Modern Challenges of Human Rights Protection. Selected Problems

Edited by
Sebastian Ożóg

Modern Challenges of Human Rights Protection.
Selected Problems
Edited by Sebastian Ożóg

This book first published 2011

ISBN 978-83-62383-11-5

This book was reviewed by Tadeusz Jasudowicz
(Nicolaus Copernicus University)

Table of contents

INTRODUCTION

System of domestic and international guarantees aiming to protect human rights is a subject to constant evolution. This phenomenon is inevitable and necessary – only in this way we may adapt existing human rights' protective mechanisms to ever changing social and economical circumstances and increasingly rapid technological development, nowadays affecting vast aspects of our lives.

Our response to new threats can lie in a creative interpretation of existing legislative rules, adapting their general principles to the new circumstances or, when this would seem not sufficient enough, in the introduction of new regulations.

Regardless of a chosen solution, in most cases determined by the circumstances of a situation, a necessary step is an earlier in-depth reflection on the effect we plan to achieve, as well as all the possible side effects, occurring as a consequences of our choice. It shall be reasonable and thoughtful, as sometimes a change in the legislation aiming to solve one problem can lead to complications, sometimes more dire then the situation we originally tried to address. Therefore it is extremely important to continuously analyse these changing circumstances, trying to understand their nature, and regulate them in a manner consistent with the social sense of fairness and just, basing on the achievements of jurisprudence of human rights.

This publication aims to support this goal. The authors of the articles collected herein, dealing with the various challenges of the modern human rights protection, address new issues (or new problems related to issues that seemed to be resolved), and look for solutions. These are proposed basing mostly on the existing legislation, and sometimes, when law does not seem to address the issue properly, authors suggest possible improvements to the regulations itself. While not attempting to give final resolve to the issues discussed, we hope to contribute, even in a modest extent, to the development of thought in the field of protection of human rights and the guarantees contained therein.

Sebastian Ożóg

Jakub Czepek*
(University of Warmia and Mazury in Olsztyn)

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

1. Introduction

State's positive obligations differ from each other, depending on right (or freedom) protected. Positive obligations deriving from article 2 of the European Convention on Human Rights go furthest in clarifying and safeguarding protection of right to life. The right to life is the most fundamental right of individual and it's also the basis of other rights and freedoms protected. First of all, a practical and effective enjoyment of right to life must be guaranteed. Only then the protection of other rights and freedoms may be effective. This standard also concerns article 3 of the Convention, which prohibits torture, inhuman or degrading treatment or punishment, and since the case *Rantsev v. Cyprus and Russia*[1], article 4 of the Convention, which guarantees protection from slavery, servitude, forced or compulsory labour.

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

* Jakub Czepek (Ph.D) is employee of Faculty of Law and Administration of University of Warmia and Mazury. Author of various articles concerning international law and international law of human rights. His researches mainly focused on state's positive obligations within the first generation of human rights. His doctoral thesis also considered state's positive obligations within the sphere of first generation of human rights.

[1] ECHR judgment *Rantsev v. Cyprus and Russia*, 7.1.2010, appl. no. 25965/04.

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.[2]

The protection of the right to life and freedom from torture is fundamental, because it is the basis for the protection of other rights and freedoms. It is the reason why positive obligations concerning article 2 and 3 of the Convention must be constructed in a precise and complete way.

The most full and precise construction of positive obligations had been expressed in article 2 of the International Covenant on Civil and Political Rights. It states:

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
3. *Each State Party to the present Covenant undertakes:*

(a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*

(b) *To ensure that any person claiming such a remedy shall have his*

[2] 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.

right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Within this article, it becomes obvious that most full construction of state's positive obligations should be based on obligation to ensure enjoyment of rights and freedoms protected without any discrimination (art. 2 para 1), undertake legislative positive obligations (art. 2 para 2), guarantee an effective remedy within national law (art. 2 para 3 a), realize institutional positive obligations (art. 2 para 3 b) and procedural positive obligations (art. 2 para 3 c).

