61] (signed in Rome on 4th November 1950, ratified by Poland on 19th January 1993[62] includes a catalogue of rights and freedom ensured by the State. In article 2 paragraph 1 *Convention* says: "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".[63] The essence of this article is establishing an order to respect and protect human life (the right to life).

In 1959 United Nations adopted the *Declaration of the Rights of the Child*, which marked directions of the legal protection of the child by the State. General Assembly of the United Nations, like the *Charter of the Rights of the Family*, appeals to parents, local government units and government administration authorities to introduce these

[60] Mt 25, 40.

[61] B. Gronowska (ed.), T. Jasudowicz (ed.), C. Mik (ed.), *Prawa człowieka. Wybór dokumentów międzynarodowych*, Toruń 1999, p. 11-20 (*The Universal Declaration of Human Rights*).

[62] Dziennik Ustaw of 1993 No. 61, item 284.

[63] B. Gronowska (ed.), T. Jasudowicz (ed.), C. Mik (ed.), *Prawa człowieka…*, p. 77-101.

principles: "Principle 1: (…) The child shall enjoy all the rights set forth in this *Declaration*. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction (…) Principle 2: The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration. (…) Principle 8: The child shall in all circumstances be among the first to receive protection and relief"[64].

International Covenant on Civil and Political Rights were declared by General Assembly of the United Nations on 16th December 1966. The pact came into force on 23rd March 1976 and Poland ratified it on 17th March 1977. It proclaims that 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[65] (article 6 paragraph 1). The Human Rights Committee observed that the right to life enunciated in the first paragraph of article 6 of the *International Covenant on Civil and Political Rights* is the supreme right from which no derogation is permitted even in time of public emergency[66].

On 20th November 1989 General Assembly of the United Nations adopted the *Convention on the Rights of the Child*[67] which became effective on 2nd September 1990 and has been signed by 193 parties[68]. *Convention* in its preamble (paragraph 9) declares: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as

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[64] *Declaration of the Rights of the Child* G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

[65] *Ibidem*, p. 21-48.

[66] General Comment No. 06: The right to life (art. 6):. 1982-04-30. CCPR General Comment No. 6. (General Comments).

[67] Dziennik Ustaw of 1991, No. 120, item 526 with subsequent amendments.

[68] http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-11&chapter= 4&l ang =en#Participants (23.9.2011).

well as after birth".[69] It contains a list of child's rights as a human: its civil, political, economical social and cultural rights. One of the leading rule of *Convention* is that all the decision about a child must be taken for its good. According to article 1 *Convention on the Rights of the Child*, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". About the minimum protection which belongs to a child Convention (article 6, paragraph 1: proclaims "States Parties recognize that every child has the inherent right to life"). However, about the detailed protection for a child before and after its birth every country decides itself.[70] Poland, becoming the side of *Convention* in force its article 2, obligated in borders of its jurisdiction, respect and guarantee the rights included in convention towards to every child.

So, morale responsibility for abortion falls on the legislators, who supported and validated rights are blamed for abortion. Yet, proclaimed law has its own protecting function, because of the equal rule of all citizens (also these unborn) towards to law.[71] The duty of the law should be safety for common good, by admission and protection of basic personal rights, moral and peace development. In any sphere of the life the law should not replace the conscience. The right to live for every human being, since the conception until natural death, must be accepted and respected by political authorities, because it does not depend on individual units. These rules are not the privilege granted by the State or society.[72]

Jurisprudence in Strasbourg has always recognized the special importance and confirmed the order to protect life. The European

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[69] *The Convention* in Poland is in force from July 7th 1991.

[70] Vo v France, application No. 53924/00, judgment of 8 Juli 2004. O. Sitarz, *Ochrona praw dziecka w polskim prawie karnym na tle postanowień Konwencji o prawach dziecka*, Katowice 2004, p. 10.

[71] QA, No. 23, *op. cit*.

[72] R. Sztychmiler, *Funkcja prokreacyjna rodziny w prawie polskim*, J. Krukowski (ed.), T. Śliwowski (ed.), *Współdziałanie Kościoła i państwa na rzecz małżeństwa i rodziny. Materiały z ogólnopolskiej konferencji naukowej, Łomża 6-7 września 2004*, Łomża 2005, p. 85-111.

Court of Human Rights pointed out that Article 2 of the European Charter of Human Rights (Charter of Fundamental Rights of the European Union) is one of its fundamental deciosins.[73] The Court in its jurisprudence opposed the right to life to any hypothetical right to end life[74] and recognized the right to life as a necessary starting point to use all other rights and freedom.[75] Recently, the Polish media has commented loudly A. Tysiąc versus Poland case.[76] The applicant (A. Tysiąc) complained that the facts of the case had given rise to a breach of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. According to A. Tysiąc her right to due respect for her private life and her physical and moral integrity had been violated both substantively, by failing to provide her with a legal therapeutic abortion, and as regards the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights.

John Paul II many times applied to the issue of abortion legalization by countries. He perceived discordance between ratifying declaration of human life protection and at the same time legalizing a right to abortion. According to the Pope, an acquiescence in abortion is a huge calamity not only for a man but also for the whole nation[77], as the nation which let for legalization of abortion is the barbarous society, never mind for its achievements in economic, artistic, technical or scientific spheres.[78] Moreover the Holy Father is strongly against the woman's right to abortion, because a law that lets to kill

[73] *McCann and Others v United Kingdom*, application no. 18984/91, judgment of 27 September 1995.

[74] *Dianne Pretty v United Kingdom*, application no. 2346/02, judgment of 29 April 2002.

[75] *Ibidem*. *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, t. 1. *Komentarz do artykułów 1-18*, L. Garlicki (ed.), Warszawa 2010, p. 64-65.

[76] Application no. 5410/03, judgment of 20 March 2007.

[77] A. Grześkowiak, *Prawna ochrona życia dziecka poczętego na tle nauczania Jana Pawła II*, A. Grześkowiak (ed.), *Zagadnienia prawa karnego na tle nauczania Jana Pawła II*, Lublin 2004, p. 58.

[78] *Ibidem*, p. 43.

living although unborn child ought not to exist[79]. Respect for the right to life in all phases of its development is the duty of every man, the whole society, as well, and perhaps above all legislators. The Pope underlines that it is "the basic coexistence between people"[80] and a condition of the rule of law.[81] The basis of the value of the rule of law must be permanent and immutable – i.e. objective moral law. Without a moral law expressing the worths, which outcomes from the person's truly being, there is not a democratical deal.[82] And an act which is out of accordance with the natural moral law is completely devoid of power and it is not a law at all.[83]

Legalization of abortion is very often cleared by lawmakers different reasons: criminal, healthy or personal. But, as the Pope claims no legal acts can give the reason devoting human life on behalf of rescuing other value.[84] As well no circumstances and purposes will never cause that abortion may be the approval and rewarded act.[85] In spite of law is not the only one device which can protect man's body it also has crucial influence on society's mentality and customs.[86] So throughout permition for abortion people are sure that this, action is not a crime, killing human being, but rightful.[87] According to John Paul II pro-abortion statutes do not vanish the underworld of abortion, but they cause social morality degradation and they become a circumstance to make people's selection in consideration of their lives worth. John Paul II advise that secular legislation should follow

[79] *Ibidem*, p. 59.

[80] EV, No. 2.

[81] R. Sztychmiler, *Ochrona prawa…*, p. 225.

[82] J. Nagórny, *Sprzeciw wobec „prawa" do zabijania. Uczestnictwo katolików w życiu politycznym w kontekście obowiązku prawnej ochrony życia nienarodzonych*, „Ethos" 61-62 (2003), p. 240.

[83] EV, No. 196.

[84] A. Grześkowiak, *op. cit.*, p. 57.

[85] EV, No. 62.

[86] EV, No. 90.

[87] EV, No. 11.

the example of canonic legislature, in which centre a human being and all goods the most important for him are[88] and, which base is a law to live since conception, consequent from sacred human's dignity.[89]

4. Child's protection in Polish legislation

Expressing respect and rightful care about a child is to born, since the conception, should be foreseen by legislation adequate penalty sanctions for every transgression of its rights.[90] The State's duty is to take care about vital devices to protect conceptived child. A human being in prenatal stage is extreme unprotected and unnoticeable, it cannot protect itself and is utterly under control and good will of people on who it depends.

A right to live as the superior value, is the source of all the other human's right and at the same time a condition to use them. It is reflected in the highest home affairs statute. In the majority of constitutional act the right to live is expressis verbis recognized as the most essential private human's law.[91] Poland belongs to 1/4 countries which legislation limits abortion in some ways.[92] The main source of forming laws about child's protection and its rights is *The Constitution of the Republic of Poland* on 2nd April 1997.[93] According to *The Constitution Republic of Poland* assures child's right protection. "Everyone shall have the right to demand from organs of public authority that they defend children against violence, cruelty,

[88] John Paul II, *Speech to the participants in the Symposium on „Evangelium vitae and Law"* 24.5.1996.

[89] A. Grześkowiak, *op. cit.*, p. 79.

[90] KKK, No. 2273.

[91] J. Giezek, R. Kokot, *Granice ludzkiego życia a jego prawna ochrona*, B. Banaszek (ed.), A. Preisner (ed.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, p. 101.

[92] R. Sztychmiler, *Rodzina wobec zagrożeń w Polsce i w Europie*, „Sprawy Rodziny" 1 (2005), p. 97.

[93] Dziennik Ustaw of 1997 No. 78, item 483.

exploitation and actions which undermine their moral sense. A child deprived of parental care shall have the right to care and assistance provided by public authorities".[94]

Human life in Polish legislation has the constitutional rank. The article 38 of essential statute says: "The Republic of Poland shall ensure the legal protection of the life of every human being". This rule gives definition of subjective borders of life but it does not precisely state whom this protection belongs to, that means who is a human.[95] Included in the article 38 *The Constitution of the Republic of Poland* from 1997 the rule which safeguards the right to life protection is the law act. There is not the slightest doubt as to the article 38 should be used as an interpretative instruction for other rules, which are its realization. Interpretation of this rule towards nasciturus awakens a lot of controversy, because it depends if the unborn is own a human being.

Positive decision leads to notice that *The Constitution* protects human's life since the beginning. Negative means that constitutional-law protection of human's life starts at the moment of child's birth.[96] The direct reference towards the article 38 of *The Constitution* is its article 30 concerning human's dignity. The law doctrine underlines inseparable connection between guarantee of people's lives and human's self-esteem.[97]

In *The Constitution* unfortunately there is not the expression explicite, that an unborn has guaranteed protection[98]. *The Constitution*

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[94] *The Constitution of the Republic of Poland*, the article 72 subparas 1 and 2.

[95] J. Haberko, *Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych*, Warszawa 2010, p. 44.

[96] P. Winczorek, *Komentarz do Konstytucji Rzeczpospolitej Polskiej z 1997 r.*, Warszawa 2000, p. 57.

[97] L. Bosek, *Konstytucyjna gwarancja ochrony życia ludzkiego*, „Disputatio", vol. 4, Gdańsk 2009, p. 112.

[98] R. Sztychmiler, *Rodzina i prawo*, W. Nowak (ed.), M. Tunkiewicz (ed.), *Godność człowieka i rodziny*, Olsztyn 2007, p. 146.

introduced the establishment of the Law on Ombudsman for Children, independent of Ombudsman Institution.[99]

Moreover, the article 18 of the *essentials Act* appeals to motherhood protection.[100] Motherhood is a particular connection between mother and child lasting before and after child's birth.[101] As it is precise relation between mother and child it cannot be considered that motherhood protection is only protection of woman's business. This rule contains also protection of an embryo, without which the motherhood relation may be disconnected. A function of this relation is a proper process of human life in the period when he or she needs a special concern. In the antenatal period the care is realized in biological domain and is indispensable and irreplaceable, because no one apart from mother can support conception of child's life.[102]

Specification of the general resolution of *The Constitution* about child's rights is included in many legislation acts. The most important are: *The Civil Code*[103], *The Family and Guardianship Code*[104], *The Penal Code*[105], *The Law on Family Planning, Protection of Human Fetus, and Conditions Permitting Pregnancy Termination*.[106]

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[99] *The Constitution of the Republic of Poland*, the article 72 para. 4.

[100] *The Constitution of the Republic of Poland*, the article 18: „Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland".

[101] L. Garlicki, *Wolności i prawa osobiste*, L. Garlicki (ed.), *Komentarz do Konstytucji Rzeczpospolitej Polskiej*, Warszawa 2003, p. 4.

[102] *Orzeczenie Trybunału Konstytucyjnego* z 28.5.1997, sygn. K 26/96 (*Judgments of the Constitutional Court*).

[103] *Ustawa* z 23.4.1964 *Kodeks cywilny*, Dziennik Ustaw of 1964 No. 16, item 93 with subsequent amendments (*The Civil Code*).

[104] *Ustawa z* 25.2.1964 *Kodeks rodzinny i opiekuńczy*, Dziennik Ustaw of 1964 No. 9, item 59 as amended (*The Family and Guardianship Code*).

[105] *Ustawa z* 6.6.1997 *Kodeks karny*, [KK], Dziennik Ustaw of 1997 No. 88, item 553 as amended (*The Criminal Code*).

[106] *Ustawa z* 7.1.1993 *o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży*, Dziennik Ustaw of 1993 No. 17, item 78

In the civil law conceived child is called nasciturus.[107] It means "the new who has to be born".[108] The lawmaker did not introduce the general regulation describing the legal position of nasciturus, however the civil law rule is protection at least some effects of events followed the period when child is *nasciturus*.[109] Authorization and pretences admitted to a nasciturus child refer to: inheritance[110], improving damages which happened before the birth in a condition that it will be born alive.[111]

According to article 75 *The Family and Guardianship Code* even unborn child may be admitted if it was conceived. Admission is an institution when a man who is biological father of the unborn child affirms before the registrar's office manager, that he is child's father and mother this man's conation confirms.[112] It causes law results in the area of civil state, having reference results backward, until the moment of conceive.[113] The father of unborn is the subject of interest child's situation and will be reliable for its health and ensure good conditions during the pregnancy and childbirth.[114] Furthermore the article 182

(*The Law on Family Planning, Protection of Human Fetus, and Conditions Permitting Pregnancy Termination*); *Ustawa z dnia* 30.8.1996 *o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży oraz o zmianie niektórych innych ustaw*, Dziennik Ustaw No. 139, item 646 (*The Act amending the act on family planning, protection of the human fetus and conditions for the admissibility of abortion and amending certain other laws*).

[107] J. Haberko, *Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych*, Warszawa 2010, p. 61.

[108] Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2009, p. 148.

[109] M. Pazdan, *Osoby fizyczne*, M. Safjan (ed.), *Prawo cywilne – część ogólna*, Warszawa 2007, p. 938-941.

[110] *The Civil Code*, article 927 § 2.

[111] *The Civil Code*, article 4461 and article 446 § 2.

[112] J. Haberko, *Cywilnoprawna…*, p. 72.

[113] T. Smyczyński (ed.), *Pochodzenie dziecka w wyniku zabiegu medycznie wspomaganej prokreacji*, vol.12, Warszawa 2003, p. 216.

[114] T. Sokołowski, *Cywilnoprawna ochrona człowieka przed jego narodzeniem*, S. Pikulski (ed.), *Ochrona człowieka w świetle prawa RP*, Olsztyn 2002, p. 112.

of *the Code* proclaims that "for *nasciturus* but not born yet child a guardian is set up if it is necessary to protect future child's rights". In the doctrine it is made that they are whichever child's rights, not only these marked in the act.[115] Quoted above codes give inducement to claim, that in Polish civil law exists, although unstated rule: *nasciturus pro iam nato habetur quodiens de commodis eius agitur*, what means that conceived child, but not born yet, should be treated as a born child because of its benefit.[116] This code has to be used as an advice during searching the solution for unstated in the rule cases.

Passed in 2000 *The Law on Ombudsman for Children* gave the definition of a child as "every human being since conception till the age of consent".[117] The obligation of this office is to provide children realization due them rights at every stage of their lives, so also before and after birth. It is possible to use help of this office, for example, in situation when the child's father would like to be against the abortion.[118]

On 7th January 1993 the Seym of the Republic of Poland passed *The Law on Family Planning of Human Fetus and Conditions Permitting Pregnancy Termination*[119], which did not guarantee certain and direct law-penalty protection of conceived child. Coming into effect of that law delimited pregnancy termination – since then the legal abortion may be done if one of these circumstances come into being: 1) when pregnancy endangers mother's life or health, 2) when pre-natal tests or other medical findings indicate a high risk that the fetus may be severely and irreversibly damaged, or to be suffering from an incurable disease dangerous to its life[120], 3) when there are

[115] Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2009, p. 150.

[116] A. Kawałko, H. Witczak, *Prawo cywilne. Zarys prawa*, Warszawa 2008, p. 79.

[117] *Ustawa z* 6.1.2000 *o Rzeczniku Praw Dziecka*, Dziennik Ustaw of 2008 No. 214, item 1345 (*The Law on Ombudsman for Children*).

[118] M. Tunkiewicz, *Podmiot i przestrzeń duchowa wczesnej formacji prorodzinnej*, W. Nowak (ed.), M. Tunkiewicz (ed.) *Godność człowieka i rodziny*, Olsztyn 2007, p. 146.

[119] Dziennik Ustaw of 1993 No. 17, item 78.

[120] The Supreme Court of the Republic of Poland, judgment of 13 October 2005

strong grounds for arguing that the pregnancy is a result of criminal activity[121].

In consideration of health problem the pregnancy termination is done by a doctor in hospital after medical consultation with another doctor, but not this one who is doing the termination. Cyesis may be terminated on every stage of it.[122] Pregnancy termination because of embryo-pathological stage is done in hospital until the moment of child's self-dependent life outside the mother's system.[123] A criminal problem a prosecutor ascertained. It is not necessary that criminal deed was surly confirm, but if there is something which arouses suspicions that the action was done. On possibility of pregnancy termination it does not influence its author, his or her seizure or sentence.[124] Pregnancy termination is possible if since the beginning of cyesis is not more than 12 weeks.[125] A condition to terminate a pregnancy is a pregnant woman's written permition. In the case of juvenile or incapacitation a legal representative's permission is demanded. If the pregnant women is under 13 tutelar court of justice's permission is needed[126], and a juvenile woman has a right to tell her opinion.[127]

Since 1996 the *Act* let pregnancy termination always when the material conditions of a pregnant woman are hard or her personal situation is difficult; a declaration is demanded to confirm by a pregnant woman and consultation with another doctor or other person (for example a midwife) but not this one who is going to do

(IV CJ 161/05).

[121] The Supreme Court of the Republic of Poland, judgment of 21 November 2003 (V CK 167/03).

[122] A. Zoll, *Rozdział XIX, Przestępstwa przeciwko życiu i zdrowiu*, A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz. T. 2, Komentarz do art. 117-277 k.k.*, Kraków 2006, p. 304.

[123] *Ibidem*.

[124] J. Kondratiewa, *Początek prawnej ochrony życia*, Warszawa 2009, p. 260.

[125] A. Zoll, *Rozdział XIX...*, p. 304.

[126] *Ibidem*.

[127] J. Kondratiewa, *op. cit.*, p. 260.

the termination, the surgery would be possible after 3 days from the consultation. But the regulations of 4th circumstance lost their value on 23rd December 1997 based on the president of Judgments of the Constitutional Court announcement on 18th December 1997.[128] In 2007 it was tried directly to write in *The Constitution* law protection of a human life since the conception but his proposal was not approved by Seym.[129] In spring 2011 a civic project of law was submitted to Polish Republic Seym[130], signed by 600 000 inhabitant of Poland, demanding completely protection of people lives i.e. liquidation exception in human life protection in Polish law. It makes law protection of all children, without any exception, antenatal ill and conceived in prohibited action. Passing the act will lead to the situation when Polish law protecting life be compact and consistent. Passing the law close down deeply unfair discrimination situation when a right to live is refused some group of conceived children.

Unfortunately on 31st August 2011 members of the Seym rejected the draft of the citizenship act. In support of the draft; 186 members voted for, 191 voted against, and 5 withhold from voting.[131]

Penalty rules refer to abortion send to *The Law* of January 7th 1993 *Family Planning protection of human fetus and Conditions Permitting Pregnancy Termination*, stating legal pregnancy termination. Whereas in *The Penal Code* abortion is penalized in spite of rules containing in the Act, and injury body execution or disorder of conceived child's health.[132]

Nowadays abortion crime is put in order in article 152 of *Penalty Code* from 1997. The article says: "§ 1.who, with the woman permition, terminates her pregnancy breaking the rules is under an act of imprisonment penalty till 3 years; § 2. Under this same penalty is a person who helps pregnant woman to terminate pregnancy disturbing

[128] Dziennik Ustaw of 1997 No. 157, item 1040.

[129] http://orka.sejm.gov.pl/Druki5ka.nsf/0/79EB9DAFA9F1849FC12571F60033806C/$file/993.pdf (11.5.2011).