Of course, it does not mean that such construction of positive obligations exists only within the universal system of protection of human rights under the ICCPR. The construction of positive obligation is similar under the European Convention on Human Rights. Naturally, article 1 of the Convention, which obliges states to fulfill their obligations under the Convention, isn't constructed in such way. However, relevant aspects of the construction of positive obligations within the Convention system, derive from European Court's of Human Rights case law.

Only such full construction of state's positive obligations may guarantee proper and effective protection of human rights. This is the reason why state's positive obligations within the most fundamental rights, such as the right to life, prohibition of torture or prohibition of slavery, were constructed in such way.

Within the ambit of article 2 the great importance had been imposed on guaranteeing a practical realization (within the law system of State-Party) positive obligations within their procedural aspect. Initially, most of the state's procedural obligations were based on article 2 read together with art. 1 of the Convention. Nowadays, the ECHR constructs state's procedural obligations solely under article 2, resorting to its procedural limb. The particular procedural obligations will be subjected to a further study.

2. Obligation to protect life and its procedural aspects

First sentence of art. 2 states that: *Everyone's right to life shall be protected by law*. 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 imposes a material positive obligation, but it is also necessary that this material obligation is backed-up by procedural positive obligations.

For the first time this positive obligation had been expressed in *L.C.B v. the United Kingdom*. 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.[3]

The above formula expressed mainly material positive obligations, but, as the later ECHR case-law showed, it also expressed the necessity to guarantee the practical and effective aspects of material obligations by putting in place procedural obligations.

In *Osman v. the United Kingdom*, The Court stated 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.[4]

[3] *L.C.B. v. U.K.*, 9.6.1998, appl. no. 23413/94, § 36.

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

The above clearly presents that the Court expressed few groups of positive obligations in *Osman* case. These are:

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

Legislative obligations won't be a subject of a further study, as they had been taken up in the first part of this article, concerning state's material obligations deriving from article 2 of the Convention[5].

First of all, procedural obligations should be considered in the perspective of state's obligations and not as individual's claims or individual's powers.[6] The ECHR clearly stated that it should in no way be inferred from the foregoing that article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined.[7]

The main procedural obligation in this respect is to subject any case of death to a careful scrutiny, so that life-endangering offences would not go unpunished. On the other hand, the Court, has

[5] J. Czepek, *State's positive obligations under article 2 of the ECHR. Part 1 – material obligations*, J. Czepek (ed.), *Selected Problems of the European Protection of Human Rights*, Olsztyn 2011, p. 7-37.

[6] L. Garlicki (ed.), *Konwencja o ochronie praw człowieka i podstawowych wolności. Tom I. Komentarz do artykułów 1-18*, Warszawa 2010, p. 90.

[7] ECHR judgment *Öneryildiz v. Turkey*, 30.11.2004, appl. no. 48939/99, § 96; ECHR judgment *Zavoloka v. Latvia*, 07.07.2009, appl. no. 58447/00, § 34.

to bear 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.[8]

The state is afforded a margin of appreciation and while taking its actions the state must take under consideration measures and resources at its disposal and also the necessity to protect the rights and freedoms of other individuals.[9]

As the ECHR stated in *Osman* case, 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.[10]

Obligation to protect life is particularly intense when it is a result of absolutely necessary use of force. In this respect, always arises a question if the way of conducting and preparation of police action was in conformity with the standard of protection the right to life. In *Makaratzis v. Greece* the Court was struck by the chaotic way in which the firearms were actually used by the police in the circumstances. Also the applicant was injured during an unplanned operation which gave rise to developments to which the police were called upon to react without prior preparation. Taking the above into consideration, ECHR stated that authorities had not, at the relevant time, done all that could be reasonably expected of them to afford to citizens, and in particular to those, such as the applicant, against whom potentially lethal force was used, the level of safeguards required and

[8] *Osman v. U.K.*, § 116.

[9] L. Garlicki (ed.), *op. cit*., p. 90.

[10] *Osman v. U.K.*, § 116.

to avoid real and immediate risk to life which they knew was liable to arise, albeit only exceptionally, in hot-pursuit police operations.[11]

Particularly stringent positive procedural obligations arise in situations when an individual is in detention or is deprived of liberty in any other situation. It is important that an individual is in particular control of authorities. In such cases state's positive obligations play an important role, especially when an individual dies. As the Court stated in *Salman v. Turkey*: In the light of the importance of the protection afforded by article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of state agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them.[12]

Death in detention obliges states to provide an explanation concerning any actions (or lack of them) of any officers responsible. In *Velikova v. Bulgaria*, the Court stated that where an individual is taken into police custody in good health but is later found dead, it is incumbent on the state to provide a plausible explanation of the events leading to his death, failing which the authorities must be held responsible under article 2 of the Convention.[13]

The Court clearly understands that all the most important whereabouts concerning the death in custody are very often known only to the authorities. This is the reason why the ECHR uses particular standard of proof "beyond reasonable doubt". The Court stated that in assessing evidence, the general principle applied in cases has been to apply the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control while in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed,

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

[12] ECHR judgment *Salman v. Turkey*, 27.6.2000, appl. no. 21986/93, § 99.

[13] ECHR judgment *Velikova v. Bulgaria*, 18.5.2000, appl. no. 41488/98, § 70.

the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.[14]

The detention authorities are also responsible for giving the immediate necessary medical assistance. In *Anguelova v. Bulgaria* the Court examined the case in which the applicant (mother of the deceased) alleged that her son had been beaten and ill-treated by police officers and had died as a result, that the police had failed to provide adequate medical treatment for her son's injuries.[15]

The Court stated that the police officers, not being medical professionals, could not be criticized for having failed to detect that there was a medical emergency. However, it is irrelevant, as it is not disputed that at a certain point the police officers realised that Mr Zabchekov's condition was deteriorating. Even then, instead of calling for an ambulance, they contacted their colleagues who had arrested the boy. Those officers, who were on patrol duty, saw fit to abandon their patrolling tasks and drive back to the police station to verify the situation. Having seen Mr Zabchekov's condition, they took the time to drive to the hospital and then return, followed by an ambulance, instead of calling for one. The expert whose opinion was submitted by the applicant found that the delay in providing medical assistance had been fatal. The Court decided that the behaviour of the police officers and the lack of any reaction by the authorities constituted a violation of the state's obligation to protect the lives of persons in custody.[16]

In *Mojsiejew v. Poland* the Court examined the case of death in Tychy sobering-up centre. As applicant's son had uttered threats and had been aggressive to the employees, he had been tied up to a bed with belts. The room in which he had been detained had not been inspected often enough to prevent him from death from asphyxiation.[17]

The ECHR decided that in the particularly grave circumstances of the case, in which the applicant's son died under the exclusive

[14] *Ibidem*, also *Salman v. Turkey*, § 100.

[15] ECHR judgment *Anguelova v. Bulgaria*, 13.6.2002, appl. no. 38361/97, § 10-40.

[16] *Ibidem*, § 126-131.

[17] ECHR judgment *Mojsiejew v. Poland*, 24.3.2009, appl. no. 11818/02, § 7-20.

control of the Polish authorities, the obligation on the Government to provide plausible explanations was particularly stringent.

Moreover, the Court considers that the Government's explanations should have been provided within a reasonable time. Postponing them further until the resolution of the criminal case, even though over nine years have elapsed since the events in question, shows that the state is unable to provide a plausible explanation in the present case and to satisfy the burden of proof. The Government also failed to provide a convincing explanation as to whether the centre's employees had carried out periodic checks on Mr Mojsiejew and had complied with domestic regulations aimed at protecting the health and life of persons admitted to sobering-up centres, particularly those immobilised by belts.[18]