[130] http://fronda.pl/blogowisko/blog/autor/mariusz3 (13.7.2011).

[131] http://www.opoka.org.pl/aktualnosci/news.php?id=39137&s=opoka (23.9.2011).

[132] W. Lang, *Prawne problemy ludzkiej prokreacji*, Toruń 2000, p. 58.

an act or induces her to do it; § 3. somebody who commits an act described in § 1 or 2, when an embryo achieved ability to live himself outside the pregnant woman`s organism, is under imprisonment penalty since 6 months to 8 years".[133] The subject of that crime protection is durable being of pregnancy, i.e. *nasciturus* and life and health of pregnant woman. In up-to-date law every abortion different from the *Act*, even with the permition of a pregnant woman, is under penal liability a person who did the action.[134] An author of an abortion may be everyone. It is a common crime. Doctors are most often law-breakers of abortion who do his action breaking the law which lets to pregnancy termination.[135] Polish law provides penalty sanctions for pregnancy termination with transgression the rules of *The Law of Family Plannig*. A pregnancy termination can take place with or without women's permition. In case when abortion was with the pregnant woman's permition, a person who did an abortion is under the penalty under 3 years. Under this same penalty is a person who helps a woman to terminate pregnancy disturbing the ruls of *Act* or inclins her to do it. And a person who does an action of abortion, when a nasciturus achieved possibility to live outside mother's organism, is under imprisonment penalty since 6 months till 8 years.[136] An example of help may be covering the costs of pregnancy termination[137], or organization of abortion touring to the countries which abortion law is more liberal.[138] In a case when pregnancy termination took place in a consequence of an act of violence towards a pregnant woman or in another way without her permition came to pregnancy termination or using violence, illegaly threat or cunning devices a pregnant woman

[133] KK, art. 152.

[134] T. Bojarski, A. Michalska-Warias, J. Piórkowska-Flieger, M. Szwarczyk, *Kodeks karny. Komentarz*, wyd. 4, Warszawa 2011, p. 320.

[135] R. Krajewski, *Prawne kontrowersje ochrony życia człowieka. Studium z prawa polskiego i prawa kanonicznego*, Płock 2004, p. 85.

[136] KK, art. 152 § 1-3.

[137] O. Górniok, *Kodeks karny. Komentarz*, Gdańsk 2005, p. 120.

[138] J. Wojciechowski, *Kodeks karny. Komentarz, orzecznictwo*, Warszawa 2000, p. 283.

was led to abortion, an originator is under an imprionment penalty since 6 months till 8 years. An author who did above-mentioned action, when a nasciturus reached the possibility to live outside a pregnant woman's organism is under imrisonment penalty from 1 to 10 years.[139] If the consequence of pregnancy termination, done with a woman's permition, is her death, its author is under imprisonment penalty from 1 to 10 years. Under this same penalty is a person who helps a pregnant woman to terminate pregnancy disturbing the rules of Act or inducing her to do it. In a case when pregnancy termination took place at the time when a nasciturus achieved possibility to live oneself outside the woman's organism (no matter if the abortion was with or without pregnant woman's permition), when a pregnancy was terminated in a result of using violence, illegal threat or cunning devices and as a result of those actions a pregnant woman died, an author of abortion is under imprisonmen penalty since 2 untill 12 years.[140] Fine, limited freedom or imprisonmen till 2 years is for a person who causing *nasciturus*' injuries or its life is in danger as a result of health disorder. However, a doctor does not commits a crime if injuries of the body or health disorder of a *nasciturus* were during the treatment nesessery for staving off a danger threatens pregnant women or *nasciturus*' health or life. Under penalty is not a *nasciturus*' mother who causes its body demages or helth disorder which threaten its life.[141]

A law "Don't kill" is univocally given by God and that is why people do not have any possibilities to change it themselves. If in all civilized countries killing a man is a crime, why does the discussion about legal regulation of prohibition of abortion cause so many disputes?[142] Important is a woman who conceived a child consciously or not (for example under the influence of drink) her partner or husband but not a small, unprotected person, who did not ask to live in this world.

[139] KK, art. 153 § 1-2.

[140] KK, art. 154 § 1-2.

[141] KK, art. 157a § 1-3.

[142] QA, No. 19-23, *op. cit.*

All cods appear decidedly against them who commit attempt on human's life. Every murder shocks people. In everyday sounds of information killing innocent people done in the law protection escape notice. It means about a rule written in many countries laws permitting to kill unborn children and also deprive incurable ill and old people of their lives (euthanasia). Innocent children, in the first stage of their development during the artificial reproduction, die. They also die during the medical experiments on conceived human life.[143] We should remember that if the new life started to exist, when pregnancy began parents must accept it regardless of their economical conditions.

No people's law can collide with the law of nature. Every law which let pregnancy termination is from the moral point of view unacceptable. If the State's law lets abortion[144], a person, who has right conscience, can never follow the law which is immoral itself.[145] Christians have a right and duty demand a law which would protect every innocent man's life, also these unborn.[146]

5. Summary

Among all human's rights the law to live since the moment of conception is the which cannot be questioned. In nowadays world unfortunately it is different and that is why a constant protection of conceived life is needed. In Church's teaching human life invariably

[143] T. Ślipko, *Dyskusja czy walka z wiatrakami? Uwagi na marginesie artykułu Adama Chmielewskiego Czy aborcja jest niemoralna?*, B. Czech (ed.), *Małżeństwo w prawie świeckim i prawie kanonicznym. Materiały Ogólnopolskiej Konferencji Naukowej zorganizowanej w dniach 12 i 13 maja 1994 roku w Katowicach*, Katowice 1996, p. 403-411.

[144] Dziennik Ustaw of 1993 No. 17, item 78.

[145] J. Krukowski, *Polskie prawo wyznaniowe*, Warszawa 2005, p. 274-276; W. Witczak, *Odpowiedzialność karna lekarza za nieudzielenie pomocy w stanach zagrożenia życia*, A. Dębiński (ed.), A. Grześkowiak (ed.), K. Wiak (ed.), *Ius et lex. Księga jubileuszowa ku czci Profesora Adama Strzembosza*, Lublin 2002, p. 81-85.

[146] J. Mazur, *Katolicka nauka społeczna*, Kraków 1992, p. 201-204.

is recognized the highest earthly value and great God's gift. Many statement about human life worth and its protection were published.

"Apart from wars, abortion is one of a big people's failure".[147] The author of this sentence perfectly describes a huge problem of abortion. Alarming data about several million of women who admit pregnancy termination every year give evidence of it and also lack of consequences in lawmaking and observance of its rules.

Only constant teaching of God's rights, consciousness awareness of human life value may bring changes in nowadays generations' minds. Because person's life is in danger at every stages of its development, it needs intensive effort of all good willed people. Nobody can be exemption from this obligation. Closing towards the human being life gift, escape from its defense, indifference towards *nasciturus*' lot, lack of committal in life's service is a serious sin of remissness. That is why building of life culture is very important. It should be built by the public opinion, media, state. Lot of many nasciturus' depend on public activity.[148] Good quality, which we are asked to, is proclamation the truth about holiness and sacredness of human life. In the discussion about abortion clearly opinion for unborn children ought to be shown. The government, local governments and different institutions' (which are not connected with government) work is vital towards helping families with many children[149], leading action, which aim is to protect life in danger of unborn children, supporting opening house for alone mothers and activity for unborn ("life window"). Media people have to awareness that, information they spread, get at the masses and should not be mutilated or deformed.[150] A

[147] U. Dudziak, *Przerywanie ciąży w ocenie ekspertów – pokłosie międzynarodowej konferencji o aborcji*, „Roczniki Teologiczne", vol. 52 (2005), p. 147.

[148] R. Sztychmiler, *Wartości w życiu rodziny i społeczeństwa*, J. Guzowski (ed.), *Kościół wobec przemian w Polsce. Szanse i zagrożenia. Materiały II Spotkań Naukowych w Hosianum, czyli XII Warmińskich Dni Duszpasterskich*, Olsztyn 1996, p. 80-93.

[149] T. Borutka, *Społeczne nauczanie Kościoła. Teoria i zastosowanie*, Kraków 2004, p. 323-324.

[150] J. Krzywkowska, *Chrześcijanin dobrym dziennikarzem*, R. Sztychmiler (ed.), *Media – wartości – prawo*, Olsztyn 2008, p. 83-85.

proper legal solution about adoption should be introduced. Not only a child but also its parents ought to have particular laws guaranteed.[151] As members of parliament should be chosen people who defence human life since the conception until natural death[152]. No one has a right to disturb basic people's right, a law to live. No reason and motive (economic, social, political) cannot proclaim an argument for rightness of pregnancy termination. The great advocate of life culture was the Pope John Paul II, who in many documents written during his pontificate, declared for life. Also the Pope Benedict XVI sees a great need to propagate proper Christian teaching about basic moral laws. The Catholic Church many times show the public authorities that in creating legislation the weakest should be considered. The problem of a human life protection has a connection with a preservation of conscience and religion freedom. A part of Catholics share Church's standpoint about pregnancy termination and using contraception, but the other part reject them. Strong-minded standpoint of the Catholic Church in the spheres like moral inadmissibility of abortion, awaken a lot of recalcitrance in some social and political circles, and many people demand attestation these activities.[153] The Catholic Church is described as a main enemy of an abortion. Besides – being in favour of obscurantist assumptions that nasciturus is a part of woman's body but not a separate life – the outline »the attempt on woman's freedom« and »her law to own tummy« is manipulated, showing the life of unborn as a matter of conscious and »private and religious«[154]. In a speech to Spanish ambassador on 18th June 2004 John Paul II said: "The life protection is everyone's duty because the question of life

[151] T. Bilicki, *Dziecko i wychowanie w pedagogii Jana Pawła II na podstawie jego encyklik, adhortacji, wybranych listów i przemówień*, Kraków 2007, p. 64-67.

[152] R. Sztychmiler, *Prawa rodziny w prawodawstwie i nauczaniu Jana Pawła II*, J. Rebeta (ed.), *Zagadnienia praw rodziny. XII Dni Praw Człowieka w Katolickim Uniwersytecie Lubelskim 1994*, Lublin 1997, p. 59-73.

[153] J. Mariański, *Jan Paweł II jako Papież rodziny*, W. Nowak (ed.), M. Tunkiewicz (ed.), *Godność człowieka i rodziny*, Olsztyn 2007, p. 59.

[154] F. Adamski, *Sytuacja społeczno-moralna kraju u zarania Trzeciej Rzeczypospolitej i jej aspekty wychowawcze*, F. Adamski (ed.), *Wartości – społeczeństwo – wychowanie. Studia z pedagogiki społecznej*, Kraków 1995, p. 14.

and its support is not only Christians prerogative but it also affects everybody's, who endeavours the truth and cares about mankind destiny, conscious. People who are reliable for the public life, as guards of all laws, are obliged to protect life and especially lives of the weakest and unprotected. The truly »social achievements« are these which serve everybody's life and at the same time society's values and protect them". [155]

A law to live means a law to be born, to exist until the natural death "until I live I have a right to live". A child sometimes appears – from the parents point of view – untimely or as an effect of rape but it will not be an unfair aggressor because it is innocent.[156] Legalization of pregnancy termination is nothing more as an authority given an adult, who in legal way may destitute of life unborn person, this one who cannot protect itself.[157] The commandment "Don't kill" does not foresee any exceptions. An anxiety for life should be fund in spontaneous people's behavior and in institutional creation of help.[158]

The life protection is guaranteed in many legal acts – national and international. *The Constitution of Polish Republic* does not say directly about protection of *nasciturus*. But we can conclude it from the general rule of life protection. *Polish Civil Code* guarantees property law protection of *nasciturus*, giving the unborn child conditional legal capacity starting with the moment of conception. *Crime Code* decrees that *nasciturus* is generally protected because a pregnancy termination is prohibited, but there are some exceptions which are contained in *The Law on Family Planning, Protection of Human Fetus and Conditions Permitting Pregnancy Termination* of January 7th 1993 when abortion is allowed. The analysis of obligatory rightful rules does not give the

[155] „L'Osservatore Romano" 11-12 (2004), p. 20.

[156] M. Machinek, *Szacunek dla życia ludzkiego jako czołowy motyw nauczania Jana Pawła II*, R. Sztychmiler (ed.), *Jan Paweł II prawodawca i sługa prawa Bożego*, Olsztyn 2006, p. 185.

[157] Jan Paweł II, *Przekroczyć próg nadziei*, Lublin 1994, p. 152.

[158] H. Krenczkowski (ed.), *Dekalog. Przemówienia i homilie Jana Pawła II. IV pielgrzymka do Ojczyzny*, Pelplin 1991, p. 126.

univocal answer the subject of unborn child protection and woman's right to abortion.

In the stated matter a teaching of the Catholic Church is constant. Since the very beginning an abortion was seriously prohibited and was treated as a solemn offence against God's gift of life. A Church standpoint is unmistakable and immune from changes. An abortion is regarded as shamefully, disgusting and worthy condemnation crime against the weakest lives. Canon law gives nasciturus legal subjectivity and treats it as a born man. That is why pregnancy termination is under threat the heaviest Church's punishment – excommunication, which reaches an originator at the moment of committing the crime. It is different from formal law, where a pregnant woman is not responsible for procure an abortion, canon law clearly show that a woman commits a crime and an excommunication punishment will be inflected. Uncertain numerical data about legal and illegal abortions, cause that a real scale of this occurrence is difficult to estimate. Thanks to efforts of pro-choice movements less consent for abortion is observed. In Poland is a constant argument about woman's right to abortion. A guaranteed law to terminate pregnancy limits fully the rights of an unborn person, and its basic powers – law to live innocent who is put to death.[159]

* * *

Prawna ochrona dziecka poczętego

Życie jest najwyższą wartością jednostki. Wśród wszystkich praw człowieka, prawo do życia od chwili poczęcia jest prawem, które nie może być kwestionowane. W świecie współczesnym niestety jest inaczej i dlatego potrzebna jest stała obrona życia poczętego. Zamykanie się na dar życia ludzkiego, ucieczka od jego obrony, obojętność na los nienarodzonych dzieci, brak zaangażowania się

[159] KKK, No. 2272.

w służbę życiu jest poważnym grzechem zaniedbania. Dlatego tak ważną rzeczą jest tworzenie kultury życia.

Prawna ochrony dziecka poczętego z punktu widzenia prawa kanonicznego, prawa międzynarodowego i prawa polskiego jest wciąż aktualna. Państwa mają obowiązek podejmować właściwe kroki dla ochrony życia ludzkiego. Wszelkie podejmowane działania winny zmierzać do wyznaczonego celu, jakim jest poszanowanie i ochrona należnych człowiekowi praw wynikających z godności osobistej.

W Polsce trwa ciągły spór o prawo kobiet do aborcji; zapomina się zaś o tym, że zagwarantowanie prawa do usunięcia ciąży, ogranicza całkowicie zrealizowanie prawa osobie jeszcze nienarodzonej, do jej podstawowego uprawnienia – prawa do życia.

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STANDARD OF PERSONAL DATA PROTECTION IN POLAND - OVERVIEW OF SELECTED ELEMENTS[1]

On 29 August 2011 fourteen years have passed since the adoption of the Polish Act on Personal Data Protection[2] (the Act). During that time this legislation travelled an interesting path from legal novelty, a kind of "ephemera", barely noticed by most of the lawyers, to the act of fundamental importance for the protection of personal data in Poland. This conversion also concerned the perception of the main regulatory body, established under the Act, the Polish Inspector General for Personal Data Protection (Inspector General).

Supervisory authorities of a similar nature to the Polish Inspector General have been established around the same time in all the young democracies of Central and Eastern Europe. Given their similar way to democracy, common experience and the fact that occurrence of this new phenomena was previously unknown in Western Europe, since the beginning these bodies worked in close cooperation, often sharing their national experiences with each other. The system of data protection in Poland has thus a number of similarities to the solutions

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[1] Following article is updated translation of the article of Sebastian Ożóg, *Standard ochrony danych osobowych w Polsce – omówienie wybranych elementów*, „Polski Rocznik Praw Człowieka i Prawa Humanitarnego 2010", Olsztyn 2010, p. 149-164.

[2] Dz.U. 1997 Nr 133, poz. 883, consolidated text Dz.U. 2002 Nr 101, poz. 926 with changes.

of other countries in the region, in particular due to their exposure to the same standards of protection under international regulations. In 2001 Polish Inspector General has initiated a series of meetings of National Inspectors for Personal Data Protection in Central and Eastern Europe. At the end of April 2011, in Budapest, thirteenth such a meeting took place.[3]

Meetings of a similar nature are also held in a wider circle. There is, organized since 1991, so called Spring Conference of European Data Protection Authorities attended by national representatives from most of the European countries.[4] Under this framework, consecutive meetings are devoted to various aspects of data protection in Europe and their participants take closer look not only at the implementation of European Union (EU) legislation, but also at monitoring their compliance in individual countries. Since 2004 there also operates the European Data Protection Supervisor, who controls the processing of personal data by EU institutions and bodies. In addition, all national legislations of the EU countries are strongly influenced by the regulations of the Council of Europe, which for years has been promoting high standards for the collection, processing and protection of personal data of all kinds. Currently, all the regulations created at national and international level are increasingly intertwined, creating unique system of protection of personal data, which also shapes and determines Polish national standard of personal data protection.

The issue of personal data protection is continuously gaining importance. Each year there are new initiatives for its expansion and more complex regulation. This is a consequence of the accumulation of risks in this area and the emergence of new, often unanticipated,

[3] As a tool to assist the work group also created a website (http://www.ceecprivacy.org), where legal acts on personal data protection from member States and topics of commonly discussed issues are presented.

[4] Last conference was held on 5 April 2011 in Brussels. The Spring Conference, in particular, addresses issues related to the application of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and free movement of such data and also issues of the protection of personal data processed by police and in the context of judicial cooperation between countries in criminal and civil cases.

problems for which existing regulatory solutions are insufficient. This requires continuous monitoring of the growing phenomena in this field and as quickly as possible, though not provisional, adaptation of existing legal solutions, so that they still constitute an effective remedy against possible abuse, yet without leading to inflation of the amended regulation.

Since its adoption Polish Act has been amended seventeen times.[5] Some of these amendments were ordinal and of minor character, while others have fundamentally changed the scope and nature of the regulation.[6] It should be borne in mind that Poland (like most of the countries of Central and Eastern Europe) had to introduce legal protection standards in this field from the basis. They were created, unlike in Western European countries, almost parallel to a broader standard of general privacy protection. With the lack of national regulatory experience in this matter, the Act was heavily modelled on the legislation of other European democracies,[7] also strongly reflecting the international regulations in this field.[8]

Since its enactment perception of the Act by lawyers and experts on data protection has significantly improved (though it said to still have some weaknesses). What is more important however, it has significantly increased legal consciousness of Polish society in the scope of personal data protection (which can probably be regarded

[5] After coming parliamentary elections we should expect next amendments, given the changing approach to personal data protection across Europe, especially in the context of their processing with increasing process of cross-border *cloud computing*.

[6] For example, the amendment of 30 August 2002 (Dz.U. 2002 Nr 153, poz. 1271) amended only one provision – it changed words "the Supreme Administrative Court" to "administrative court" while the amendment of 22 January 2004 (Dz.U. 2004 Nr 33, poz. 285) amended 35 of all 62 articles.

[7] Patterns of national law derived primarily from Western European countries such as France, Germany and Switzerland.

[8] In particular, Convention No. 108 of the Council of Europe of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data and Directive 95/46/EC of the European Union of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

as a success of this regulation). Currently, of all of the peoples in the EU, the Poles are "most aware of their rights to privacy and right to privacy", while three years ago, according to studies in the area, they occupied distant eighteenth place.[9]

From the act known only to specialists in the field it has became commonly identified and invoked regulation. Similarly, the Polish Inspector General from an almost anonymous government official became the often cited and commonly recognised authority present not only in the specialist literature, but also in mass media, gathering increasing interest and attention in many of its activities. A clear confirmation of this is published on 10 October 2008, the TNS OBOP report of a survey on the attitudes of Poles related to the protection of personal data and data protection standards in Polish companies.[10] According to the survey 88% of Polish citizens are aware that their consent is required to use their personal data, and 78% are aware of the informatory obligations of the institutions collecting such data.[11] Because of the common recognition of the clauses on the processing of personal data in business activity, commonly enshrined in employment contracts or documents used in recruitment procedures, the knowledge of Polish citizens about the existence of the Act and its matter exceeds their knowledge of other legal acts. This phenomena however, is still not accompanied enough by a proportional increase in legal awareness of the government officials, as evidenced by the

[9] Interview with the Polish Inspector General – Michał Serzycki in the *Dziennik Zachodni,* available online at http://polskatimes.pl/stronaglowna/153159,internet-no-memory-elephant,id,t.html (20.12. 2009).