The state's responsibility for death of an individual in detention may also concern cases of death as a result of illness. In *Dzieciak v. Poland* ECHR stated that the quality and promptness of the medical care provided to the applicant during his four-year pre-trial detention put his health and life in danger. In particular, the lack of cooperation and coordination between the various state authorities, the failure to transport the applicant to hospital for two scheduled operations, the lack of adequate and prompt information to the trial court on the applicant's state of health, the failure to secure him access to doctors during the final days of his life and the failure to take into account his health in the automatic extensions of his detention amounted to inadequate medical treatment and constituted a violation of the state's obligation to protect the lives of persons in custody. There has been a violation of article 2 of the Convention on account of the Polish authorities' failure to protect the applicant's life.[19]

In some cases state may be obliged to take preventive actions in order to protect the right to life in detention. For example prevent a detainee from taking his own life. In *Renolde v. France* the ECHR stated that the vulnerability of mentally ill persons calls for special protection. This applies to a situation where the prisoner is placed,

[18] *Ibidem*, § 63.

[19] ECHR judgment *Dzieciak v. Poland*, 9.12.2008, appl. no. 77766/01, § 101.

as in the instant case, in solitary confinement or a punishment cell for a prolonged period, which will inevitably have an impact on his mental state, and where he has actually attempted to commit suicide shortly beforehand.[20]

This obligation is not absolute, because the Court has to bear in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the 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.[21]

Particularly stringent responsibility of a state emerges in cases of enforced disappearances. This applies to situation in which disappearing person had been taken into custody or had been taken by armed officers[22] or had been within the zone of an armed conflict controlled by one side of the conflict[23] and there are circumstances letting to conclude that disappeared person is dead[24]. Enforced disappearances create violations of article 2 both in its procedural and material aspects. The main violation in those cases concerns the lack of investigation in situations of deaths of disappeared persons.[25]

In very important case concerning enforced disappearances, *Kurt v. Turkey,* the Court recalled that almost four and a half years have passed without information as to his subsequent whereabouts or fate. In such circumstances the applicant's fears that her son may have died

[20] ECHR judgment *Renolde v. France*, 16.10.2008, appl. no. 5608/05, § 109.

[21] ECHR judgment *Paul and Audrey Edwards v. U.K.*, 14.3.2002, appl. no. 46477/99, § 55.

[22] For example ECHR judgment *Kurt v. Turkey*, 25.5.1998, appl. no. 24276/94, § 106-109; ECHR judgment *Beksultanova v. Russia*, 27.9.2011, appl. no. 31564/07, § 9-15.

[23] ECHR judgment *Cyprus v. Turkey*, 10.5.2001, appl. no. 25781/94, § 132-133; ECHR judgment in Vagapova and Zubirayev v. Russia, 26.2.2009, appl. no. 21080/05, § 85.

[24] For example ECHR judgment *Bazorkina v. Russia*, 27.7.2006, appl. no. 69481/01, § 110.

[25] L. Garlicki (ed.), *op. cit*., p. 84.

in unacknowledged custody at the hands of his captors cannot be said to be without foundation. She has contended that there are compelling grounds for drawing the conclusion that he has in fact been killed.[26]

ECHR also underlined that it must be subjected to careful scrutiny whether there does in fact exist concrete evidence which would lead it to conclude that applicant's son was, beyond reasonable doubt, killed by the authorities either while in detention in the village or at some subsequent stage. It also notes in this respect that in those cases where it has found that a Contracting State had a positive obligation under article 2 to conduct an effective investigation into the circumstances surrounding an alleged unlawful killing by the agents of that state, there existed concrete evidence of a fatal shooting which could bring that obligation into play.[27]

As to the circumstances of the case and violation of article 2, The Court stated that it is to be observed in this regard that the applicant's case rests entirely on presumptions deduced from the circumstances of her son's initial detention bolstered by more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent state. The Court for its part considers that these arguments are not in themselves sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody. As to the applicant's argument that there exists a practice of violation of, *inter alia*, article 2, the Court considers that the evidence which she has adduced does not substantiate that claim. The Court however, found that the state failed in its obligation to protect her son's life in the circumstances described fall to be assessed from the standpoint of article 5 of the Convention.[28]

Enforced disappearances may also entail a violation of article 3 of the Convention, regarding close family of the disappeared person and the suffering of the relatives, which is very often found to be contrary with the standards of article 3 of the Convention. In the very

[26] ECHR judgment *Kurt v. Turkey*, 25.5.1998, appl. no. 24276/94, § 106.

[27] *Ibidem*, § 107.

[28] *Ibidem*, § 108-109.

same case *Kurt v. Turkey*, the Court reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. It recalls in this respect that the applicant approached the public prosecutor in the days following her son's disappearance in the definite belief that he had been taken into custody. She had witnessed his detention in the village with her own eyes and his non-appearance since that last sighting made her fear for his safety, as shown by her petitions of 30 November and 15 December 1993. However, the public prosecutor gave no serious consideration to her complaint, preferring instead to take at face value the gendarmes' supposition that her son had been kidnapped by the PKK. As a result, she has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time. In this case, the ECHR stated that the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress, the Court found that the respondent state was in breach of article 3 in respect of the applicant.[29]

Taking into consideration various cases concerning enforce disappearances, the Court stated that the decision whether there was a violation of art. 3 of the Convention, should be based on special factors. In *Luluyev and others v. Russia*, ECHR stated that the question whether a family member may claim to be a victim of treatment contrary to article 3 will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond – the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to

[29] *Ibidem*, § 133-134.

those enquiries. The Court further emphasized that the essence of such a violation does not mainly lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.[30]

State's positive obligations in their procedural aspect also arise in situation of a deportation when there is great probability that an individual would be deprived of his life in the recipient state. In *Soering v. U.K*. the Court stated that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services.[31] The Court also found incompatibility of sentencing to a death row with article 3 of the Convention. ECHR stated that having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.[32]

Of course, deportation may involve responsibility of a State Party. As the Court underlined in *Bader and Kanbor v. Sweden*, an issue may arise under articles 2 and 3 of the Convention if a Contracting State deports an alien who has suffered or risks suffering a flagrant

[30] ECHR judgment *Luluyev and others v. Russsia*, 9.10.2006, appl. no. 69480/01, § 111.

[31] ECHR judgment *Soering v. U.K*., 7.7.1989, appl. no. 14038/88, § 111.

[32] *Ibidem*.

denial of a fair trial in the receiving state, the outcome of which was or is likely to be the death penalty.[33]

The obligation to protect life also entails positive preventive obligations. As the Court underlined in *Osman* and consequently repeated in later case-law, 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 (…). Also, 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. The scope of this obligation is a matter of dispute between the parties.[34]

Of course, the state must 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. It is important, however to prove that 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. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life.[35]

In *Kontrová v. Slovakia*, The Court examined a case in which the police did not take any actions, knowing that father of a family is planning to murder his children and commit suicide. ECHR stated

[33] ECHR judgment *Bader and Kanbor v. Sweden*, 8.11.2005, appl. no. 13284/04, § 42.

[34] *Osman v. U.K.*, § 115.

[35] *Ibidem*, § 116.

that the police had an array of specific obligations. These included, *inter alia*, accepting and duly registering the applicant's criminal complaint; launching a criminal investigation and commencing criminal proceedings against the applicant's husband immediately; keeping a proper record of the emergency calls and advising the next shift of the situation; and taking action in respect of the allegation that the applicant's husband had a shotgun and had made violent threats with it.[36]

Similarly in *Opuz v. Turkey*, the authorities ignored a long period of violence against a family and the possibility of a murder committed on mother in law. The Court decided that there had been a violation of art. 2 in this respect and that that, once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim.[37]

The Court's preventive obligations does not solely concern obligation to protect from actions of a third person. It also concerns other situations, which may lead to loss of life. In *Öneryýldýz v. Turkey*, death was caused by toxic air from the rubbish tip. The ECHR decided that art. 2 does not only concern deaths resulting from the use of force by agents of the state but also lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. Moreover, 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, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites.[38] This interpretation was followed in *Budayeva*[39] case, which concerned deaths caused by avalanche of mud.