[10] TNS OBOP report from 10 October 2008 commissioned for Fleishman-Hillard. Telephone survey consisted of 13 closed questions (using CATI method) was carried out throughout the country during the period from 25 September to 3 October 2008. The sample was representative of the group of 300 people aged 18 and older.

[11] However, these statistics are not as optimistic when it comes to opinions of the Poles on the quality of data processing in the domestic institutions – less than half of respondents (43%) is confident about the good protection of personal data there. Even worse, very few people (5-7%) protect their personal information by destroying the documents containing address data, handwritten signatures, or medical data before trashing them.

complaints submitted to the Inspector General, largely concerning the processing of personal data in the structures of government.

Due to this increased popularity of the personal data processing regulation the Act was in recent years a subject to numerous commentaries and studies. Some of them had an impact on subsequent changes in the regulation itself. Matter of the Act is therefore already commonly known and complied. Most of the concepts and institutions contained therein, hardly recognised and enigmatic some years ago, no longer raise such doubts, and those not yet fully interpreted are increasingly more accurately and confidently clarified within the jurisdiction of the courts.

The greatest challenge currently is not the interpretation of the institutions and concepts contained in the Act, but rather keeping up with the technological progress in the field of storage and processing of personal data requiring almost continuous amending of the legislation. Particular challenges in the coming years probably await in the field of processing of personal data with use of so-called *cloud computing* – information analysis systems based on parallel processing of data in a complex multi-computer systems with hundreds or even thousands of machines in different, often distant locations. The individual elements of such a system are often located in the territories of different countries, which, in the absence of legal regulation regarding that specific area, can easily lead to abuse and complications in applying the personal data protection legislation.

However, Polish legal system concerning the protection of personal data is not based solely on the Act, which is focused strictly on its title subject. To reconstruct the complete standard of protection in this field we also must take into consideration other legislation relating to the protection of privacy in its broader sense. These regulations partly overlap, creating a more complex system of guarantees, thus creating a tighter, though sometimes less transparent, protective barrier. It is worth remembering that the Act, because of its place in the hierarchy of sources of law, must be compatible with many other regulations in which one can seek additional protective measures, not guaranteed in the Act itself. This article is an attempt

of overview of these acts, and selected issues associated with their implementation.

The foundation of the whole legal system in Poland is the Constitution.[12] Because of its superior role in Polish legislation the Constitution determines the position of the other legal regulations and thus determines their mutual interaction. Right to privacy is regulated directly in Articles 47, 49 and 50 of the Polish Constitution, while the basis for the protection of personal data itself are enshrined within its Article 51. Some guarantees within the Act constitute direct expansion of the provisions of the Article 51 (e.g. the term "information concerning a person", used in the first paragraph of Article 51, seems to be synonymous to the concept of "personal data" within the meaning of the Act).

According to the provisions of the first paragraph of Article 51 of Polish Constitution provision "no one may be obliged, except under the law, to disclose information concerning himself". This is a significant restriction as to the possibility of legal obligations to the citizens to disclose any data relating to them. This provision does not preclude the possibility of regulating personal data of the Polish citizens in subordinate legislation, but such regulations should meet specific requirements set out in Article 92 of the Constitution, meaning these regulations should be consistent with other laws and within the limits specified in them.[13] In light of this provision it seems to be unacceptable to introduce any obligation to disclose personal information in other kinds of regulations, such as company work regulations or employment contracts.[14] However, in case of additional benefits for the employees (such as social grant) these can be dependant on the voluntary submission by the beneficiary his certificate of earnings obtained with another employer.[15]

[12] Dz.U. 1997 Nr 78, poz. 483 with changes.

[13] Judgment of the Regional Administrative Court in Warsaw of 2 November 2005 (Ref. No. VI SA / Wa 1080/2005).

[14] J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona danych osobowych. Komentarz (Rev. 4)*, Kraków 2007, p. 113-114.

[15] As said by the Polish Supreme Court – Administrative, Labour and Social Security

In the second paragraph of the Article 51[16] the legislator introduced a general restriction on processing personal data by public authorities only to the data necessary in a democratic state of law. This general clause prevents state authorities from collecting data "just in case". Each category of data collected should be treated individually and their processing permitted only exceptionally, after fulfilling the condition of necessity in a democratic state of law, which undoubtedly contains effective protection of citizens' personal data. In addition, according to the of Article 51 paragraph 5, the rules and procedures for gathering and sharing such information must be regulated by law.[17] In conjunction with the disposition of the Article 51 paragraph 2it means that public authorities in Poland cannot collect and process personal data without explicit legal basis. Such legislation must clearly define the categories of personal data that can be processed and specific rules for storing and protection of such information. It should be noted that this restriction applies only to public authorities – they do not apply to data stored or processed by private individuals or any other entities that do not have the attribute of public authority. In case of such data remedy might be sought on the grounds of the Article 47,[18] which protects the whole range of private and family life, as well as honour and reputation of individuals. Effectiveness of such general basis might be questioned, but when lacking specific regulations regarding the protection of personal data protective measures should be derived directly from the guarantees of the right to privacy contained within the Constitution, also guided by the, often rich in this matter, jurisprudence of the European Court of Human Rights.

Board in judgment of 8 May 2002 (Ref. No. I PKN 267/2001).

[16] Art 51 para 2 of the Polish Constitution: "Public authorities shall not acquire, collect and share information on the citizens other than those necessary in a democratic state of law."

[17] It is no coincidence that those provisions are similar to the standard conditions of privacy and family life within the Article 8 of the European Convention on Human Rights. Provisions of the Polish Constitution were in fact largely inspired by the Convention and the case-law of the European Court of Human Rights.

[18] Art 47 of the Polish Constitution: "Everyone has the right to protect his privacy, family, honour and good name and to make decisions about his personal life."

Apart from the above-mentioned limitations there also exist specific supervisory privileges of every individual in context of data concerning him. As stated expressly in Article 51 paragraph 3 and 4 of Constitution everyone has the "right to access the official documents and data collections concerning him", and the right to "request the correction or deletion of information that is incorrect, incomplete or harvested in a manner contrary to law".

Considering clear wording of Article 51 paragraph 3 one can come to the conclusion that its disposition involves a broader category of documents and data sets than only those containing personal data. Theoretically the documents "concerning him" need not always contain the personal information on someone, but in the light of this provision any such collection should be available to the supervision of an individual.[19] Right formulated by that provision may be, according to its further disposition, limited by law. Also, because this regulation regards only the "official documents and data sets", one cannot request on its basis access to the materials held by other private individuals.[20]

Special position in the Polish legal system have international agreements. Those concerning personal data protection fall into the category of "liberties, rights or obligations of citizens enshrined in the Constitution" that are ratified with prior consent of Polish Parliament (Sejm) granted in a way of statute.[21] This gives them a privileged position in the Polish legal system, because, according to Article 91 of the Constitution, they have precedence over the laws whose contents could be reconciled as contrary to the stipulations of such agreements. Provisions of such agreements have shaped to a large extent the legal standards concerning privacy in Poland and within it also rules on the protection of personal data. In particular, the weighty role is played by two European sources of such regulation – the Council of Europe

[19] In contrast, interpreting the indicated stipulations narrowly – only to the data files directly to the person – J. Barta, *op. cit.*, p.114.

[20] *Ibidem*, p.114-115.

[21] Article 89 para 1.2 of the Polish Constitution.

and the European Union, and also universally applicable human right standards adopted within the United Nations.

European organisation of the oldest traditions in the protection of human rights is undoubtedly the Council of Europe. Within this organization was introduced the majority of the recommendations in the field of privacy, and in 2006 it established[22] international Data Protection Day, celebrated every year on January 28. Numerous conventions and resolutions adopted within the Council of Europe, as well as the jurisprudence of the European Court of Human Rights (ECHR), established under the European Convention on Human Rights (the Convention),[23] has had an enormous impact on the development of human rights on our continent and beyond.

The right to privacy has been enshrined in the Article 8 of the Convention. It is impossible to discuss here, even briefly, all the case law on the right to privacy, but we can pay attention to the selected thesis from the case-law that apply to the issues of personal data protection. Interestingly, despite the significant number of complaints from Poland submitted to the Court each year, they rarely concern the processing of personal data.[24] This can perhaps be regarded as a sign of a certain effectiveness of domestic remedies in this area.

To meet the standards of the Convention, data processing must be done "in accordance with the law" and must be "necessary in a democratic society".[25] The processing of personal data "should have some basis in domestic law", that "should be accessible to

[22] That is the anniversary of the opening for signature by the Council of Europe the Convention No. 108 of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data.

[23] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ratified by Poland on 19 January 1993 (Dz.U. 1993 Nr 61, poz. 284 with changes).

[24] Recently, however, there were complaints about the compliance with the Convention of the lustration proceedings in Poland and limited access of the defendants to data archived from the communist era, still prohibited by a government security clause (ECHR judgments in cases of: *Matyjek v. Poland*, *Bobek v. Poland*, *Luboch v. Poland* and *Rasmussen v. Poland*).

[25] Article 8 para 2 of the Convention.

the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law".[26] In the event of such interference, the data collected should be limited to information necessary for the purposes of the investigation.[27] Storing and sharing of the gathered information should be carefully regulated, and those which data subjects should be able to request changes to this information or remove them when they would be false, defamatory or would not meet the criteria set by law.[28] State authorities also cannot restrict the right of access to documents related to the judicial proceedings because of their classified nature,[29] as well as establish timely infinite restriction of access to such classified data, especially in the case of archival documents, in particular, those produced by the secret services of the former regime.[30]

Information protected by right to privacy is not limited to the "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. "Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings".[31] Telephone conversations conducted from the workplace as well as those of the house may be covered by "private life" and "correspondence" and are also protected.[32] On the other hand one can not expect full respect for their privacy when knowingly engages in activities which, because of its

[26] ECHR judgment *Kopp v. Switzerland*, 25.03.1998, appl. no. 23224/94, § 55.

[27] ECHR judgment *Amann v. Switzerland*, 16.02.2000, appl. no. 27798/95, § 76.

[28] ECHR judgments *Leander v. Sweden*, 26.03.1987, appl. no. 9248/81 § 51, and *Rotaru v. Romania*, 04.05.2000, appl. no. 28341/95, § 56-59.

[29] ECHR judgment *Bobek v. Poland*, 17.07.2007, appl. no. 68761/01, § 57.

[30] ECHR judgments *Turek v. Slovakia*, 13.09.2006, appl. no. 57986/00, § 115 and *Luboch v. Poland* 15.04.2008, appl. no. 37496/05, § 61.

[31] ECHR judgment *Niemietz v. Germany*, 16.12.1992, appl. no. 13710/88, § 29.

[32] ECHR judgments *Klass and Others v. Germany*, 06.09.1978, appl. no. 5029/71, § 41, *Malone v. United Kingdom*, 02.08.1984, appl. no. 8691/79, § 64, *Huvig v. France*, 24.04.1990, appl. no. 11105/84, § 25 and *Halford v. United Kingdom*, 25.06.1997, appl. no. 20605/92, § 42.

specificity (in particular, how and where they happen), are subject to automatic recording and further processed using different technical means.[33]

The Council of Europe also adopted the act of fundamental importance specifically for the protection of personal data – Convention No 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data. It is the oldest act on an international scale, comprehensively regulating the issue of personal data protection.[34] The Convention is complemented by the Additional Protocol, which entered into force on 1 July 2004[35] The Convention, together with the Protocol, introduced in Member States a uniform standard of protection for personal data processing. Countries that have ratified it treat this standard as the basis for further development. It is, in the spirit of other legal solutions of the Council of Europe, the minimum standard and Member States are encouraged to expand it under their domestic legislation. However, the Convention does not introduce unalterable patterns. To the extent its regulation respects already existing national regulations, giving the States the possibility of shaping an autonomous and varied protection measures. The only demand is to ensure certain, specified by the Convention, level of protection of individuals in the context of personal data processing. It should be noted that this act does not give any specific rights directly to citizens of individual countries – it only imposes some obligations on the countries in the sphere of their public law.

The purpose of the Convention is to secure for every individual "in particular his right to privacy with regard to automatic processing

[33] ECHR judgment *P.G. and J.H. v. United Kingdom*, 25.12.2001, appl. no. 44787/98, § 57.

[34] Convention No. 108 came into force on 1 October 1985, following its ratification by five countries (France, Germany, Norway, Spain and Sweden). In relation to Poland the Convention entered into force on 1 September 2002 (Dz.U. 2003 Nr 3 poz. 25).

[35] Poland has ratified it on 12 July 2005 (Dz.U. 2006 Nr 3 poz. 15). This protocol primary purpose was to mitigate the differences between the Convention and the EU Directive 95/46/EC concerning established supervisory authorities in the matter of personal data processing and cross-border transmission of such data.

of personal data relating to him."[36] As such data should be considered, in light of the definition enshrined in Article 2a, "any information relating to an identified or identifiable individual". Article 5 of the Convention imposes on States obligations as to the quality of the processed data in terms of their collection and processing. According to these obligations personal data undergoing automatic processing shall be obtained and processed in a fair, lawful way and for legitimate purposes only. Stored data shall be accurate and updated and should not last any longer than is required for the purpose for which the data was collected. Data should be protected against destruction, loss or unauthorized access.[37] Furthermore, according to the Article 8, States must ensure that every individual shall be given information on the collections of data concerning him, and also given the possibility of rectification or erasure of data being processed in violation of the standards of the Convention. In such cases legal remedies should also be provided to the concerned individual (including the system of penalties and compensation, as regulated within the Article 10).

The Convention distinguishes a category of sensitive data ("Special categories of data"), which include: racial origin, political opinions, religious beliefs, as well as data concerning health, sex life and criminal conviction. Such data may not be processed automatically without providing under the domestic law additional safeguards.[38]

Restrictions on the application of the conventional measures may take place only under the law, if they are necessary in a democratic society for the protection of legitimate aims specified in the Convention, such as protection of the State security, its monetary interests, suppression of criminal offences or protection of data subjects or rights or freedoms of others.[39]

The Convention also established a Consultative Committee, composed of representatives of all states parties. This body may propose changes to facilitate the application of the Convention

[36] Article 1 ("Object and purpose") of the Convention No 108.

[37] Article 7 ("Data Security") of the Convention No 108.

[38] Article 6 ("Special categories of data") of the Convention No 108.

[39] Article 9 ("Exceptions and restrictions") of the Convention No 108.

(including changes in the content of the Convention), and, at the request of the member states, may take a position in any matter related to the implementation of the Convention.

In accordance with Article. 3, with accession to the Convention, States may, by giving the relevant statements, extend or limit the scope of the data covered by its regulation. (e.g. by extending the protective range also to the collection of data on institutions of individuals, or data processed not automatically).

There are also other measures, that can help countries in implementation of personal data protection. These are the resolutions and recommendations of the Council of Europe covering in detail data processing in various areas. They are not binding, but in practice consist a reference point for many domestic regulations of specific aspects of personal data processing.

The two most important of these resolutions concern the protection of privacy of individuals in relation to the use of electronic data in the private[40] and public sector.[41] Rules of these regulations clarify the categories of data undergoing processing along with the specific methods of accessing and processing of such data. They also contain safeguards and time restrictions of personal data processing. Council of Europe provides also other recommendations with certain protective measures in many other fields such as data banks storing medical, legal, statistical, scientific, marketing, or social insurance data. These are tens of acts concerning various aspects of data processing, where the discussion goes beyond the scope of this paper.[42]

In the nineties of the twentieth century, protection of personal data became also the point of interest of the European Union. Initially Member States were recommended to sign the Convention No 108 of the Council of Europe, but over time the EU institutions initiated proceedings to develop appropriate regulations within the framework of the Union. Currently, area of personal data protection is covered by

[40] Resolution of the Committee of Ministers of the Council of Europe No (73) 22.

[41] Resolution of the Committee of Ministers of the Council of Europe No (74) 29.

[42] For summary with a brief elaboration on these resolutions and recommendations see J. Barta, *op. cit*., p. 75-83.

several directives and regulations,[43] which were also (because of the divergent interpretations of) the subject of European Court of Justice within the framework reported by the national courts of Member States' legal questions.

The basic act of Community law concerning personal data is a European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (the Directive).[44] It obliged the Member States to implement its provisions into the domestic legislation (which was not without delays – the European Commission had to sue some States to convince them to initiate their respective legislative procedures). Eventually, in the prolonged state of lack of implementation of the Directive or in case of country not implementing the Directive properly, individuals may rely on the Directive itself before the national courts. The Directive was based on similar principles as the Council of Europe Convention No 108, but it has been adapted to new threats that have emerged since the adoption of the Convention. Provisions of the Directive is also more detailed, thereby leaving less leeway to Member States in which they adopt new regulations. The main difference is the introduction in the Directive of the obligatory appointment of national supervisory authorities to continuously monitor the status of data protection in the country. Second important difference is regulation concerning the transfer of data banks to other countries.[45]

In accordance with Article 25 of the Directive, the transmission of data banks can take place only if the country to which they are passed ensures an adequate the level of protection. The adequacy of

[43] Directive of the European Parliament and Council 95/46/EC, 2000/31/EC, 2002/58/EC, 2006/24/EC, Council Regulation (EC) No 2725/2000, Regulation (EC) No 4 /2001 of the European Parliament and of the Council, the Council Framework Decision 2008/977/JHA.

[44] OJ L281 of 23 November 1995, p. 31-50, amended by Regulation (EC) No 1882/2003 of the European Parliament and the Council of 29 September 2003 (OJ L284 of 21 October 2003, p.1).

[45] These differences have now been reduced by adoption of the aforementioned Optional Protocol to the Convention No 108.

protection should be assessed in light of all circumstances surrounding the transfer operation or set of such operations. It is important to pay special attention to the "nature of the transmitted data, the purpose and duration of the proposed processing operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country".[46] European Commission is specifically entitled here, as it may compel the state to prevent the transfer of data to selected country (in case of inadequate protective measures), and also it may confirm that the selected country meets the requirements of the Directive.[47] Independent advisory body, issuing opinions in this matter, is established under Article 29 Working Party, composed of representatives of national data protection authorities and the Commission representative. Exceptionally, it is possible to transfer personal data to countries that do not provide adequate protection, provided that they meet the requirements provided in Article 26 of the Directive.

Additional confirmation of *adequacy* of protection in other states is also possible by the national data protection authority (however, in light of the of the Polish Act Polish Inspector General essentially does not have that power)[48] , and by making an individual such assessment of *adequacy* of the level of protection by data administrator (although it is subject to the control of the national supervisory authority).[49] Because it is actually not possible to supervise the adequacy of protection for each and every international data transfer,[50] creation of "white list" is postulated for countries "generally" providing adequate level of data

[46] Article 25 para 2 ("Principles") of the Directive.

[47] Article 25 para 3-6 of the Directive.

[48] G. Sibiga, *Postępowanie w sprawach ochrony danych osobowych*, Warszawa 2003, p. 206.

[49] X. Konarski, G. Sibiga, *Zasady przekazywania danych osobowych do państwa trzeciego w prawie polskim i Unii Europejskiej*, *Ochrona danych osobowych. Aktualne problemy i nowe wyzwania*, X. Konarski (ed.), G. Sibiga (ed.), Kraków 2007, p. 94.

[50] *First Orientation on Transfers of Personal Data to Third Countries Pissible Ways Forward in Assesing Adequacy*, WIPR 1997, vol. 11, 332.

protection. This list would not be binding but would be an indication as to whether in a particular situation it is necessary to assess the admissibility of data transfer.[51]

In terms of assessing the issue of admissibility of data transfer to other country (or rather assessing of what should and what should not be regarded as a data transfer) important ruling of the European Court of Justice of the EU has been given in *Bodil Lindqvist* case (C-101/01).[52] In its decision, the Court established that there is no data transfer within the meaning of the Article 25 of the Directive, if a person in a Member State places the personal data on the website server located in that or another Member State, when the website is widely available, also for people from other countries. In support of its ruling the Court argued, *inter alia*, that in assessing whether we are dealing with "data transfer" of most importance is the way the Internet works and how one connects to the content available on the website. The Court established that the page where Ms Lindqvist placed the data was available for anyone, without limitations (also in other countries), but it has not been proven, that the data from her website were communicated (transferred) to those other countries. Assuming that in this situation, there has been no "transfer" the Court gave priority to the linguistic interpretation of the word *transfer* over the teleological interpretation (which shows that the publishing of the data on the website can lead to such transfer of data). This interpretation may, however, lead to uncontrolled transfer of data *via* the websites. It is often difficult or even impossible to prove whether the data contained on the website has been uploaded and stored on a computer from the other country, browsing through the website contents (in most countries, ISPs are not required to record what data were transferred, they are only required to record the fact that there was a connection to certain website). As a result, it may be impossible to prove whether, and if so then to what extent, the data transfer took place (especially if such transmission is being encrypted). Although this judgment raises some concerns, it should be noted, that in this case the Court had to

[51] J. Barta, *op. cit*., p. 87-88.

[52] Official Journal C 007, 10/01/2004, p. 3-4.

draw a line between the protection of personal data in the form of a preventive ban of their publication *via* website (in order to prevent the possible transfer) and the freedom of expression over the Internet, which as a consequence of such a ban would be severely limited.

In European law issues of personal data protection are continually becoming more present and sophisticated, being increasingly regulated on more and more specialized level. Although this matter has also become the subject of the United Nations (UN) regulations, which has announced on 14 December 1990 a resolution containing guidelines on the regulation of computerized personal data files.[53] This act, however, is not binding so the regulations of personal data processing on the level of universally binding international law, for the time being, should be sought in the law sources of a more general nature, such as the International Covenant on Civil and Political Rights (the Covenant).[54]

The supervisory system of the Covenant (in the case of the ratification of the Optional Protocol, including the right of individuals to communication to the Committee about their injustice) is not strictly judicial system – the decisions of the Human Rights Committee are not binding to the authorities of the States Parties. Still, this does not change the fact that, as an international agreement, the Covenant is the binding source of Polish legislation and can be invoked in a situation where acts of lower rank (including statutes) do not provide necessary protection of someone's fundamental rights and freedoms.

Broadly understood right to privacy is enshrined in Article 17 of the Covenant, which provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

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[53] Resolution 45/95 of the UN General Assembly, 26 June 1985.

[54] Adopted on 19 December 1966, entered into force on 23 March 1976, ratified by Poland on 3 March 1977, entered into force for Polish on June 18, 1977 (Dz.U. 1977 Nr 38, poz. 167). Optional Protocol providing the right of individual petition to the Committee on Human Rights, has been ratified by Poland on 14 October 1991 and entered into force on 7 February 1992 (Dz.U. 1994 Nr 23, poz. 80).

According to the Covenant, and in the light of the General Comments of the Human Rights Committee (hereinafter Comments and Committee)[55] protection of privacy, and therefore also the personal data protection is not absolute. However, any interference should be undertaken only when it is necessary in the democratic society, under the provisions of the law and conducted by authorized government institutions. The rules governing such interference should be as detailed as possible, to eliminate the arbitrariness of decisions of officials acting on behalf of the state. State Parties should submit in their periodic reports to the Committee the information about the bodies authorized to carry out such interference, and the rules governing their conduct. Reports should also include information on the complaints on the arbitrary or unlawful interference, the number of confirmed cases and the remedies applied.

In terms of data protection Committee requires that legal measures, protecting the integrity and confidentiality of correspondence, were clearly defined in the law and actually available, as well as measures against those responsible for the violations in the field. All correspondence (including sms, e-mail and other ways electronic communication) should be delivered to the addressee directly, "without being opened or otherwise read"[56]. Any means of "surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited".[57]

In accordance with Comments of the Committee all "gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law".[58] The Covenant and consequently the Committee does not make distinction in this regard between private

[55] *General Comment no. 16: The right to Respect of privacy, family, home and correspondence, and protection of honor and reputation (Article 17),* 8 April 1988 (32nd session of the Human Rights Committee).

[56] *Ibidem*, § 8.

[57] *Ibidem*.

[58] *Ibidem*, § 10.

individuals and government officials performing such processing of the data. Though under provisions of the Covenant both contexts are equally protected. The State should ensure that information concerning the private life of individuals did not venture into the hands of persons not entitled to it and that it would not be used for the purpose contrary to the provisions of the Covenant.

In the light of Comments of the Committee "every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes" and "be able to ascertain which public authorises or private individuals or bodies control or may control their files".[59] In the event that the data were collected or processed contrary to the provisions of the law the data subject should also be entitled to expect, as necessary, their rectification or elimination.

Consequently, by a way of interpretation of the Covenant, the Committee has established a protective standard in the field of personal data processing that does not deviate much from, much more detailed, European regulations. This is proof that problems associated with the introduction of new technologies can often be successfully resolved by a wise and respectful interpretation of core values, even without making extensive, detailed and full of technical jargon regulation.

Standard of protection of personal data in Poland is steadily being raised. Its scope is defined not only in the framework of the Act, but also in several other regulations. This development takes place not only at national level, but also largely in the framework of European Community law and other international organizations. In this article, author did not discussed specific issues of national and international regulations in the field of telecommunications law, medical or data processing for purposes of defence and state security, as there are a number of different regulations and exceptions to general rules. All these acts constitute an increasingly complex system in which the scope of protection of certain categories of data depends under which of these specific acts, we can classify a particular set of data (the Act applies to a limited extent, to the collections of data processed under the

[59] *Ibidem*.

rules of other regulations). This rapidly growing regulation is forced by technological progress, challenging legislators with new phenomena. In such a "normative rush" to extend the existing legislation to cover any possible situation, it cannot be forgotten that the more detailed regulation, the smaller the field of its practical application. Standards with a high degree of detail are also a subject to faster obsolescence resulting in the need for even more amendments, increasing the already severe inflation of law. This peculiar "overregulation" is not totally unfavorable from the perspective of a protected person, because one can always seek protection under other regulation. These regulations overlap each other, thus forming a more leak-proof system, but also by a less transparent one. This may pose, however, specific problems of interpretation and doubts about the scope of individual acts. Some time ago such a conflict could result in the application of the Convention No 108 and EU Directives for the transfer of data to other countries. Article 12 of the Convention obliged states parties to ensure "free flow of data", while the Directive required an adequate level of protection of transmitted data by the regulations of the country of destination.[60] Therefore, in future regulations we will have to increasingly take into account overlapping of different protection standards, which at some stage may require a more comprehensive solution to the problem of their interaction. In this legislative "avalanche" of ever more technical and detailed rules, sometimes we might try taking a different approach, based on general values, that have for long time been recognized within the human rights and leave little broader interpretation leeway to authorities applying the law. Obviously it will not eliminate the necessity of amending this law – it is indeed somewhat natural tendency to improve what has already been achieved. But at some point a comprehensive and uniform legislation will be needed for all the matters that are now provisioned autonomously, under different, often unrelated regulation. Stable foundation for such a solution may be provided by international standards of human rights, for years proven in the protection of the right to privacy. Sometimes, instead

[60] This problem has been resolved by the Protocol to the Convention, which prohibits the transfer of data when the other country does not meet the relevant safety requirements.

of creating new, more detailed legal concepts we might benefit from standards already universally recognized, and find a solution in the way of their creative interpretation.

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Standard ochrony danych osobowych w Polsce – omówienie wybranych elementów

Opracowanie dotyczy prawnych podstaw systemu ochrony danych osobowych w Polsce. Autor nie skupia się na jednym, wybranym akcie prawnym, opisując kwestię ochrony danych osobowych przekrojowo, w świetle różnych źródeł prawa obowiązującego w RP.

Pierwszym omawianym aktem prawnym omawianym jest Konstytucja RP, wyznaczająca ramy dla funkcjonowania wszelkich innych źródeł prawa w tym zakresie. W tej części autor analizuje w szczególności art. 51 Konstytucji, wskazując wyznaczone nim granice ochrony, a także konsekwencje poszczególnych uregulowań dla innych aktów prawnych.

W przypadku Europejskiej Konwencji Praw Człowieka autor przedstawia wybrane orzeczenia Europejskiego Trybunału Praw Człowieka wydane w sprawach dotyczących zgodności ustawodawstwa i praktyki państw członkowskich z art. 8 Konwencji, z których poszczególne, wskazywane w artykule tezy mogą znajdować zastosowanie w sprawach dotyczących ochrony danych osobowych w krajowym porządku prawnym, a także powinny być rozważane przy kształtowaniu regulacji ustawowej z tego zakresu.

Opisując Konwencję Rady Europy o ochronie osób w związku z automatycznym przetwarzaniem danych osobowych autor przedstawia wymogi stawiane przez tę regulację ustawodawstwom krajowym oraz wprowadzony w jej ramach tzw. standard minimalny, stanowiący podstawę do dalszej regulacji państw członkowskich, umożliwiający im jednocześnie zachowanie autonomii w ramach samodzielnie wypracowanych rozwiązań. W tym zakresie autor wskazuje także na inne, niewiążące regulacje dotyczące wybranych

aspektów ochrony danych osobowych uchwalone na przestrzeni lat w ramach Rady Europy.

Osobno autor opisuje regulacje wiążące Polskę w ramach prawa Unii Europejskiej, szczególną uwagę poświęcając Dyrektywie Parlamentu Europejskiego i Rady 95/46/WE z 24 października 1995 r. w sprawie ochrony osób fizycznych w zakresie przetwarzania danych osobowych oraz swobodnego przepływu danych. W artykule wskazano na obowiązki państw członkowskich wynikające z tej regulacji, zwracając uwagę na różnice między Dyrektywą a Konwencją Rady Europy, w szczególności te dotyczące transferu danych do innych państw. W tym zakresie omówiono także orzeczenie Europejskiego Trybunału Sprawiedliwości w sprawie Bodil Lindqvist, w którym Trybunał wyznaczył granicę między umieszczeniem danych na serwerze a dokonywaniem w podobny sposób ich transferu za granicę.

Na koniec autor omawia art. 17 Międzynarodowego Paktu Praw Obywatelskich i Politycznych, w którym uregulowano szeroko rozumiane prawo do prywatności. Szczególne znaczenie dla interpretacji postanowień tego artykułu mają Uwagi Ogólne nr 16 Komitetu Praw Człowieka, którym autor poświęca więcej uwagi, odnosząc je do materii przetwarzania danych osobowych i analizując skutki w zakresie obowiązków państw-stron Paktu.

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CONCERN FOR THE RECONCILIATION OF PARTIES IN THE CONTEXT OF THE IMPLEMENTATION OF THE RIGHT TO AN ACTION FOR NULLITY OF MARRIAGE

Concern for the reconciliation of parties in cases of nullity of marriage, ecclesiastical legislator expresses both the Code of Canon Law from 1983[1], as well as procedural instruction Dignitas Connubii, to be observed by diocesan and interdiocesan tribunals in handling causes of the nullity of marriage, from 2005[2]. Very important is the support of the legal norms of the Magisterium of the Church[3].

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[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, 25.01.1983, *Acts of the Apostolic See* 75 II (1983) 1-317. The English text: http://www.vatican.va/archive/ENG1104/_INDEX.HTM (25.8.2011).

[2] Pontificium Consilium de Legum Textibus, *Dignitas connubii*. Instructio servanda a tribunalibus dioecesanis et interdioecesanis in pertractantibus causis nullitatis matrimonii, 25.01.2005, Citta del Vaticano 2005. The English text: http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html (25.8.2011).

[3] The importance of this teaching in the context of applying the law of the Church, John Paul II explained in his recent address to members of the Tribunal of the Roman Rota delivered on 29 January 2005: "In fact, the authentic interpretation of God's Word, exercised by the Magisterium of the Church (cf. Second Vatican Council, Dogmatic Constitution on Divine Revelation *Dei Verbum*, n. 10 2), has juridical value to the extent that it concerns the context of law, without requiring any further formal procedure in order to become juridically and morally binding. For a healthy juridical

Analysis of the applicable rules highlights the general concern of the legislator of the Church is "to avoid litigation among the people of God as much as possible, without prejudice to justice, and to resolve litigation peacefully as soon as possible"[4]. This concern is the responsibility of all the Christian faithful[5].

Moreover, special care is expressed in the context of the introduction to court cases concerning the nullity of marriage, as well as part of its processing[6].[7] In the introduction to the Instruction, "to be observed by diocesan and interdiocesan tribunals in handling causes of the nullity of marriage", Dignitas connubii – at the very beginning placed the following words: "The dignity of marriage, which between the baptized «is the image of and the participation in the covenant of love between Christ and the Church»[8], demands that the Church with the greatest pastoral solicitude promote marriage and the family founded in marriage, and protect and defend them with all the means available." The reference to "covenant love" clearly indicates that the Church attaches great importance to unity in marriage and family. Any measures taken to reconcile the spouses are intended to achieve full unity in the community of the Church.

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interpretation, it is indispensable to understand the whole body of the Church's teachings, and to place every affirmation systematically in the flow of tradition. It will thus be possible to avoid selective and distorted interpretations and useless criticisms at every step." – http://www.vatican.va/holy_father/john_paul_ii/speeches/2005/january/documents/hf_jp-ii_spe_20050129_roman-rota_en.html (25.8.2011).

[4] CIC 1983, can. 1446 § 1.

[5] *Ibidem.*

[6] CIC 1983, cann. 1446 § 2, 1676 and DC, art. 65 §§ 1-2.

[7] Cases to declare the nullity of marriage have been regulated in Book VII, Part III, as belonging to special processes. But according to the can. 1691: "In other procedural matters, the canons on trials in general and on the ordinary contentious trial must be applied unless the nature of the matter precludes it; the special norms for cases concerning the status of persons and cases pertaining to the public good are to be observed." The provisions on trials in general were included in the canons 1400-1500, and the rules on the ordinary contentious trial – in canons 1501-1655.

[8] Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the modern world *Gaudium et Spes*, *Acts of the Apostolic See* 58 (1966), n. 48d.

Depending on the situation, the legislator indicates a various possible and relevant areas of reconciliation and recommends or suggests various ways to reconcile in the specified way. However, the legislator does not limit on setting any clear guidelines. The need for action to conciliation between the parties of the conflict may also arise from the provisions of requiring pursuit for a particular purpose, when its achievement is dependent on persuading the parties to participate in the process or cooperation between them. This leads to look for other ways that may prove to be useful, available in a given case, and are fair.

1. Base for concern of the Church of reconciliation parties in cases of nullity of marriage

The particular care of that the Church strives for reconciliation parties in cases of nullity of marriage results from the multidimensional meaning the institution of matrimony itself.

Marriage is undoubtedly the sphere of the private good of the spouses – because to its contraction and duration occur on the basis of personal experiences, emotions, feelings, aspirations two particular people – women and men – and it creates between them special, mutual rights and obligations oriented for their welfare.

However, because of "its twofold natural and sacramental" dimension and "its social and public nature" it is also the realm of the public good of the Church community[9].

In a marriage between the baptized – validly contracted – is of particularly important its sacramental dimension. It gives the possibility to use by the faithful from support of the spiritual – divine grace, which strengthens them in carrying out the obligations arising

[9] Benedict XVI, *Address to the Tribunal of the Roman Rota*, 28 January 2006, http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/january/documents/hf_ben-xvi_spe_20060128_roman-rota_en.html (25.8.2011).

from the married life and family life, and in the proper exercise of their rights in a married state[10].

The sacraments are the good of the whole Church. They are the liturgical actions[11], so they "are not private actions but celebrations of the Church itself which is the sacrament of unity, that is, a holy people gathered and ordered under the bishops. (…) therefore belong to the whole body of the Church and manifest and affect it" (cf. can. 837 § 1). They "were instituted by Christ the Lord and entrusted to the Church. As actions of Christ and the Church, they are signs and means which express and strengthen the faith, render worship to God, and effect the sanctification of humanity and thus contribute in the greatest way to establish, strengthen, and manifest ecclesiastical communion." (cf. can. 840). Therefore marriage is "sacred reality", and cases of nullity of marriage concern the salvation of souls[12]. The salvation of souls must always be the supreme law in the Church[13]. This is emphasized in the words of John Paul II: "the work of defending a valid marriage represents the protection of God's irrevocable gift to the spouses, to their children, to the Church, and to civil society."[14]

Benedict XVI, in his address to the members of the Tribunal of the Roman Rota in 2006, pointed out that marriage is a "reality

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[10] "Christian spouses, in virtue of the sacrament of matrimony, signify and partake of the mystery of that unity and fruitful love which exists between Christ and His Church (cf. Eph 5,32). The spouses thereby help each other to attain to holiness in their married life and by the acceptance and education of their children. And so, in their state and way of life, they have their own special gift among the People of God" – Second Vatican Ecumenical Council, Dogmatic Constitution *Lumen Gentium*, *Acts of the Apostolic See* 57 (1965), n. 11.

[11] CIC 1983, can. 843 § 1.

[12] John Paul II, *Address to the Tribunal of the Roman Rota*, 30 January 2003, http://www.vatican.va/holy_father/john_paul_ii/speeches/2003/january/documents/hf_jp-ii_spe_20030130_roman-rota_en.html (25.8.2011).

[13] CIC 1983, can. 1752.

[14] John Paul II, *Address to the Tribunal of the Roman Rota*, 18 January 1990, http://www.vatican.va/holy_father/john_paul_ii/speeches/1990/documents/hf_jp-ii_spe_19900118_roman-rota_en.html (25.8.2011).

that establishes the institution of the family and deeply concerns the Church and civil society"[15].

Marriage is the basis for the development and proper functioning of the community of the faithful: the basis for improvement of the faithful in their relationships to other people – the spouse, children, also in their relationship as a marriage or family to other members of the community (religious, state, local, at work, at school, etc.), in which they live, while providing an example for other faithful, and to non-believers – as testimony the functioning of the Catholic community.

Marriage is the foundation of the family, and the family, "the natural community in which human social nature is experienced, makes a unique and irreplaceable contribution to the good of society"[16]; "the family constitutes, much more than a mere juridical, social and economic unit, a community of love and solidarity, which is uniquely suited to teach and transmit cultural, ethical, social, spiritual and religious values, essential for the development and well-being of its own members and of society"[17]. The unity and welfare of the family are

[15] Benedict XVI, *Address to the Tribunal of the Roman Rota*, 28 January 2006.

[16] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, paragraph 213, http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html (25.8.2011).

[17] The Holy See, *Charter of the Rights of the Family*, presented to all persons, institutions and authorities concerned with the mission of the family in today's world October 22, 1983, *Preamble*, paragraph E, http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html. In the Introduction to the Charter reads: "It [*Charter* – A.B.] aims, rather, at presenting to all our contemporaries, be they Christian or not, a formulation—as complete and ordered as possible of the fundamental rights that are inherent in that natural and universal society which is the family. (…) The Charter is addressed principally to governments. In reaffirming, for the good of society, the common awareness of the essential rights of the family, the Charter offers to all who share responsibility for the common good a model and a point of reference for the drawing up of legislation and family policy, and guidance for action programmes. At the same time the Holy See confidently proposes this document to the attention of intergovernmental international organizations which, in their competence and care for the defence and promotion of human rights, cannot ignore or permit violations of the fundamental rights of the family.", http://www.vatican.va/roman_curia/pontifical_councils/family/documents/

inseparably connected with the unity and indissolubility of marriage, hence "the holy Pastors' duty to defend and foster marriage is quite clear. However, this is also a specific responsibility of all the faithful, indeed, of all men and women and the civil authorities, each according to his or her own competency."[18]

It is through the prism of the importance of the family for proper human development, particularly in view of the need to protect children's rights, the international community expresses its care of the marriage.

In the a universal system of law should be paid attention to art. 23 International Covenant on Civil and Political Rights[19], which in paragraph 1 indicates that: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Human Rights Committee, in the CCPR General Comment No. 19: Protection of the family, the right to marriage and equality of

rc_pc_family_doc_20001115_family-human-rights_en.html (25.8.2011).

[18] John Paul II, Addr*ess to the Roman Rota*, 29 January 2004, http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/january/documents/hf_jp-ii_spe_20040129_roman-rota_en.html (25.8.2011).

[19] *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, New York, http://www2.ohchr.org/english/law/ccpr.htm. Article 23: "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.". Human Rights Committee also indicates that: "(…) the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages. (…) for a State to require that a marriage, which is celebrated in accordance with religious rites, be conducted, affirmed or registered also under civil law is not incompatible with the Covenant." – CCPR General Comment No. 19: *Protection of the family, the right to marriage and equality of the spouses (Art. 23)*, thirty-ninth session, 1990-07-27, paragraph 6, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcdc12563ed004c3881?Opendocument (25.8.2011).

the spouses, indicates that: "Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant. Thus, article 17 establishes a prohibition on arbitrary or unlawful interference with the family[20]. In addition, article 24 of the Covenant specifically addresses the protection of the rights of the child, as such or as a member of a family."[21].[22] However, it was also noted that "States parties often fail to give enough information on how the State and society are discharging their obligation to provide protection to the family and the persons composing it."[23]. In the CCPR General Comment No. 17: Rights of the child, was highlighted that: "Responsibility for guaranteeing children the necessary protection lies with the family, society and the State. Although the Covenant does not indicate how such responsibility is to be apportioned, it is primarily incumbent on the family, which is interpreted broadly to include all persons composing it in the society of the State party concerned, and particularly on the parents, to create conditions to promote the harmonious development of the child's personality and his enjoyment of the rights recognized in the Covenant."[24]

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[20] "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

[21] "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality."

[22] Human Rights Committee, CCPR General Comment No. 19: *Protection of the family, the right to marriage and equality of the spouses (Art. 23)*, thirty-ninth session, 1990-07-27, paragraph 1, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcdc12563ed004c3881?Opendocument (25.8.2011).