---

[36] ECHR judgment *Kontrová v. Slovakia*, 31.5.2007, appl. no. 7510/04, § 53.

[37] ECHR judgment *Opuz v. Turkey*, 9.6.2009, appl. no. 33401/02, § 153.

[38] ECHR judgment *Öneryýldýz v. Turkey,* 30.11.2004, appl. no. 48939/99, § 71.

[39] ECHR judgment *Budayeva and others v. Russia*, 20.3.2008, appl. no. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, § 131-135.

In *Rajkowska v. Poland* the Court had taken up the responsibility of state in cases concerning death in a car accident.[40] In *Ciechonska v. Poland*, the ECHR examined the case of death caused by a falling tree in Kudowa-Zdrój. The Court stated that state's duty to safeguard the right to life must also be considered to involve the taking of reasonable measures to ensure the safety of individuals in public places and, in the event of serious injury or death, having in place an effective independent judicial system securing the availability of legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. Consequently, the Court found violation of article 2.[41]

State's positive procedural obligations on one hand compel states to protect individuals from death, involving responsibility of state, (of course, within reasonable boundaries[42]), on the other hand imply the necessity to subject every case of death to a careful scrutiny. This second procedural aspect had been also taken up by the Court within the procedural obligations concerning prohibition of deprivation of life and the necessity to conduct adequate and effective official investigation.

3. Prohibition of deprivation of life and its procedural aspects

The prohibition of deprivation of life in its procedural aspect requires state to conduct adequate and effective official investigation. In ECHR's opinion every case of unnatural death must be followed by conducting investigation. This is one of the requirements of right to life in its procedural limb. Of course, the scope and character of such official investigation, may vary, depending on particular circumstances of the case.

[40] ECHR decision *Rajkowska v. Poland*, 27.11.2007, appl. no. 37393/02.

[41] ECHR judgment *Ciechonska v. Poland*, 14.6.2011, appl. no. 19776/04, § 67.

[42] See *Osman v. U.K.*, § 116.

This obligation is particularly important, when referring to cases in which the state had used lethal force. Such investigation should, by all means, guarantee the accountability of state agents involved. The Court stated, that the obligation to protect the right to life under article 2 of the Convention, read in conjunction with the state's general duty under article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge formal complaint or to take responsibility for the conduct of any investigatory procedures.[43]

The Court numerously found a number of deficiencies in state's procedures against state's forces and underlined that it permitted or fostered a lack of accountability of members of the security forces for their actions which, was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention.[44] The Court, in respect to case-law concerning armed conflicts, decided that negligence in conducting investigations, especially when it leads to creating a general impunity of state's forces, always constitutes a violation of article 2 of Convention.[45]

The investigation must be independent. As the Court stated in Turkish cases, it was common that the investigating officer appointed by the governor was a gendarmerie lieutenant-colonel and, as such,

[43] ECHR judgment *Avşar v. Turkey*, 10.7.2001, appl. no. 25657/94, § 393.

[44] ECHR judgment *Mahmut Kaya v. Turkey*, 28.3.2000, appl. no. 22535/93, § 98.

[45] L. Garlicki (ed.), *op. cit*., p. 85.

was subordinate to the same chain of command as the security forces he was investigating. As to the Administrative Council, whose responsibility it was to decide whether proceedings should be instituted against the security forces concerned, it was composed of senior officials from the province and was chaired by the governor, who in this instance was administratively in charge of the operation by the security forces. In this connection, the evidence of one of the members of the Şirnak Administrative Council should be noted, according to which, in practice, it was not possible to oppose the governor: either the members signed the decision prepared by him or they were replaced by other members who were willing to do so.[46]

Of course, such investigation could not be regarded as independent. Investigation to be independent may not let, any links or any relation of subordination between the officers involved in using force and the organs conducting the investigation. In Turkish cases the Court numerously found incompatibility with standard of independence actions taken up by Administrative Councils in cases concerning state forces and gendarmerie.[47] In *Orhan v. Turkey* ECHR found that the Kulp District Administrative Council could not be regarded as independent as it was made up of civil servants hierarchically dependent on the governor, an executive officer linked to the very security forces under investigation.[48]

The investigation should also be adequate. The standard of adequacy of investigation is mainly focused on discovering important circumstances and factors of the incident causing death. It is also important to discover how the incident developed.