[23] *Ibidem.*

[24] Human Rights Committee, CCPR General Comment No. 19: *Rights of the child (Art. 24)*, thirty-fifth session, 1989-04-07, paragraph 6, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument (25.8.2011).

In the European legal system appropriate regulations were introduced in Convention for the Protection of Human Rights and Fundamental Freedoms[25] – in art. 12 were regulated right to marry and start a family[26], in art. 8 right to respect for private and family life[27] and in art. 5 of Protocol 7 to the Convention was set that: "Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children."[28]

2. Scope of the Church's concern for reconciliation of the spouses

Taking into consideration an important role of the institution of marriage the Catholic Church takes care of it already at the stage of preparation for marriage and its conclusion, and intensify especially at the stage of building a community of conjugal life. Pastors of souls shall endeavor any actions to prevent a crisis in the community of marriage and efforts to solve the already existing problems.

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[25] *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols No. 11 and No. 14 of 4 November 1950, Rome, http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (25.8.2011).

[26] "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

[27] "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[28] Protocol no. 7 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocol no. 11, 22 November 1984, Strasbourg, http://conventions.coe.int/Treaty/en/Treaties/Html/117.htm (25.8.2011).

Because of its importance, even in case of serious doubts about the validity of the marriage, this value can not be left to the free disposal of the spouses[29]. If somebody is troubled such doubts, may ask the court for unbiased determine the truth about her or his marriage[30]. Everyone has the right to justice. According to the can. 221 § 1: "The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law."

Moreover, the Church's concern also extends to the formation of peaceful relations between people, who for various reasons, got married in a invalid way.

This study is devoted to activities that the Church and the faithful should take for a reconciliation of the parties in cases of nullity of marriage.

The basic security of marriage introduced by the legislator of the Church is a presumption of its validity, if it is contained in any external way. According to can. 1060 CIC 1983 "Marriage possesses the favor of law; therefore, in a case of doubt, the validity of a marriage must be upheld until the contrary is proven." This means that recognition only by the parties that their marriage is invalid does not entail them to expected legal consequences, such as lack of obligations resulting from marriage. Legal effectiveness can be obtained only by

[29] "(…) in fact, in its twofold natural and sacramental dimension, marriage is not a good that spouses can dispose of nor, given its social and public nature, can any kind of self-declaration be conjectured." – Benedict XVI, *Address to the Roman Rota*, 28 January 2006.

[30] According to canon. 1059 CIC 1983: "Even if only one party is Catholic, the marriage of Catholics is governed not only by divine law but also by canon law, without prejudice to the competence of civil authority concerning the merely civil effects of the same marriage." As is apparent from the can. 1060, nullity of marriage must be proved – "Marriage possesses the favor of law; therefore, in a case of doubt, the validity of a marriage must be upheld until the contrary is proven." – and the proving process takes place generally through the courts (cf. CIC 1983, cann. 1671-1691). An interested person can contract a new marriage only when the sentence "which first declared the nullity of the marriage has been confirmed at the appellate grade either by a decree or by a second sentence" – "unless a prohibition attached to the sentence or decree or established by the local ordinary has forbidden this" (cf. CIC 1983, can. 1684 § 1).

specific actions provided by law. The proper execution often requires taking a series of other preparatory activities.

A judge cannot adjudicate a case without a petition presented according to the norm of the canons[31]. Everyone has the right to receive information on how to reach out the truth about the marriage before the court of the Church. But the case of nullity of marriage begins when a person wishes to exercise the right to challenge the marriage – seeks information and advice on how to proceed. Since then the concern of the Church for the reconciliation of the spouses requires concrete actions in relation to concrete individuals. So even before the introduction the case to court.

Commitment to take action aimed at reconciliation of the parties takes the intensity from the moment when the petitioner presents "to a competent judge a libellus which sets forth the object of the controversy and requests the services of the judge"[32]. The method of its implementation depends on an acceptance or rejection of the complaint, but in no way stops. Searching help by means of litigation usually indicates the seriousness of the conflict existing between the parties.

Rejection of the libellus may be due to lack of grounds for challenging the validity of the marriage, but also the awkwardness parties in judicial proceedings or the lack of opportunity to submit proofs of nullity of marriage[33]. Neither of these situations does not exempt from the obligation to care for the relationship existing between the parties. The activities of the court should contribute to providing the best in this case the conditions for the realization of individual rights of those concerned and to give grounds for the proper functioning of the community of the Church.

Acceptance of the libellus for consideration by the court opens the way to obtain a decision on the validity of marriage. The process is a way of searching the truth about a particular marriage. The condition of reaching the truth is often the commitment of both parties

[31] CIC 1983, can. 1501.

[32] CIC 1983, can. 1502.

[33] Cf. CIC 1983, can. 1505 § 2.

in proceedings for nullity of marriage, and sometimes also their proper interaction.

The area of concern for the reconciliation of people, which included marriage, is also a decision on the validity or nullity of that marriage. Its content should be used to show the need for normal relations between the parties and to show prospects left by the ruling.

At the judge's duty to take relevant activities at each stage of the case of nullity of marriage indicates the content of can. 1446 § 2: "Whenever the judge perceives some hope of a favorable outcome at the start of litigation or even at any other time, the judge is not to neglect to encourage and assist the parties to collaborate in seeking an equitable solution to the controversy and to indicate to them suitable means to this end, even by using reputable persons for mediation."

Cases concerning the status of persons, including cases concerning the separation of spouses, never become res iudicata[34], so – regardless of the result of the case of nullity of marriage – the Church's concern for good relations of the parties is justified also after completion of judicial proceedings.

Invalid marriage it is a union between two people. This relationship seemed to be a marriage because of external appearances[35]. Act of law has been made but turned out legally ineffective[36]. Declaration of nullity of marriage, expressing the truth about marriage, states that the marriage did not exist at all[37], but between two people established a community that resembles a marriage, and actually lasted until the collapse[38]. The process of nullity of marriage

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[34] "A *res iudicata* possesses the stability of law and cannot be challenged directly except according to the norm of can. 1645, § 1." (CIC 1983, can. 1642 § 1); „Cases concerning the status of persons, including cases concerning the separation of spouses, never become *res iudicata*." (CIC 1983, can. 1643).

[35] Cf. R. Sobański, *Iudex veritatem de matrimonio dicit*, "Ius Matrimoniale" 4 (1999), p. 181.

[36] Cf. *ibidem*.

[37] *Ibidem*, p. 182-183.

[38] *Ibidem*, p. 184.

is ruled about a man who has already experienced marriage[39]. In this invalid relationship arose between the parties the various relations that can not erase by any sentence. Common experience, commitment, common offspring.

There are different results of the statement that the nullity of marriage has not been proven. The court ruling that nullity of the marriage has not been proven, also gives parties different dilemmas. This kind of truth can be embarrassing for them, especially when they already are in relationship – actual relationship or civil marriage – with other person. The right to challenge the marriage has not brought desired effect, and this can give a possibility to rise further conflicts between the spouses. This situation obliges the Church to continue its efforts to reconcile them – for their temporal and spiritual welfare, for the proper development of their offspring. The complexity of the circumstances surrounding the parties in the particular moment of their life does not exclude the possibility to renew their common marriage life in the longer term.

3. Basic plane of reconciliation and their meaning

Initiation of a case in court accompanied by more or less strained relations between persons who included the marriage. Depending on the specific situation, an expression of reconciliation may have to restore the community of married life the parties or to initiate such a community, where previously this did not happen and if necessary and possible to induce the spouses to convalidate the marriage.

When that did not happen, a very valuable is to persuade the parties to cooperate in establishing the truth about marriage, that the final decision of the competent judicial authority also gave them both a subjective sense of realization of their right to a fair appeal, contributing to control emotions guiding their mutual relations.

Sometimes achievement may be to induce the other spouse (the respondent) to engage in the proceedings or conviction of both

[39] *Ibidem*, p. 185.

parties to a non-aggression, to provide the basic conditions for the tribunal members to act in a given case.

a) convalidate the marriage and restore conjugal living

As noted by R. Sztychmiler "The legislature more valuable peace between the parties and restore the broken bonds of marriage, than the investigation process to the truth and its own law, which often result in antagonizing the parties."[40]. First, the legislature directs attention to a possible opportunity to bring about a resumption of the marriage life by the putative spouse, when their case was referred to the court. Both in the can. 1676, CIC 1983, and in art. 65 § 1 of the Instructions Dignitas connubii[41] it indicates that: "Before accepting a case and whenever there is hope of a favorable outcome, a judge is to use pastoral means to induce the spouses if possible to convalidate the marriage and restore conjugal living."

About bringing about the parties to a resumption of the marriage life the legislature recalls in the context of to convalidate the marriage, thus assuming a nullity of marriage; convalidation a marriage is "the act of law by which marriage contained invalid becomes a canonically valid"[42].

Sometimes, however, that to the tribunal reach cases lacks any basis for nullity of marriage "and that there is no possibility that any such basis will appear through a process"[43]. These may be situations where due to the difficulties encountered in the relationship of marriage, the person asks the church tribunal headed belief that

[40] R. Sztychmiler, *Prawa stron procesowych w kanonicznym procesie o nieważność małżeństwa*, E. Szczot (ed.), S. Białek (ed.), *Zagadnienia kościelnego prawa majątkowego i procesowego*, Lublin 2008, p. 113-114. Similarly G. Erlebach, *Sprawy o orzeczenie nieważności małżeństwa. Urząd sędziego*, J. Krukowski (ed.), *Komentarz do Kodeksu Prawa Kanonicznego*, Poznań 2007, p. 340.

[41] The wording of both provisions is identical.

[42] W. Góralski, *Kościelne prawo małżeńskie*, Warszawa 2006, p. 349.

[43] Cf. CIC 1983, can. 1505 § 2, n. 4.

church law on the forum can get a solution to the disintegration of a marriage relationship, in the likeness of the options provided for state law. It also gives the opportunity to take action to protect the institution of marriage by reconciliation of feuding spouses and to bring about to resume their married life, or even bring about such a community, when conflicts or disagreements have prevented its proper reference.

If there are arguments for nullity of marriage, the legislature provides a possible opportunity to convalidate a marriage. Convalidation is a very important protection for the relationships already established by the parties – in that it led a common life, together faced with the problems in everyday life, often have common descendants, and know a lot about each other. Presentation to a competent judge the action for nullity of marriage due to the knowledge or assumption of invalidity of marriage may not result from mutual aversion of the parties, attributed to void union. May result from the conflict that arose during the period of their life together, may be from particularly difficult worries or misunderstanding, obscuring the earlier good side of their common life. In addition – due to the great social role of marriage and its public nature – the Church is interested in convalidation this union, which took the external form of marriage[44].

Because of the presumption of validity of the marriage (cf. CIC 1983, can. 1060), the convalidation is only necessary in case of evident nullity of marriage[45]; it may prove useful in case of serious doubts as to its validity[46]. The convalidation is not always possible.

The legislation provides two types of convalidation – simple convalidation[47] and radical sanation[48]. The first requires the cessation or removal of the impediment that caused the marriage nullity, and the

[44] "Marriage possesses the favor of law; therefore, in a case of doubt, the validity of a marriage must be upheld until the contrary is proven." (CIC 1983, can. 1060).

[45] G. Erlebach, *Sprawy o orzeczenie nieważności małżeństwa…*, p. 340.

[46] *Ibidem*, p. 341.

[47] CIC 1983, cann. 1156-1160.

[48] CIC 1983, cann. 1161-1165.

renewal of marital consent at least the party aware of the impediment[49]. The second includes "the dispensation from an impediment, if there is one, and from canonical form, if it was not observedand" and dispensation from the renewal of consent[50],[51]. The convalidation is not possible if there are impediments that can not be removed by a dispensation. The radical sanation moreover it is not possible in the absence of consent or the circumstances of its revoke[52].

Specific actions taken under the care of the reconciliation of the parties will therefore depend on the particular situation. They are based on the admissibility of the validation and the ability to bring about the resumption by the common conjugal life. A clear lack of reconciliation (caused a serious conflict, a special aversion, etc.) will make possible the validation will be useless, useless[53]. Tendency to reconcile the parties should be verified at every stage of the case – "even on the occasion of the judgment not confirming the nullity of marriage."[54]

[49] „To convalidate a marriage which is invalid because of a diriment impediment, it is required that the impediment ceases or is dispensed and that at least the party conscious of the impediment renews consent." (CIC 1983, can. 1156 § 1).

[50] „The radical sanation of an invalid marriage is its convalidation without the renewal of consent, which is granted by competent authority and entails the dispensation from an impediment, if there is one, and from canonical form, if it was not observed, and the retroactivity of canonical effects." (CIC 1983, can. 1161 § 1).

[51] Cf. *Uważnienie małżeństwa*, M. Sitarz, *Słownik prawa kanonicznego*, Warszawa 2004, columns 187-188; W. Góralski, *Kościelne*..., p. 349.

[52] „A marriage cannot be radically sanated if consent is lacking in either or both of the parties, whether the consent was lacking from the beginning or, though present in the beginning, was revoked afterwards." (CIC 1983, can. 1162 § 1).

[53] G. Erlebach, *Sprawy o orzeczenie nieważności małżeństwa*..., p. 340.

[54] *Ibidem*, p. 341. CIC 1983, can. 1446 § 2.

b) cooperation of parties in the search for the truth about their marriage

If it is not possible validation of a marriage and the resumption of the common life of the parties – the primary purpose of reconciliation, though not always feasible, is to encourage the spouses to cooperate in the process. The general indication contained in the can. 1446 § 2 has been clarified in the Instuction Dignitas connubii: "If this cannot be done, the judge is to urge the spouses to work together sincerely, putting aside any personal desire and living the truth in charity, in order to arrive at the objective truth, as the very nature of a marriage cause demands." (art. 65 § 2). Reaching such an agreement gives parties the best chance of reaching the truth about marriage, which was contained, include: provides greater accuracy and precision in the determination of the dispute, facilitates the use of evidence at the disposal of each party, diminishes the concerns of witnesses about the negative attitude of a party to their testimony, makes it easy to confront parties with respect to certain facts and proofs awakening any doubt.

Collaboration also creates a better atmosphere to clarify certain doubts and misunderstandings between the same parties, thereby reducing the possibility of further misunderstandings and conflicts between them. This also gives an opportunity to resolve the old dispute and therefore look at issues from the perspective of the other.

c) the abandonment of hostility to the other side

Cooperation parties in the investigation of truth is the optimal situation, but not always possible to achieve. Therefore, in art. 65 § 3 of the legislature calls for the efforts of such mutual attitudes of the parties, which do not lead to the display of the conflict in the actions taken in the proceedings in the court: "If, however, the judge observes that the spouses are affected by a spirit of mutual animosity, he is to urge them strongly to observe mutual courtesy, graciousness, and charity within the process, avoiding any hostility."

The efficient conduct of the process requires appropriate behavior not only from staff of the tribunal, but also from the parties. Their mutual hostility can hinder or even prevent the proper conduct of the proceedings. In extreme cases, may even adversely affect the proper functioning of the tribunal.

Depending on the atmosphere in relations between parties the plane of reconciliation can be polite dialogue, or simply encourage parties to cease their malicious and aggressive activities.

Dialogue established within the process may provide additional benefits when it go beyond issues related to managing the affairs of nullity of marriage. The value of such an agreement can pass on the relationship of the parties to their families, mutual friends or acquaintances, and their mutual relations on the basis of professional, economic, or in the custody of joint children, their upbringing and education.

Sedation of aggression should prevent the transformation of legal proceedings in the battlefield of alleged spouse and an excuse for mental, physical or economic destruction on the other. It may also induce the defendant to participate in the proceedings, if previously refused to appear because of the pain experienced by a spouse or a malignancy, which itself directed at the other.

4. Entities required to take action to conciliation between the parties

The circle of entities required to take action to conciliation between the parties is very wide because of the multidimensional meaning of marriage, and associated with the fact that the importance of this extends also to the appearance of married life built on the only actual connection. As stressed by John Paul II – "The support of marriage (…) must inspire the entire activity of the Church, of Pastors, of the faithful and of civil society: in a word, of all people of good will."[55]

[55] John Paul II, Addr*ess to the Tribunal of the Roman Rota*, 29 January 2004.

In the context of a specific case of nullity of marriage must be performed by a group of persons, of whom alleged the spouses remaining together in the conflict are in contact – especially by family and friends, acquaintances, colleagues, pastors, employees of all types of marriage and family counseling, treatment centers staff, psychologists and psychiatrists, mediators, legal clinic workers and courts, operating as in the Church and in the state[56].

a) all the faithful

Generally referred to concern about "to avoid litigation among the people of God as much as possible" as well as their quick and peaceful settle has been entrusted to all the faithful[57]. Remind us that also the words of John Paul II: "(…) we must all contribute our share to the building up of a society that makes possible and feasible the enjoyment of rights and the discharge of the duties inherent in these rights"[58].

The scope of care entrusted to all the faithful depends on the position that a person occupies in the community of the Church, her personal relationship to the parties to the conflict, and the knowledge and expertise at its disposal[59]. In this framework can be put to mediate

[56] In his address to the prelate auditors, officials and advocates of the Tribunal of the Roman Rota, on 30 January 2003, John Paul II has pointed out: "Working towards a positive overcoming of marital conflicts and in providing assistance to the faithful who are in an irregular marital situation, it is necessary to create a synergy that involves everyone in the church: pastors of souls, jurists, experts in the psychological and psychiatric sciences, other laity, especially those who are married and have life experience. All must keep in mind that they are dealing with a sacred reality and with a question that touches on the salvation of souls." –http://www.vatican.va/holy_father/john_paul_ii/speeches/2003/january/documents/hf_jp-ii_spe_20030130_roman-rota_en.html (25.8.2011).

[57] Cf. CIC 1983, can. 1446 § 1.

[58] John Paul II, *Message to the secretary of the United Nations Organization on the occasion of the thirtieth anniversary of the Declaration of Human Rights*, December 2, 1978, *Acts of the Apostolic See* 71 (1979) pp. 124–125.

[59] It also follows from the rights and obligations made by the legislature, including

in finding appropriate ways to resolve conflicts (can. 1446 § 2), provide assistance and advice of the opinion (can. 228 § 2, can. 1064) [60].

In his speech to the to the prelate auditors, officials and advocates of the Tribunal of the Roman Rota from 28 January 2002 John Paul II called for: "The Church and every Christian must be the light of the world."[61] It is therefore also the commitment of the faithful as "ecclesiastical community"[62] "by help offered to those who are married, so that faithfully preserving and protecting the conjugal covenant, they daily come to lead holier and fuller lives in their family"[63].

b) marriages

Extremely important role in conflict prevention and resolution of problems in marriage is the example of other people involved in marriage. The ability to handle with problems that arise in marriage and family is undoubtedly a matter of innate and learned skills, but also knowledge, experience, awareness of own limitations and work on their own development. Reliable message about this can give

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with can. 210: "All the Christian faithful must direct their efforts to lead a holy life and to promote the growth of the Church and its continual sanctification, according to their own condition."

[60] CIC 1983, can. 1446 § 2: "Whenever the judge perceives some hope of a favorable outcome at the start of litigation or even at any other time, the judge is not to neglect to encourage and assist the parties to collaborate in seeking an equitable solution to the controversy and to indicate to them suitable means to this end, even by using reputable persons for mediation."; can. 228 § 2: "Lay persons who excel in necessary knowledge, prudence, and integrity are qualified to assist the pastors of the Church as experts and advisors, even in councils according to the norm of law."; can. 1064: "It is for the local ordinary to take care that such assistance is organized fittingly, after he has also heard men and women proven by experience and expertise if it seems opportune."

[61] http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rota_en.html (25.8.2011).

[62] CIC 1983, can. 1063, 1st sentence.

[63] CIC 1983, can. 1063 n. 4.

only those who themselves are involved in the experience of living in a marriage and family[64]. The legislature also tends to use their opinion – "men and women proven by experience and expertise" – in organizing by the community of Church "help offered to those who are married"[65].

c) family and friends

Because of emotional ties essential meaning to the reconciliation between warring spouses have their loved ones and friends. Very often, their authority and the appropriate involvement can be used to reconciliation. It is important, however, their consciousness, to what extent can – because of the special relationship with the parties or one of them – to support the parties in their married life, would not contribute to conflict. Good example of their life will be always major support for the others.

d) colleagues and other acquaintances

Colleagues and other acquaintances also can contribute to ways of curbing the conflicts between spouses, or even prevent them. It may be helpful for the parties of their detachment. In case of improper relationships with loved ones, their opinion and advice can influence the relationship of the parties.

[64] CIC 1983, can. 208: "From their rebirth in Christ, there exists among all the Christian faithful a true equality regarding dignity and action by which they all cooperate in the building up of the Body of Christ according to each one's own condition and function."; can. 225 § 2: "According to each one's own condition, they are also bound by a particular duty to imbue and perfect the order of temporal affairs with the spirit of the gospel and thus to give witness to Christ, especially in carrying out these same affairs and in exercising secular functions."

[65] CIC 1983, can. 1064.

e) pastors of souls

All pastors are required "to take care that their ecclesiastical community offers the Christian faithful the assistance by which the matrimonial state is preserved in a Christian spirit and advances in perfection"[66]. Their role in the reconciliation of conflicting interests of the spouses is significant because of the measures which are at their disposal, and properly used can important influence on the relationship between spouses[67].

The scope of the obligation to take action for the reconciliation of the spouses is determined by the office or function exercised by particular cleric. The source of information for the parties about the possibility of challenging the marriages is often priest known for them – own pastor, vicar or confessor.

According to can. 529 § 1: "In order to fulfill his office diligently, a pastor is to strive to know the faithful entrusted to his care. Therefore he is to visit families, sharing especially in the cares, anxieties, and griefs of the faithful, strengthening them in the Lord, and prudently correcting them if they are failing in certain areas. (…) He is to work so that spouses and parents are supported in fulfilling their proper duties and is to foster growth of Christian life in the family."

And a parochial vicar – by reason of his office – "is obliged to assist the pastor in the entire parochial ministry" (can. 548 § 2).

The local Ordinary should take care of the proper organization of the assistance provided by the community of believers. He should also listen to the opinion the spouses – men and women – if it will be useful[68].

In cases of nullity of marriage special options for activity in protecting the fraternal relations between the faithful also between spouses, has confessor. Its participation is also a great responsibility: "In hearing confessions the priest is to remember that he is equally a judge and a physician and has been established by God as a minister

[66] CIC 1983, can. 1063, 1st sentence.

[67] CIC 1983, can. 1063.

[68] CIC 1983, can. 1064.

of divine justice and mercy, so that he has regard for the divine honor and the salvation of souls." (can. 978 § 1).

f) staff of the institution of marriage and family support, and experts from different fields of knowledge

The judge, realizing the obligation under the can. 1446 § 2, in the quest for reconciliation of the spouses, may use "reputable persons for mediation". They may be staff of marriage and family counseling, treatment centers, staff legal clinics, specialists in the field of psychology and psychiatry, therapists, mediators. But I also experienced pastors, "family members, friends, people trusted because of their impartiality, kindness, social prestige"[69].

An important role also have specialists in secular law – lawyers working in the courts, lawyers, legal advisors and legal clinics staff. It is them who deal with people in situations of major marriage crises and relationship break-ups, before sending the case for consideration in the church tribunal. First of all, importance is the attitude of those who belong to the Church. Stressed and explained this John Paul II in his address to the prelate auditors, officials and advocates of the Tribunal of the Roman Rota, on 28 January 2002: "(…) professionals in the field of civil law should avoid being personally involved in anything that might imply a cooperation with divorce. (…) this may prove difficult (…) But they too must seek effective means to encourage marital unions, especially through a wisely handled work of reconciliation."[70]

Moreover, the atmosphere in which will be held between the spouses their case in the civil court can largely decide the attitude of the parties to each other and to other courts before which the parties

[69] J. Krukowski, *Obowiązki sędziów i urzędników trybunału*, J. Krukowski (ed.), *Komentarz do Kodeksu* ..., p. 73.

[70] http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rota_en.html (25.8.2011).

will operate – including the proper tribunal in cases of nullity of the marriage canon.

g) advocates and a staff of canonical clinics

A special responsibility rests with the canonical advocates and a staff of canonical clinics. It's mostly on them bear the burden of responsibility of clarify to the parties the proper meaning of the proceedings for nullity of marriage, to visualize what good is it protected in process – also in the spiritual dimension – and which attitudes contribute to a determination the truth about marriage and, which may be a threat.

Requires indicate that the task of a lawyer is not only protect the interest of the client subjectively understood by the party, but also protect the interest of the Church[71]. The common goal to the Church and to the parties is to establish the truth about marriage[72], about the sacrament.

The responsibility of those who advise to the parties or represent them is the greater, the greater their authority, higher legal education and more experience. Require them also to the steady expansion of their knowledge in the service of truth.

h) staff of the ecclesiastical tribunal

The concern for the reconciliation efforts of the spouses rests primarily on those employees who were called to the composition of the tribunal in a particular case of nullity of marriage. They in fact – knowing precisely the case – are best able to verify at which level and by what means it will be possible reconciliation of warring parties.

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[71] Cf. R. Sztychmiler, *Podmioty obowiązku ustalenia prawdy w procesie o nieważność małżeństwa*, R. Sztychmiler (ed.), J. Krzywkowska (ed.), *Współpraca sądów ze stronami procesowymi i adwokatami*, Olsztyn 2011, p. 92.

[72] *Ibidem*, p. 91.

However, the obligation to take action urging both parties to participate in the process, their activity, mutual dialogue, or even cooperation, relates also extends to other employees of the tribunal. Especially if the person concerned to challenge own marriage until the tribunal will seek information on opportunities and manner of bringing the case to the ecclesiastical court. Similarly, in the proceedings, because of the significant time for the consideration of the matter, the party involved will often have to deal with various members of the tribunal – either by telephone contact or personal.

The atmosphere of seriousness, professionalism and understanding and a common position which will express the values of reconciliation of the parties to the case can convince that this is not just a trick designed to simplify the work of justice, but the real concern for the protection of the rights of the parties of the judicial forum. On the attitude of unquestionable value for all employees ecclesiastical tribunals pointed John Paul II, in the words addressed to the staff of the Tribunal of the Roman Rota in 1986: "Your work is judicial, but your mission is evangelical, ecclesial, and sacerdotal, while at the same time remaining humanitarian and social."[73]

i) judges

A clearly stated obligation to strive for reconciliation of the parties relates the judges[74] and remains topical at any time of the dispute submitted to arbitration by a tribunal[75]. Can not be treated as a simple formality – requires the faithful use "as a very important expression of pastoral concern for spouses experiencing difficulties"[76].

[73] John Paul II, *Address to the Tribunal of the Roman Rota*, 30 January 1986, http://www.vatican.va/holy_father/john_paul_ii/speeches/1986/documents/hf_jp-ii_spe_19860130_roman-rota_en.html (25.8.2011).

[74] CIC 1983, cann. 1446 § 2, 1676; DC, art. 65 §§ 1-3.

[75] CIC 1983, can. 1446 § 2.

[76] John Paul II, *Address to the Tribunal of the Roman Rota*, 18 January 1990, http:/www.vatican.va/holy_father/john_paul_ii/speeches/1990/documents/hf_jp-ii_

Its implementation is also expressed in efforts to prevent new conflicts between the parties[77].

The legislature also obliges judges to care about the relationship the parties after the case of nullity of their marriage[78]. Existing provisions are reinforced by the Magisterium of the Church. Expression of special concern for the proper exercise of justice are the annual speeches by the Pope to the staff of the Tribunal of the Roman Rota.

Reminding the words of Pope Paul VI, John Paul II stressed the value of proper preparation and permanent formation of the judges, not only in terms of legal: "The ecclesiastical judge is essentially that 'living justice' (*quaedam iustitia animata*) of which St. Thomas speaks, citing Aristotle. He must, therefore, understand and fulfill his mission in a priestly spirit. Over and above the requisite knowledge – judicial, theological, psychological, social, etc. – he must also acquire a great and habitual self-mastery."[79]

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spe_19900118_roman-rota_en.html (25.8.2011).

[77] CIC 1983, can. 1508 § 2: "The *libellus* which introduces litigation is to be attached to the citation unless for grave causes the judge determines that the *libellus* must not be made known to the party before that party makes a deposition in the trial." and DC, art. 127 § 3: "The introductory *libellus* is to be attached to the citation, unless the *praeses* or *ponens* for grave reasons decrees, with a decree indicating reasons, that the *libellus* is not to be communicated to the respondent party before that party has given his judicial deposition. In this case, however, it is required that the respondent party be notified of the object of the cause and the ground(s) proposed by the petitioner (cf. can. 1508, § 2)."; CIC 1983, can. 1560 § 2 "If witnesses disagree among themselves or with a party in a grave matter, the judge, after having removed discord and scandal insofar as possible, can have those who disagree meet together or confront one another." and DC, art. 165 § 2; CIC 1983, can. 1598 § 1 "After the proofs have been collected, the judge by a decree must permit the parties and their advocates, under penalty of nullity, to inspect at the tribunal chancery the acts not yet known to them; furthermore, a copy of the acts can also be given to advocates who request one. In cases pertaining to the public good to avoid a most grave danger the judge can decree that a specific act must be shown to no one; the judge is to take care, however, that the right of defense always remains intact." and DC, art. 220.

[78] Cf. CIC 1983, can. 1686 and DC, art. 252.

[79] John Paul II, *Address to the Tribunal of the Roman Rota*, 17 February 1979, http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/february/documents/

j) bishops

In accordance with the provision of canon 1446 § 1, then "especially bishops, are to strive diligently to avoid litigation among the people of God as much as possible, without prejudice to justice, and to resolve litigation peacefully as soon as possible".

The duty of the diocesan bishop is to care for the particular church entrusted to him. This concern is performed by using the power of governance afforded to him – legislative, executive, and judicial power[80]. He must protect the unity of the universal Church[81]. He is the judge of first instance in his diocese and for all cases not expressly excepted by law.[82] He can exercise judicial power personally, but the legislature recommends that has exercised this power through others[83].

Therefore the Bishop must establish a diocesan tribunal for their respective dioceses.[84] He should watch over the activities of his court – to verify the attitudes of employees and associates of the tribunal and establish rules for the functioning of the tribunal[85]. He should worry about the proper preparation of persons involved in the justice system – the appropriate qualifications, solid formation, knowledge not only in the field of canon law, but psychology, psychiatry, sociology, etc. Because such knowledge can significantly affect the increase in the effectiveness of measures aimed at reconciliation of the parties the process.

The Authors of Instructions DC, in the introduction to it, underlined: "(…) it falls to the Bishops, and this should weigh heavily on their consciences, to see to it that suitable ministers of justice for

hf_jp-ii_spe_19790217_roman-rota_en.html (25.8.2011).

[80] CIC 1983, can. 391 § 1.

[81] CIC 1983, can. 391 § 2.

[82] CIC 1983, can. 1419 § 2 and DC, art. 22 § 1.

[83] DC, art. 22 § 2.

[84] DC, art. 22 § 3.

[85] DC, art. 303 and art. 308.

their tribunals are trained in canon law appropriately and in a timely manner, and are prepared by suitable practice to instruct causes of marriage properly and decide them correctly."

5. Measures for the reconciliation of the spouses

The case arising from the conviction of at least one of the spouses about a nullity of the marriage ends up in a court, if that person no longer sees any other way resolve the existing problems in her life.

In order to limit the number of cases filed to the tribunal as a result of hasty actions of spouses struggling in life with more or less serious problems, are very important all the activities of the Church – both as an institution, and how the community – in order "to avoid litigation among the people of God", and "to resolve litigation peacefully"[86].

When the case of nullity of marriage (alleged the spouses) is already in court, the implementation of actions aimed at reconciliation of the parties requires that the tribunal made contact with both of them[87]. The legislature foresaw a series of provisions that directly or indirectly are aimed to intended to lead to the involvement of both parties in the proceedings by the court. They contain the following requirements and recommendations: "The notification of citations, decrees, sentences, and other judicial acts must be made through the public postal services or by some other very secure method according to the norms established in particular law." (CIC 1983, can. 1509 § 1; similarly DC, art. 130 § 1); "(…) there must be proof, even through a new citation if needed, that the citation, made legitimately, reached the respondent party in sufficient time (cf. can. 1592, § 2)." (DC, art. 138

[86] Cf. CIC 1983, can. 1446 § 1.

[87] "In order for the truth to be more easily discovered and for the right of defense to be more aptly safeguarded, it is most expedient that both spouses take part in a process of the nullity of marriage." – DC, art. 95 § 1.

§ 3); "Whenever, after a diligent investigation has been made, it is still unknown where a party lives who is to be cited (...) Particular law can establish that in this sort of case the citation or communication can be made by edict (cf. can. 1509, § 1)." (DC, art. 132 §§ 1-2); "(…) a spouse legitimately summoned to the trial must respond." (DC, art. 95 § 2); "A respondent who refuses to accept the document of citation or who prevents its delivery is considered to be legitimately cited." (CIC 1983, can. 1510); "If the respondent party is properly cited but neither appears nor offers a suitable excuse for the absence or does not respond in accordance with art. 126, § 1 (…) the praeses or ponens is to make an effort to have the party withdraw from the absence." (DC, art. 138 §§ 1-2); "Even when a spouse has named a procurator or advocate, he is still bound to take part in the trial when so prescribed by the law or the judge (cf. can. 1477)." (DC, art. 96; similarly CIC 1983, can. 1477 to which indicates); "The Bishop Moderator is to see that neither by the manner of acting of the ministers of the tribunal nor by excessive expenses are the faithful kept away from the ministry of the tribunal with grave harm to souls, whose salvation must always remain the supreme law in the Church." (DC, art. 308); "The Diocesan Bishop, in regard to a diocesan tribunal, or the coetus of Bishops or the Bishop designated by them, in regard to an interdiocesan tribunal, is to set norms (…) concerning the granting of gratuitous legal assistance or the reduction of expenses (…). In setting these norms, the Bishop is to keep in mind the particular nature of matrimonial causes, which demands that, inasmuch as this can be done, both spouses take part in a process of nullity (cf. art. 95, § 1)." (DC, art. 303 § 1 n. 3 and § 2).

Due to the fact that the parties may be in different life situations, sometimes hinder or even prevent direct contact with the tribunal (e.g. stay abroad, illness, serve a sentence of imprisonment, of no fixed address for correspondence, etc.), is particularly important to correct way of popularizing the knowledge about the importance of the canonical process of nullity of marriage – about its object and purpose. It should be promoted in the context of the Church's teaching on marriage, also to prevent directing cases to the courts without proper reflection, when a court is not the only way to resolve the conflict between warring spouses.

The faithful often treat the declaration of nullity as a formality ("church divorce") required to achieve the possibility to conclude the re-marriage[88]. When there are no arguments for invalidity of marriage or there are the conditions for its convalidation, a means of reconciliation of the spouses may not be aware of the importance of sacramental grace of marriage resulting of marriage validly contained.

It also happens that the process provides otherwise unattainable opportunity to verify the relationship between the parties and to reconciliation. This is an opportunity to educate the parties about their mutual rights and obligations – towards each other, the loved ones (especially children), the community of the faithful, the tribunal because of the supposition about the merits of referring the matter of validity of their marriage, for consideration by the tribunal. Relationships between the court of Church and the parties are analogous to the relation between the bishop and the faithful, they are the summary of the term "pastoral care"[89].

R. Sobanski observed that: "The language has changed. People are more bold and aggressive. They react angrily on tries to view the merits of the action, they also react sometimes insolently, preceptorial, instructive, sometimes with a clear will «have one's own way»"[90]. The undeniable importance of competent staff and clinic tribunals (explaining the meaning of the proceedings in the tribunal church, reaching the parties tactful behavior towards parties ability to deal with difficult attitudes and behaviors of the parties, confidentiality, conscious that the proceedings in a particular case will be influenced the court's image and the value of the information about the processes of nullity of marriage, what will be coming out from the sides, which the experienced).

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[88] R. Sobański, *Kanoniczny proces o nieważność małżeństwa (uwagi w świetle 50-letniego doświadczenia)*, E. Szczot (ed.), S. Białek (ed.), *Zagadnienia kościelnego prawa majątkowego* ..., p. 99.

[89] Cf. R. Sobański, *Ochrona małżeństw w kanonicznym prawie procesowym*, „Prawo Kanoniczne" 52 (2009) 3-4, p. 167.

[90] R Sobański, *Kanoniczny proces*..., p. 98.

If the parties are to each other too much grudge, or demonstrate – both or one of them – the aggression, it is important to refer to the help of professionals – professional mediators[91], psychologists, even psychiatrists. It's also about so as not to contribute to wrong for parties by blind striving for reconcile their

When the situation is less severe enough to refer to the help of trusted individuals (due to the adequate preparation of merit, experience, natural abilities, trust that a person have for both parties to the dispute). It is all about effective presentation to the parties to any possible solutions in their situation and directing them to the dialogue on the common choice of the appropriate option to end the conflict between them.

If both spouses want to challenge the marriage, it's show the area, which can lead to better shape the relationship between them. Their interest in the conduct of the process gives better opportunities for dialogue and cooperation between them [92]. It requires them to master the emotions and encourages them to kindness. It may therefore also become an opportunity for reconciliation in relationships outside of tribunal.

Common striving to achieve the desired judicial decision, especially when they depend on time, may lead to the establishment of a common representative or an advocate[93]. Professional support of the lawyer is seen by the parties as the guarantor of their aspirations. Using the services of one (common) lawyer helps the economics of the process[94], and is also beneficial due to a common share of the

[91] In family matters with an element of international, mediation has already recommended in 1998 – Council of Europe Committee of Ministers, Recommendation No. R (98) 1 of the Committee of Ministers to Member States on family mediation (Adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies), https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2 (25.8.2011).

[92] Although this may also give rise to danger of collusion in order to obtain the expected final ruling on the nullity of marriage.

[93] DC, art. 102.

[94] M. Greszata, *Iudicium cum principiis. Kodeksowa weryfikacja zasad procesowych*

costs. Advocate should propose to the parties a reconciliation[95]. It is his duty as a faithful[96] and a person skilled in the discipline – in canon law. Attorney is a 'contributor of justice'[97]. His position is a public function[98]. Expertise of advocate may be useful for the relationship between the spouses[99]. Lawyer participation increases the chances of reconciling the parties, to convalidate a marriage which is invalid and the resumption of conjugal living[100].

The concern for good relations between the parties is also a desire for proper transmission of data on evidence (because of possible libel, slander, other misstatements, but also the possible lack of knowledge on the side of one of the spouses about the facts cited by the second, which can inflame the conflict – for example: confession of adultery, confession of having children with another person of the child, when the other spouse is presumed own parenthood, confession of progress aimed for conclude the marriage, etc.).

The aim of the ecclesiastical tribunals are fair dispute resolution[101] hence the same sentence is important conciliatory – "The judge proclaims the truth. On this truth, the faithful can build their future life."[102]

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w kanonicznych sprawach o nieważność małżeństwa, Lublin 2008, p. 238.

[95] *Ibidem*, p. 237; R. Sztychmiler, *Prawa stron procesowych…*, p. 104.

[96] CIC, can. 1446 § 1. Cf. also R. Sztychmiler, *Adwokat w procesie o nieważność małżeństwa,* T. Rozkrut (ed.), *Proces małżeński w świetle Dignitas connubii – pierwsze doświadczenia*, Tarnów 2007, p. 119.

[97] M. Greszata, *Iudicium cum principiis…*, p. 237.

[98] *Ibidem.*

[99] *Ibidem*, p. 238.

[100] *Ibidem.*

[101] Cf. R. Sobański, *Ochrona małżeństw w kanonicznym prawie procesowym*, „Prawo Kanoniczne" 52 (2009) 3-4, p. 159.

[102] Cf. R. Sobański, *Iudex veritatem…*, p. 196.

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Troska o pojednanie stron w kontekście realizacji prawa do skargi o nieważność małżeństwa

Troskę o pojednanie stron w sprawach o nieważność małżeństwa prawodawca kościelny wyraża zarówno w Kodeksie Prawa Kanonicznego z 1983 roku, jak i w instrukcji procesowej Dignitas connubii. Przedmiotem opracowania jest wykazanie możliwych i istotnych płaszczyzn pojednania osób, które zawierały związek małżeński, w kontekście powierzonej trybunałowi kościelnemu do rozpatrzenia sprawy o nieważność tegoż związku oraz wskazanie kręgu podmiotów zobowiązanych do podejmowania działań zmierzających do pojednania domniemanych współmałżonków.

Zależnie od konkretnej sytuacji, wyrazem pojednania może być przywrócenie wspólnoty życia małżeńskiego stron bądź podjęcie takiej wspólnoty, jeżeli wcześniej do tego nie doszło; w razie potrzeby i możności doprowadzenie do uważnienia małżeństwa; ale także skłonienie stron do współdziałania przy ustalaniu prawdy o małżeństwie, by końcowe rozstrzygnięcie kompetentnej władzy sądowej dawało obojgu również subiektywne poczucie realizacji ich prawa do sprawiedliwego wyroku, przyczyniając się tym samym do opanowania emocji kierujących ich wzajemnymi relacjami.

Wyraźnie sformułowany obowiązek w rozpatrywanym zakresie spoczywa na sędziach i pozostaje aktualny w każdym momencie sporu przedłożonego do rozstrzygnięcia trybunałowi. Ogólnie określona troska o „wykluczanie sporów w Ludzie Bożym", jak też szybkie i pokojowe ich rozstrzygnie została powierzona wszystkim wiernym, przede wszystkim zaś biskupom. W kontekście konkretnej sprawy o nieważność małżeństwa winna być realizowana przez krąg osób, z którymi domniemani małżonkowie pozostający ze sobą w konflikcie mają styczność – szczególnie zaś przez rodzinę i przyjaciół, znajomych, duszpasterzy, pracowników wszelkiego rodzaju poradni małżeńskich i prawnych oraz trybunałów.