In *Mahmut Kaya v. Turkey*, the Court found that the investigation at the scene of discovery of the bodies involved two autopsies. The first was cursory and included the remarkable

[46] ECHR judgment *Oğur v. Turkey*, 20.5.1999, appl. no. 21594/93, § 91.

[47] T. Jasudowicz, *Kryminalistyczne aspekty prawa do życia w świetle orzecznictwa strasburskiego*, A. Bulsiewicz, A. Marek, V. Kwiatkowska-Danel (eds.), *Doctrina multiplex veritas una. Księga jubileuszowa ofiarowana profesorowi Mariuszowi Kulickiemu*, Toruń 2004, p. 216.

[48] ECHR judgment *Orhan v. Turkey*, 18.6.2002, appl. no. 25656/94, § 342.

statement that there were no marks of ill-treatment on the bodies. The second autopsy was more detailed and did record marks on both bodies. It omitted, however, to provide explanations or conclusions regarding the ecchymoses on the nail bases and the knees and ankle or the scratches on the ankle. Bruises on the right ear and head area were attributed to pressure on the body, without clear explanation as to what that might involve. There was no forensic examination of the scene or report regarding whether the victims were killed at the scene or how they were deposited at the scene. Nor was there any investigation concerning how the two victims had been transported from Elazig to Tunceli, which journey would have involved stopping at a series of official checkpoints along the more than 130 km route.[49] Such deficiencies in determining the incident causing death and its circumstances could not be in conformity with standards of adequacy and effectiveness of investigation.

The effectiveness of investigation is the standard concerning that the investigation should lead to finding the perpetrators and bringing them before justice which, naturally should include fulfilling the standards of a fair trial.

As the Court stated, the system required by article 2 must provide for an independent and impartial official investigation that satisfies certain minimum standards as to 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. The requirement of public scrutiny is also relevant in this context.[50]

Generally, the standard of effectiveness requires that the investigation is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is

[49] ECHR judgment *Mahmut Kaya v. Turkey*, § 104.

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

not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.[51]

It is also necessary, that the authorities responsible for the investigation undertake all the necessary steps in order to determine the perpetrators. It may mean the necessity to properly secure the proof in the case. In *Basayeva* case, the Court underlined, that crucial action had to be taken in the first days after the event. It appears that a number of essential steps were delayed and were taken either several years later or not at all.[52]

It may also mean conducting an autopsy. In *Oğur* case the ECHR found that if a proper post-mortem examination had been carried out, it could have provided valuable information about the approximate positions of the person who fired and the victim, and the distance between them, at the moment of the shot. The report merely mentions the discovery of eight cartridges, three shotguns and a quantity of powder, but none of that evidence was subsequently subjected to detailed examination. Here too a proper examination, in particular a ballistic test, could have revealed exactly when those items had been used. Also, the expert report prepared at the prosecutor's request contains information that is very imprecise and findings mostly unsupported by any established facts.[53]

The Court also finds it extremely important to identify all persons involved in incident. In *Makaratzis* case the Court found striking omissions in the conduct of the investigation. In particular, the

[51] ECHR judgment *Hugh Jordan v U.K.*, 4.5.2001, appl. no. 24746/94, § 107.

[52] ECHR judgment *Basayeva and others v Russia*, 28.5.2009, appl. no. 15441/05, 20731/04, § 136.