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RESPECT FOR PERSONAL DIGNITY RULE IN THE SPHERE OF THE EMPLOYMENT RELATIONS

1. Introduction

Nowadays, the issue of respect for human dignity composes the multi-aspect range of problems, that we can consider in the different philosophical categories, legal, sociological and psychological studies. Dignity is a congenital value, impossible to loose, in contrary to the conception regarding dignity as a value to be acquired and lost.[1] Each and every man, regardless the age, financial and social status or religion does possess a personal dignity. It is entitled to everyone obliges the very single person and a whole society he lives in, to respect that dignity in all its dimensions.[2] The topic of dignity in the modern labour law is quite broad, refers mainly to such legal aspects as carrying out a personal inspection in the employing establishment, using of work-monitoring devices by employer or, what is more, different GPS devices that are able to localize the employee everywhere. According to the international law and the obligation to care for the good of the employing establishment, the issue of controlling the employee

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[1] L. Antonowicz, *Ochrona godności człowieka w prawie międzynarodowy*, J. Mazurek (ed.), *Godność osoby ludzkiej podstawą praw człowieka*, Lublin 2001, p. 14.

[2] A. Szostek, *Wokół godności, prawdy i miłości. Rozważania etyczne*, Lublin 1995, p. 46.

appears to be the most current and up-to-date. Dignity is an internal, innate and natural imprint of man, independent of social and historical context. Society and history does not give it to man, but are obliged to respect and protect her.[3]

2. Protection of employee's personal dignity in the international legal acts

Personal goods of the employee are the subject of the protection of the international law, the community law (EU), and also Polish Constitution as well as other legal acts. The Universal Declaration of Human Rights (UDHR, 10th December 1948) in its preamble refers to the inherent dignity of every human being, constituting that rule as a base among other "ideas of justice".[4] Article 18th of the Declaration states that everyone has a right to the "freedom of thought, conscience and religion".[5]

The place of work may create many dangerous situations, in which the sexual harassment may occur. Therefore a significant in its meaning is the recommendation no 19 to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW – adopted by UN General Assembly 18 December 1979), that deems the sexual harassment to be a kind of a sex-oriented discrimination. Poland as a part of the Pacts is obliged to respect the contained regulations that have been agreed in 1980.

It is worth to note the articles no 7 and 12 of the International Covenant on Economic, Social and Cultural Rights (16th December 1996). The article no 7 recognizes "the right of everyone to the enjoyment of just and favorable conditions of work which ensure fair wages and equal remuneration for work of equal value without distinction of any kind. In particular women being guaranteed conditions of work not

[3] J. Gałkowski, *Jan Paweł II o godności człowieka*, J. Czerkawski (ed.), *Zagadnienie godności człowieka*, Lublin 1994, p. 108.

[4] K. Motyka, *Prawa człowieka. Wprowadzenie. Wybór źródeł*, Lublin 2004, p. 125.

[5] *Ibidem*, p. 128.

inferior to those enjoyed by men, with equal pay for equal work; and a decent living for themselves and their families in accordance with the provisions of the present covenant."[6]

In 1945 the International Labour Organization (ILO) became a specialized organization within UN. Poland has ratified 80 conventions regarding the cooperation within that organization. A principle of the ILO activity is to support the employees life and health protection. Convention and the recommendations of ILO concerning security and protection of the health distinguish concrete hazards, that employees may be exposed to, warns of the hazards in the branches of industry and speaks generally of the technical standards, that must be abbiden regardless the kind of work executed.[7]

In the European Labour Law the main legal act regulating the rights of people employed in the area of European Union is the Community Charter of Fundamental Social Rights for Workers (9th December 1989). Article no 19 states as following: "Every worker must enjoy satisfactory health and safety conditions in his working environment."[8]

Dignity is a fundamental rule of the community law, while Charter of Fundamental Rights of the European Union (October 2000) in its article no 1 recognizes that "Human dignity is inviolable. It must be respected and protected."[9] Dignity is a source of rights and its violation means violating those rights included in the Charter with simultaneous encroaching of the unit's integrity.

Personal rights listed in the chapter titled "Freedoms" refer to: Respect for private and family life, Protection of personal data, Freedom of thought, conscience and religion, Freedom of expression and information, Freedom to choose an occupation and right to engage in work.[10] While article 21 of the Charter: "Any discrimination based

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[6] *Ibidem*, p. 133.

[7] H. Szewczyk, *Ochrona dóbr osobistych w zatrudnieniu*, Warszawa 2007, p. 58.

[8] *Ibidem*, p. 79.

[9] K. Motyka, *Prawa człowieka*…, p. 255.

[10] *Ibidem*, p. 256 and next.

on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."[11]

In 1997 the European Union countries adopted the Treaty of Amsterdam. Article 2 of the Treaty states that gender equality is one of the main objectives of the Union to contribute to the harmonious and sustainable economic development, upgrading and quality of life, economic and social cohesion. The Amsterdam Treaty introduced to Part I of the Treaty establishing the European Community, entitled "Principles", article 13, which gave the Community new powers to combat discrimination. According with Article 13 of the Community may adopt measures necessary "to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[12] One of the main legal provisions concerning equality between women and men is article 141 of the Treaty of Amsterdam. This provision prohibits discrimination and sets priorities for the EU in the field of equal rights for both sexes. These include the so-called running. positive discrimination and "gender mainstreaming". To implement the provisions of Article 13, the European Union adopted two Directives proposing minimum standards of legal protection against discrimination in the European Union:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

In 2006, the European Union adopted Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and

[11] *Ibidem*, p. 258.

[12] http://www.rownetraktowanie.gov.pl/dyskryminacja/dyskryminacja_ze_wzgledu (29.9.2011).

occupation (repealing Directives 75/117/EEC, 76/207/EEC, 2002/73/EC, 86/378/EEC, 96/97/EC, 97/80/EC, 98/52/EC).

An extremely important role in the adaptation of Polish law to the standards of the European Union law was the European Social Charter ratification by Poland.[13] However, the Republic of Poland has not done the full ratification, and therefore not all aspects of the legislation has not been accepted by Poland. The European Social Charter[14] was signed on 18 October 1961 in Turin, and from 25 July 1997 Poland is obliged to implement the following provisions referred to the employees. These include in particular:

- the right to freedom in forming associations on national and international level and collective bargaining
- the right to adequate, occupational health and safety conditions
- the right to earn for a living by working in freely chosen employment
- the right to use any possible ways that helps to ensure the best possible health level
- protection of dignity at work and protection against sexual harassment
- prohibition of forced labour
- fair working conditions for wage and working time
- the right to strike
- access to employment for people with disabilities.

The European Committee of Social Rights will assess whether the state met the obligations under the Charter. Its fifteen independent and impartial members are elected by the Council of Europe Committee

[13] Dz.U. of 1999, No 8, item 67

[14] The European Social Charter (hereinafter referred to as "the Charter") sets out rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by States Parties. It was revised, and the 1996 Revised European Social Charter, which came into force in 1999, is gradually replacing the initial 1961 treaty. 43 States have ratified either the 1961 Charter or the Revised Charter. Three Protocols have been added to the initial 1961 treaty: Protocol No. 1 (1988) which adds new rights – Protocol No. 2 (1991) which reforms the procedure of control regarding reports – Protocol No. 3 (1995) which provides for a procedure of collective complaints.

of Ministers for period of six years, renewable once. The Committee shall decide whether the law and practise of the States Parties to violate or comply with the Charter (article 24 of the Charter of the Turin Protocol of 1991). A monitoring procedure based on national reports: Every year the States Parties submit a report indicating how they implement the Charter in law and in practice. Each report concerns some of the accepted provisions of the Charter. The Committee examines the reports and decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as "conclusions", are published every year.[15] Council of Europe seems to act known as the Convention – they are not binding, serve as guidelines and standards from the law (soft-law). The Committee interprets also the different articles of The European Social Charter, and article 20 guarantees the right to equality at all stages of working life – access to employment, remuneration and other working conditions, including dismissal and other forms of detriment, vocational training and guidance and promotion. These words give Article 20 the status of *lex specialis* in relation to Article 1 § 2 of the Charter, which prohibits all discrimination at work on whatever ground.[16]

Discrimination in breach of the Charter is constituted by a difference in treatment between people in comparable situations which does not pursue a legitimate aim and is not based on objective and reasonable grounds.[17] Indirect discrimination occurs where a rule, identical for everyone, disproportionately affects men or women without a legitimate aim. Equal treatment of full-time and part-time employees is considered from this angle in particular in respect of social security issues.[18] Indirect discrimination can also occur when people in different situations are not treated differently. Referring to the case-law of the European Court of Human Rights (Thlimmenos v. Greece, Complaint No. 34369/97, ECHR 2000-IV,

[15] http://www.coe.int/lportal/web/coe-portal (28.9.2011).

[16] *Ibidem*, (28.9.2011).

[17] Syndicat national des Professions du Tourisme v. France, Complaint No. 6/1999, Decision on the meritsof 10 October 2000, § 25.

[18] http://www.coe.int/lportal/web/coe-portal (28.9.2011).

§ 44), the Committee has stated that the Charter prohibits all forms of indirect discrimination which can arise "by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all"[19] and requires that particular measures are taken to meet the specific needs of persons whose situation distinguishes them from the majority.[20]

3. The control of employee and the obligation to care for the good of the employing establishment

In the article 100 § 2 point 4 k.p. (Polish Labour Code) ("to care for the good of the employing establishment, protect its property and to keep in secret the information, which revealing could cause harm to the employer") the legislator lists the property in the contents of the mentioned obligation, in the meantime underlining its separate meaning. The obligation to care for the good of workplace has undoubtedly a broader range, than a prohibition to cause harm to the employer, related to the material responsibility of the employee. An obligation to care about the employer's (employing establishment) property includes not just a protection against any harm but also means taking a special care of the property and keeping it in the best condition possible.[21]

In the labour law, on the base of the subjective criterion, it clearly drafts a division of the entirety of the property rights of companies and employees. The employing establishment may also possess an individual property, that may be stay in the disposition of the employing establishment or natural persons employing theirs employees not appearing as employing establishment" in the meaning

[19] Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, Decision on the merits of 4 November 2003, § 52.

[20] European Roma Rights Center (ERRC) v. Italy, Complaint No. 27/2004, Decision on the merits of 7 December 2005, § 20.

[21] J. Czerniak-Swędzioł, *Pracowniczy obowiązek*…, p. 103.

of labour law. To these persons, refer only adequate regulations of the labour code concerning employing establishment.[22] Individual property that includes subjective rights of the natural persons, generally applies to the goods of the production and service purposes. Distinguishing that category of the property gives to the natural persons an opportunity to carry out a determined service or production activity.[23]

A. Nowak wonders whether the produced property should entirely belong to the employing establishment, if the employee uses his own tools while working. Considering that issue in the light of the social relations regulated by the labour law it should be noted that an employee providing work (under supervision) to the employer not entirely a property produced by him being an effect of his work. It is the employing establishment, who pays the employee his salary, acquires this way a right to profit from his work. Both, material items produced by the employee during the process of work and immaterial values are included in the employing establishment property.[24] In the light of the labour law, the fact of whose the work tools are, does not really matter. Using the tools owned by an employee in the process of work, in the workplace, does not interfere with their personal ownership (of the employee) if the final work's effect/product is being owned by the employer.[25] Generally, the obligation to care for good of the employing establishment includes the items or tools essential for the employee to work and follow the supervision during the work process.

The substance of the obligation to care for good of the employing establishment is also to take all the essential actions in order to protect the employing establishment against the possible hazard, harm or loss of the expected benefits. The obligation to care

[22] To the natural individuals employing the employees it is used the legal regulations concerning the employing establishment. See the ordinance of the Ministry from the 20th November 1974 regarding the employment relations where the natural individual is an employee (Dz.U. nr 45, poz. 272), A. Nowak (ed.), *Mienie pracownika jako przedmiot ochrony prawa pracy,* „Prace Naukowe UŚ. Prawo Pracy" 5 (1998), p. 84.

[23] A. Nowak, *Mienie pracownika*…, p. 84.

[24] T. Zieliński, *Zarys wykładu prawa pracy. Część II,* Katowice 1978, p. 204-205.

[25] A. Nowak, *Mienie pracownika*…, p. 85.

for good of the employing establishment defines the procedure the employee should follow in the extraordinary situations, difficult to foresee, in which an employee as a member of the works community may be obliged to undertake all necessary steps in order to protect the employing establishment against any harm or loss.[26] In the context of the obligation to care for good of the employing establishment, an employee during the process of his work, fulfilling faithfully and responsibly his duties of his position should protect the property of the employing establishment against possible theft, destruction or damage. It is the employee's special responsibility to care about right condition of the devices, using the machines and the tools occurring in the area of the workplace in accordance with their purpose to be used, appropriate usage of the entrusted resources and other items, that should be used during the work process, production in the factory only, and exclusively in the area of the workplace.

Unfortunately, the employee does not always fulfill his care duty, therefore it should be mentioned, that an employee is obliged to show his care, protection against damage and loss not only of the items given to him, but also all other, that belong to the employer, even if such a responsibility does not directly follow from the law or supervisor's commands.[27] A person employed ought to show the care in the economical management of the electric energy, proportional company phones usage, simultaneously restraining from the actions that could cause harm to the right interests of the employing establishment, including waste of resources, wrapping used in the production process and accurate protection of the ready products against any mechanical or physical damages. An active attitude and proper reaction of the employee is desired when noticed some inappropriate attitudes of the other employees (especially close co-workers), while the property of the employer is being damaged, wasted or stolen. Particular responsibility to care for good of the employing establishment, its protection and rational resources usage should be required from persons of the

[26] W. Masewicz, *Obowiązki stron stosunku pracy*, Warszawa 1970, p. 18.

[27] Z. Salwa, *Prawo pracy i zabezpieczeń społecznych*, Warszawa 2004, p. 164 and next.

managerial positions, responsible of organization of the work process and appropriate property management, and also from the employees to whom the property has been entrusted with an obligation to return or count up. (warehousemen, cashiers, guards and others).[28]

The obligation of care for the good of the employing establishment is undoubtedly a positive obligation, supposed to make an employee manifest some positive actions, making all efforts to ensure that the property given in usage by employer is not being exposed to any harm. It is pointed out that the duty to care of the entirety and safety of the entrusted property, not only in the situation when such a behavior is predicted by law, but also undertaking some actions on one's own initiative, that may prevent occurring a significant damage to the employing establishment. It is found that the property of the employing establishment is a part of the term "employing establishment". Rights that are the subject of the property must have a nature of the property, therefore they differ from the rights and personal goods: surname, honor, freedom. Under the circumstances of the employment, the property will be understood as the assets of the employer. Not necessarily an employer must be also the owner of these items, may be a subject of the leasehold, may be rented or possess them on the base of a different legal title.[29]

Among the negatives behaviors qualified as the employees' duties violation, the cases of an unauthorized disposal of the goods should be mentioned. An employee working in the managerial position embezzles the employer's gear (a balance, a calculator, a freezer) that is his property. The gear has been in the possession and use to the private purposes of the employee without any knowledge and permission of the supervisor. Such a behavior definitely violates the employee's obligation of the employer's property protection, being also an expression of the general duty to care of the employer's good. (article 100 § 2 point 4 Polish Labour Code). This kind of proceeding has the hallmarks of the gross negligence in carrying out the employee's duties, as also very obvious is the level of the danger for the interests

[28] A. Krajewski, *Obowiązki stron stosunku pracy*, Warszawa 1978, p. 46.

[29] J. Czerniak-Swędzioł, *Pracowniczy obowiązek*... p. 103 and next.

of the employer, that such behaviors do generate. The effects of the optional dissemination of the practices – the employer's property usage for the private purposes without a knowledge and permission – among the employing establishment's crew, could be unpredictable, standing for the irreparable losses of the employer's property in the meantime.[30]

a. Monitoring

The employers, in order to protect the employing establishment property against a possible theft, are looking for another forms of its protection, often operating the modern technology, especially in the field of electronics, informatics or audio-video equipment.

One of many new technologies, used in the relations employer-employee is monitoring. Because of the growing interest in monitoring by the employing party and using its features, many legal doubts have occurred concerning the legality of its application in the employment relations. Especial problem under the conditions of the broadly developed and more common electronics and informatics that is applied is the employees' monitoring in the workplace by the usage of cameras and monitoring their phone calls. The employer has his interest in it, especially based on controlling whether the employee is using the time of work as supposed to and whether is not using the company phone and internet for some private purposes. However, monitoring may violate the privacy of the employee, mainly its aspect described as a right to be isolated, therefore definitely not under surveillance.[31] The regulations

[30] The sentence of the Highest Court from 24.2.1998, I PKN 547/97, OSNAP 1999/4/119, (orig.) *„użytkowanie bez wiedzy i zgody pracodawcy sprzętów z jego zakładu w prywatnym sklepie współmałżonka pracownika stanowi ciężkie naruszenie podstawowego obowiązku ochrony mienia pracodawcy (art. 100 § 2 pkt 4 k.p.) i uzasadnia rozwiązanie umowy o pracę bez wypowiedzenia z winy pracownika na podstawie art. 52 § 1 pkt 1 k.p.".*

[31] T. Liszcz, *Ochrona prywatności pracownika w relacjach z pracodawcą,* „Monitor Prawa Pracy" 1 (2007), printout from system Legalis: www.legalis.net.pl (23.9.2011).

of the Polish labour law do not define the direct legal normalization referring to the problem of monitoring in the workplace, in contrary to some European Union's countries (e.x. Belgium, Finland, Great Britain, Germany, France) or International Labour Organization.[32] When it comes to the regulation of acceptable forms of monitoring in the relations of employment in the countries that are members of EU, significant is to underline the role and the meaning of the collective labour law as a legal regulation of this issue, and also strictly linked to the legal regulation regarding the personal data protection, such an example may be Belgium, Denmark or Austria.[33]

The French labour law predicts pro-employee solutions in the matter of monitoring the employees in the workplace. To bring in any monitoring, the employer is obliged to fulfill some conditions, that are: to inform the Commission of the Informatics Technologies and Human Rights, that oversees the matters of personal data protection, reveal the existence of the monitoring to the employees, carry out the consultations with the works council if the company employs more than 50 people. An authority to monitor does not include the contents of the mail that can not be violated, even i f an employer forbids to use the informatics system for personal purposes. The evidences obtained from the violations mentioned above are in France deemed to be unacceptable.[34] In the Polish law the Constitution of Poland (2nd of April 1997) in its 47th article ("everyone has a right to the legal protection of private and family life, honor, reputation and to decide about his own personal life") indicates directly the right of every human to respect his personal life's sphere. In realization of the right to the privacy in the matter of monitoring should serve the regulations of the Personal Data Protection act from the 29th of August 1997[35], that

[32] International Labour Office, Code of Practice on Protection of Workers' Personal Data, Genewa 1997, p. 1-7.

[33] D. Döre-Nowak, *Monitoring w miejscu pracy a prawo do prywatności,* PiZS 9 (2004), p. 9.

[34] N.E. Muenchinger, *Workplace Privacy-France,* Computer Law & Security Report, vol. 18, No. 6 (2002), p. 424 and next.

[35] Dz.U. of 2002, No. 101, item 926 (consolidated version).

are being adjusted to the European Union's directives. In the Polish labour law the reference to the personal goods protection contains in the article no 11 of Polish labour code.[1] That regulation, stating one of basic law categories, has been formulated as the employer's obligation to respect the dignity and other personal goods of the employees. The lack of any further, detailed regulation of this issue in the labour law causes, when following the article no. 300 of the labour code, a need to refer to the civil law regulations.[36]

The control of the employees when using the monitoring is an action with many effects. A positive effect to the employer is mainly manifested as a measurable financial benefit – not desired employee's activity during work minimalizes the effectiveness of the work, and in the radical cases may also appear as an activity to the detriment of the employer, e.x. thefts, using the company phone for personal purposes, using internet not to work. A negative effect appears as a possibility of the violation of the dignity, the right to the privacy and the secrecy of the mail, and also as following the obligations of the legal regulations regarding the protection of the information achieved that way by the employer.[37] A hidden monitoring, operated without a knowledge of the persons under the surveillance, should be an acceptation and may be used only when determines the realization of the scope, impossible to reach when using another methods.[38] The employers more often use the surveillance cameras in practice, that may be installed most of all for the purposes of the safety. (e.x. gas stations), to prevent the thefts (in the shops) or finally – what is the most controversial – to control the employees. When bringing the cameras in the workplace some rules should be considered:

- it is not allowed to install the cameras in the places, where an employee or another person (e.x. a client) can reasonably expect to have his privacy guaranteed; e.x. changing rooms, toilets, private offices;

[36] D. Döre-Nowak, *Monitoring*…, p. 11.

[37] *Ibidem*, p. 8.

[38] D. Döre-Nowak, *Ochrona godności i innych dóbr osobistych pracownika*, Warszawa 2005, p. 177.

- persons that may be in range of the monitoring should be informed. Especially an employee should know which places are under a surveillance;
- the records should be stored for a necessary period of time for the purposes of the monitoring (e.x. to find out a theft) and in the conditions that will secure them against the access of not authorized persons.[39]

b. A lie-detector

Many controversies have occurred over the usage of the lie-detector by the employers. In order to find out a possible lie, and simultaneously to prove a theft of the employing establishment property (an employee) or to test his loyalty. A main task of this device is to check the truthfulness by the record of the pulse changes, the blood pressure, breathing and another body's reactions. An employee being tested this way has the sensors attached to his body, and is asked some questions supposed to answer briefly "yes" or "no". That device records all the most sensitive emotional reactions linked to the questioning process, producing in the meantime a graphic image of the physiological changes as the curves of the record. It is likely to state that a lie-detector records the human emotions, therefore is not a lie-detector like it is in the criminalistics literature in which there is a tendency not to use such a definition any longer.

A famous authority of the criminalistics – Brunon Hołyst – concludes that: "a phenomenon that is being determined during the usage of a lie-detector is not a lie, but the symptoms emotionally linked between a person being examined and a fact of the critical question".[40] Big and especially private companies tend to check the honesty of their employees and use the lie-detecting services more often. The candidates to be employed are being tested and what is easy

[39] A. Lech, *Monitorowanie pracownika w miejscu pracy,* „Monitor Prawa Pracy" 10 (2004), p. 267.

[40] B. Hołyst, *Kryminalistyka,* Warszawa1993, ed. VII, p. 595.

to guess, the results are decisive. In some employing establishment the result of the examination has influence on the employee's status or is a reason of taking some actions by the employer. May be also decisive to cause the denouncement of the employment or its termination, sometimes immediately.[41] The labour law regulations do not directly forbid the usage of a lie-detector, therefore an examination itself cannot be ordered by the employer. However, some controversial opinions occur in this field,[42] claiming a positive function of a lie-detector in the employment relations. The lie-detector examination may be carried out with the employee's acceptance only, that must be expressed before the examination, knowing the scope of the examination and how does it work. The acceptance of the employee automatically entitles the employer to examine him. The form and the way of examination require preparing such conditions that will not interfere with the examined employee's dignity. The question asked by a person operation the device must not be insistent, neither referring to the personal life. One of the authors recommends the usage of the lie-detectors to:[43]

- the pre-employment examination,
- the periodic loyalty tests,
- the determination of those responsible for the incidents.

A totally different opinion on this subject is represented by another author stating that the lie-detection examination of the employees is generally illegal, because it violates the personal goods of the examined person, particularly his freedom and privacy, while is acceptance does not exclude the illegality of the examination because of its character and a lack of a reasonable interest of the employer. Moreover, achieving the information about the physiological reactions of the person being examined has a willful nature cause excludes the

[41] „Rzeczpospolita" 14.2.2000, p. C1.

[42] J. Pietruszka, *O dopuszczalności i silnie prewencyjnym oddziaływaniu badań poligraficznych w stosunkach pracy,* „Monitor Prawa Pracy" 4 (2006), printout from the system Legalis; J. Konieczny *Wprowadzenie do bezpieczeństwa biznesu*, Warszawa 2004, p. 62 and next.

[43] J. Konieczny, *Wprowadzenie*…, p. 63-69.

influence on the results be a person that is being tested. It is then against the basic assumptions of the private law, according to which a participation in the private-law relations depends on the free will of this law's subjects. So it is worth considering: what is a scope and the usefulness of the lie-detection examination's results in the employment relations? Can an employer by the lie-detection effectively check the loyalty of the employees or the find the answer: who has committed a theft of the employing establishment property? Whether using such an opportunity of checking the employees, the employer can build a bilateral trust, that is essential for the correct functioning of the employing establishment?

I conclude with full knowledge that examination using the lie-detection will not be an element bringing in some good atmosphere in the employing establishment, and so in the employment relations between the employer and employees. It is also likely to cause an opposite effect, (even if a theft has been revealed by the lie-detection) like a loss of the employees, who may look for another employer. For the employment relations such an examination is completely useless excepting the penal process which is specified by a different legal regulation. A lie-detection examination are controversial regarding the effectiveness of the tests, because it shows a graphic record of the human psyche only. An employer, that has been examined by a "lie-detection" when asked about a current theft occurred in the workplace may remind himself let say "stealing" a pencil, some years ago. His emotions driven by stress and fear linked to the previous theft may be misinterpreted and revealed in a graphic form, concerning a different current event. A lie-detector does not detect a lie, but the increased emotional states occurring in the human psyche during the examination.[44] The usefulness of the employee to work is determined by his qualifications to the duties entrusted by the employer, whether he is responsible for what he does, conscientiousness, engagement in work, a regular relations with supervisors and co-workers. An employee has his legally defined duties and must fulfill them. Whereas the question whether and which of the emotion he is a subject of, answering

[44] T. Hanausek, *Kryminalistyka – zarys wykładu,* Kraków 1996, p. 189.

negatively the answers, for example if he has ever stolen anything or paid a fine for incorrect car parking, does not disqualify a person as a good employee.[45]

c. A personal control

It is worth paying attention to the matter of the acceptability of the personal control of the employee executed by the employer or another person, that is supposed to do so or the external security service. The aim of the personal control is to control the important interest of the employer. I must not appear in a form of the action unreasonable by the legally protected employer's interest. In that field, an argument of the "important employer's interest" should objectively have a bigger value than a threatened good of the employee. The control actions ought be free from features of the deliberate, individual ailment (a repression, a chicane), should exclusively lead to the effective protection of the employer's property that is exposed to any damage.[46] A protective function of the control involves providing the safety in the company or the employing establishment, and also its property or confidential information protection. By the usage of the allowed control instruments, the employer takes all the necessary actions to properly secure the property. The control may be divided into a bureaucratic and the control involving the employees, while that first is characterized by a strict compliance of the internal regulations, formally used control tools and a strict hierarchy of the controlling subjects.

The second one provides an active participation of the employees in the control executed in the workplace.[47] The personal employee's control executed by the employer causes many

[45] E. Wichrowska-Janikowska, *Badania wariograficzne a stosunki pracy*, PiZS 5 (2001), p. 38.

[46] P. Wąż, *Kontrola osobista pracownika,* „Atest" 1 (2008), p. 4.

[47] R.E. Walton, *From Control to Commitment in the Workplace*, „Harvard Business Review" 1985, vol. 2, p. 76-84.

controversies. Undoubtedly it is one of the most far-reaching kind of interference with the employee's personal goods, a right to the private life protection, human dignity and reputation. An obligation to respect the personal goods and the employee's dignity states one of the main labour law principles, that states the article no 11 of the labour code.[1] The issue of the personal employee's control is ruled by the sentence of the Highest Court from the 13th April 1972[48], notes that "a searching of the members of the crew in order to prevent stealing the property of the employing establishment is legally binding and does not violate the personal goods of the employees (articles 23 and 24 of the labour code) then while the employees have been warned of the possibility of such a control in order to protect the social property and when that control is executed in accordance with the representation of the crew in a manner not remaining in contradiction with the socio-economic purpose or the social symbiosis rules in Poland".

The employees should be informed in a proper manner about the possibility of the personal control execution, executed in the workplace by the employer or a person appointed by him. Generally such an information is registered in the work regulations, a collective work agreement, an appendix to the employment contract or another internal legal act, if the employer is not obliged to draw the work regulations (while employing less than 20 employees). In the legally binding legal act of the employer, it must be précised who is allowed to execute such a control, in what period, place and what actions may be taken of the personal control. In the situation when an employee works in a shop, a manufacturing facility, pharmacy it would be appropriate to define how the employees may make purchases from his employer for his own usage. An intention to make the purchases an employee should report to his employer, simultaneously attaching a receipt to the product purchased. Before the control actions, an employee must express his acceptance and the employer should instruct him of the possibility of refusal and the consequences that an employee may suffer from it. After finishing his work, the employer himself or a person appointed by him in writing, may require such a person to show the content of

[48] The sentence of the Highest Court from 13.4.1972, I PR 153/72, OSNC 1972/10/184.

the bag, net, plastic bag that is owned by the employee, while the items inside taken out by the employee himself only. An exception may be when an employee does not accept the personal control, and a theft of the employing establishment is very likely, the employer should call the police to execute the search, basing on the law. On the other hand a personal search executed in a broader range than the control of the bag, may violate the personal goods of the employee, also exposing the employer on the responsibility in that field.

According to the article 24 § 1 labour code in connection with the article 300 labour code, it is possible to talk about the violation of the personal good only if the action of the second party was illegal.[49] An employer executing the personal control may also use a specialist devices for example the metal detector. A remarkable example of such a personal control are the workers of the State Mint, routinely controlled before entering and when leaving the workplace premises. Although, many controversies of the legal nature arise over the execution of the personal control by so called internal security services that is hired on the base on a different contract. The particular legal bases of the actions, scope and tasks of the internal control security services are specified by the legal act from the 22th of August 1997 of property and personal security.[50] However, in the legal literature it is stated that the actions of the personal control, executed by the employees of those services remain beyond the range of its powers. The authorization and the range of the duties of the security worker are usually specified in the contents of the contract in so called "security plan". A detailed range of actions specify a so called "security execution statue" Nevertheless, the range of allowed actions of the internal control services must not extend the rights given by law and the range specified by the ordinances.[51]

Execution of the personal search by the employees of the hired security services is forbidden, because in that case, the personal dignity of the employee is evidently violated and qualifies to report it to the adequate prosecutor's office. There are also some doubts

[49] Wyrok S. Apel. z 14.5.1998, II APa 18/98, Apel. Warszawa 1998/4/17.

[50] Dz.U. of 2005, No. 145, item. 1221.

[51] P. Wąż, *Kontrola*…, p. 6.

about such a frequent practice of giving the allowances to execute the personal control of the employees in a concrete employing establishment, by the internal security services. It states an excess of the rights given by law, therefore such actions may result in a penal responsibility of the security worker as well as the person giving such an allowance.[52] The victimized employees can in the particular cases demand to suppress such effects of the violation of the personal goods by the employer by giving an appropriate statement (e.x. to apologize in a local newspaper), financial redress or a payment with a specific scope. They may also make a complaint to the General Inspector of the Personal Data and to assert claims in the judicial proceeding. (basing on the articles: 23 and 24 labour code).[53]

4. Undertaking an additional gainful activity and an obligation to care for the good of the employing establishment

In practice, the prohibition of undertaking any additional gainful activity by an employee is realized in three different ways. The first one, introduces a rule of the full subordination of the employee's activity to the employer, and therefore an absolute prohibition of undertaking any activity outside of the company (an absolute, contractual prohibition of undertaking any additional activity). The second one, less rigorous, introduces some limitations of such an activity only (a limited, contractual prohibition of undertaking an additional activity) with a permission or only knowledge of the employer. The third one states only the order how to notify the employer of undertaking or running such a n activity. An absolute prohibition of an additional gainful activity is based in its legal construction on a double kind of the decisions, i.e. on the prohibition of undertaking any additional, gainful activity during the time of a contract and on the order to spend the

[52] G. Gozdór, *Przestępstwa z ustawy o ochronie osób i mienia,* „Prokuratura i Prawo" 2 (2003), p. 145.

[53] Ł. Guza, *Kontrola pracowników w firmie,* www.kadry.infor.pl (23.9.2011).

whole employee's activity exclusively and only for the one employer. Under the particular circumstances, a too broadly set prohibition of this kind may be however considered to be against the labour law or even the Constitution.[54]

The contents of the contract dealing with the prohibition of the competition should be concrete, free from some general formulations related to the prohibited business. The general and unlimited prohibition of undertaking any additional or competitive activity is also forbidden. Therefore, too broadly understood the competition's prohibition specified in a contract of the parties, would cause a prohibition of undertaking any work or a business activity after a cessation of the employment relations.[55] The contents of the contract regarding the competition's prohibition must not violate the principle of the freedom to work, even if the employer would try to justify his actions by the own interest.

The prohibition of undertaking any activity is, in my opinion, too far-reaching. It interferes with the right to freedom in choosing the employer and a workplace. What is more, it states a limitation of the personal employee's freedom and his right to dispose of his free time (while working for the first employer). If an employee is able to manage his time in such a manner that the one employment would not interfere with another one, and a second employer does not run a competitive activity for the first one, it should not be forbidden. Such an activity of the employees not only violate the competition's prohibition (narrower), but also significantly broader obligation to care for the good of the company. A similar opinion is being expressed by J. Stencel,[56] and J. Czerniak-Swędzioł[57], who show that not each rendition of work for the competitive subject, or undertaking a competitive activity is automatically synonymous with the violation

[54] *Ibidem*, p. 166 and next.

[55] The sentence of the Highest Court from the 24.2.1998, I PKN 535/97, OSNAPiUS Nr 3/1999, poz. 85.

[56] J. Stencel, *Zakaz konkurencji w prawie pracy,* Warszawa 2001, p. 124-125.

[57] J. Czerniak–Swędzioł, *Pracowniczy obowiązek dbałości*, A. Świątkowski (ed.), *Studia z zakresu prawa pracy i polityki społecznej*, Kraków 2005, p. 114.

of care for good of the employing establishment. There are some possible situations, in which even running a competitive activity by an employee could not be threatened as a competitive activity.[58] However, S. Ciupa claims that, if that is possible to prove that when undertaking some additional activity, an employee did not fulfill his duties or it had a negative effect on the employer's interest, even if that activity has not been competitive and a competition prohibiting agreement had not been concluded, there are some existing premises to apply any penalties together with a termination of the contract because of the employee's fault. In some range, a prohibition of that kind may be derived from the employee's obligation to keep confident the information, which revealing could expose the employer to any harm, (article 100 § 2 point 4 Labour Code), if running the additional business activity would violate it.[59] The additional activity is a broader term than a competitive activity. Every competitive activity, if is being run during the employment relation, must be considered as an additional activity, but not every activity of this kind must has a competitive character.[60]

The prohibition of the competitive activity in the light of the special legal regulation is not contained in the general obligation to care, but results from the agreement, but the prohibition of an additional employment, in the scope which protects the employer's interest, than the ones supposed to be protected by the prohibition of the competition, is a part of that obligation (…), when an optional prohibition of the additional employment is only a realization of the already existing obligation (resulting from law) for care of the employing establishment good, on the side of the employee, it cannot be accepted as a less

[58] M. Kasimowicz-Auer, *Zakaz podejmowania działalności konkurencyjnej przez pracownika w trakcie trwania stosunku pracy,* „Monitor Prawniczy" 18 (2001), www.monitorprawniczy.pl (24.9.2011).

[59] S. Ciupa, *Checklist*…, Warszawa 2005, printout from system www.legalis.net.pl (23.9.2011).

[60] R. Tazbir, *Ochrona interesów pracodawcy przed działalnością konkurencyjną pracownika,* Kraków 1999, p. 59 and next.

beneficial than the conditions provided by law.[61] Extraordinarily important to assume, that a certain form of the employee's activity is an additional activity is its gainful nature (the employee's will to profit).[62] According to J. Czerniak-Swędzioł,[63] an additional activity run by an employee should be characterized by two features, that is its personal nature and its exclusively gainful scope (sometimes defining the additional employee's activity as any activity beyond the work for a particular employer, including no gainful nature is too far-reaching). It would be extremely difficult to demonstrate all the possible forms, in which an employee could run an additional activity.

Undertaking an additional employment by the employee is not (and should be not) forbidden. Most of all, the competition itself is not harmful, and even under some conditions may be beneficial for the competitor (mobilization to improve the quality of the products, services, reducing the costs, increase of the interest of the certain products, because of the good advertising campaign conducted by a competitor). Undertaking some particular activity by the employee does not always mean exposing the employer to some harm. While only a competitive activity that could expose the employer to some harm or do harm, may be a subject of the agreement concerning the prohibition of the competition basing on the article 101^1 labour code. The legislator gave some competences to the parties to regulate that matter by an agreement, therefore the employer willing to prevent the employee from undertaking a certain activity, can conclude an agreement of the prohibition of the competition. Concluding such an agreement, the parties can more accurately define, which actions are supposed to be competitive.[64]

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[61] T. Rogala, *Zakaz podejmowania dodatkowego zatrudnienia niebędącego działalnością konkurencyjną– glosa – II PK 268/07,* MOP 2010, nr 16, p. 915; see also the sentence of the Highest Court from the 2.4.2008, II PK 268/07, OSNP 15-16/2009, poz. 201.

[62] W. Ciupa, *Umowa*…, p. 33 and next.

[63] J. Czerniak-Swędzioł, *Pracowniczy obowiązek ochrony interesów gospodarczych pracodawcy,* Warszawa 2007, p. 178.

[64] J. Stencel, *Zakaz konkurencji*…, p. 130-131.

The basic interests of the employer, justifying the introduction of the additional employment limitations may be, most of all, related to the availability of the employee, correctness of the tasks performed for the main employer and prevention of the impossibility of the rendition of work. In order to protect these interests, there is an obligation of the employee to care for good of the employer expressed in the article 100 § 2 point 4 labour code. This obligation allows to claim from the employee to stop all the actions, that would violate the employer's interest. The employer's interest must be at least so concrete to allow to assess its legitimacy and importance. The assessment should also consider the individual employee's interest. Therefore, every case of undertaking an additional activity by the employee must be assessed in the individual manner. The threat of the employer's interests should be in each and every case actual and real. It is unacceptable to assume that it must mean the infringement of the obligation or what is more, doing harm to the employer. Consequently, we may clearly say that not every case of undertaking an additional employment may threaten the employer's interests.[65]

To avoid the problems mentioned above, the limited range of the prohibition of additional activity is being used the most often. In such a case, the provisions are directed subjectively, objectively or territorially.

5. Summary

The employees, because of the excessive control carried out by the employer, may feel a psychological discomfort, especially when the persons being controlled conclude that the employer lost his confidence in them for no reason. An inappropriate control can lead to the frequent absence of the employees in the workplace, a bad influence on the creativity or the increase of the personnel's fluctuation. The monitoring that has been brought in the company may let to check the employee's effectiveness, simultaneously to

[65] B. Cudowski, *Dodatkowe zatrudnienie,* Warszawa 2007, p. 40-41.

react to the situations of time wasting when performing his own duties and insubordination. On the other hand, the monitoring control may discipline the employee to work more precisely and effectively, demonstrating his conscientiousness and diligence.

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Zasada poszanowania godności człowieka w sferze stosunków pracy

Pracodawca w celu skontrolowania pracy pracownika, sumienności jej wykonywania posiada wiele narzędzi do przeprowadzenia kontroli w zakładzie pracy. W obecnym stanie prawnym nowoczesne techniki, które są coraz częściej stosowane wywołują wiele kontrowersji np. wykorzystanie wariografu. Celem kontroli zawsze powinno być dobro zakładu pracy, a przede wszystkim mienie, narzędzia, którymi posługuje się pracownik, towar w sklepie bądź hurtowni. Powstają coraz szersze możliwości kontrolowania pracowników, które obejmują nie tylko miejsce pracy, ale również drogę do lub z pracy, bądź wyjazdy delegacyjne. Aspekt godności człowieka jest coraz częściej postrzegany na gruncie prawa krajowego, jak i prawa międzynarodowego czy europejskiego. Na problematykę kontroli pracownika niewątpliwie należy spojrzeć z punktu widzenia ochrony dóbr osobistych, a w szczególności mając na względzie prywatność oraz godność człowieka. W ostatnich kilkunastu latach zauważyć można wzrost zainteresowania problematyką ochrony dóbr osobistych pracowników, co niezaprzeczalnie jest spowodowane postępem cywilizacyjnym, a tym samym powstały liczne zagrożenia dla tych konkretnych dóbr.

W dobie rozwijającej się w bardzo szybkim tempie techniki, Internetu oraz komputeryzacji, pracodawca może kontrolować zewnętrzne zachowania czy emocje pracownika. Tym samym dochodzi do szerokiej, moim zdaniem, ingerencji w prywatność osób zatrudnionych w urzędach, prywatnych firmach czy dużych fabrykach.

Autorka odpowiada na pytania: czy można dokonać kontroli osobistej pracownika, jeżeli tak, to na jakiej podstawie prawnej, jednocześnie nie naruszając dóbr osobistych, a szczególności jego godności. W jakim zakresie może być zastosowany monitoring w miejscu pracy, jakie warunki musi spełnić pracodawca i czy może w razie wątpliwości oraz braku zaufania do pracownika zastosować poligraf? Wszelkie rozważania są przeprowadzane w kontekście pracowniczego obowiązku dbałości o dobro zakładu pracy – art. 100 § 2 pkt 4 Kodeksu pracy, a także norm prawa międzynarodowego.