[53] ECHR judgment *Oğur v. Turkey*, § 89.

domestic authorities failed to identify all the policemen who took part in the chase. In this connection, it may be recalled that some policemen left the scene without identifying themselves and without handing over their weapons; thus, some of the firearms which were used were never reported. This was also acknowledged by the domestic court. It also seems that the domestic authorities did not ask for the list of the policemen who were on duty in the area when the incident took place and that no other attempt was made to find out who these policemen were.[54]

Apart from identifying all the persons involved it is crucial to find and hear all the witnesses and gather all the necessary proof. The nature and degree of scrutiny which satisfies the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria.[55]

The Court also stressed that the investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.[56]

The investigation to be effective should also be conducted speedily. It does not imply any strict terms for procedures. It means

[54] ECHR judgment *Makaratzis v. Greece*, § 76.

[55] ECHR judgment *Velikova v. Bulgaria*, § 80.

[56] ECHR judgment *Kelly and others v. U.K.*, 4.5.2001, appl. no. 30054/96, § 96.

that the investigation should be free from any delays. The ECHR states that the requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.[57]

4. Procedural obligations deriving from article 2 read together with article 13 of the Convention

It had already been stressed that at the very beginning of developing the concept of positive procedural obligations deriving from article 2 of the Convention, it was constructed on the basis of article 2 read together with article 1 (which guarantees securing the rights and freedoms set in Convention to everyone within the jurisdiction of State-Party). Naturally, with further development of ECHR case-law, the Court found that state's positive procedural obligations derive from the very essence of article 2 of the Convention itself, leading to dividing alleged violations of article 2 into material and procedural sphere.

As to article 13 of the Convention, it should be mentioned that together with articles 2 and 3 it creates common positive procedural obligations, which fulfills the standards set within the material sphere of these rights. The basic positive obligation is to prevent the violations of rights set in articles 2 and 3.[58]

As to the article 13 itself, it states that: *Everyone whose rights and freedoms as set forth in the Convention are violated shall have an*

[57] *Ibidem*, § 97.

[58] M. Balcerzak, *Prawo do skutecznego środka prawnego*, B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Prawa człowieka i ich ochrona*, Toruń 2010, p. 342.

effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. The right to effective remedy has strictly procedural character and it's not an autonomous right within the meaning of the Convention. It always has to be used with other rights or freedoms set in the Convention.

Together with articles 2 and 3 it creates a procedural support to material protection of the right to life and prohibition of torture, inhuman or degrading treatment or punishment. In *Ergi v. Turkey*, the Court decided that the Commission recalled its finding that the absence of any adequate and effective investigation into the killing of Havva Ergi constituted a breach of article 2 of the Convention. Since this matter also underlay the applicant's complaints under article 13 of the Convention, the Court found it unnecessary to examine them separately.[59]

Also, the Court recalled that article 13 of the Convention guarantees the availability at the national level of a remedy to enforced the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of article 13 is to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although states are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent state.[60]

State's positive procedural obligations deriving from article 2 read together with article 13 of the Convention are definitely broader than mere obligation to conduct an effective official investigation capable of finding the responsible and bringing them to justice.

[59] ECHR judgment *Ergi v. Turkey*, 28.7.1998, appl. no. 23818/94, § 93.

[60] *Ibidem*, § 96.

As the ECHR stated that the nature of the right which the authorities were alleged to have violated in the instant case, one of the most fundamental in the scheme of the Convention, must have implications for the nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. In particular, the notion of an effective remedy for the purposes of article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. Seen in these terms the requirements of article 13 are broader than a Contracting State's procedural obligation under article 2 to conduct an effective investigation.[61]

The above clearly shows that state's positive procedural obligation in this respect also entails the necessity of proper compensation and guaranteeing the effective remedy within domestic legal system also to the relatives of the deceased. This was clearly underlined by the Court in case of *Mahmut Kaya v. Turkey*. ECHR recalled that article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this article is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent state. Article 13 also requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the

[61] *Ibidem*, § 98.

deprivation of life and including effective access for the complainant to the investigation procedure.[62]

5. Summary

The main aim of this article wasn't, by any means, to exhaustively present all the issues concerning procedural limb of article 2 of the Convention, but to present some of the most important procedural aspects of positive obligations deriving from article 2.

In Court's view, article 2 constructs one of the most fundamental guarantees – the right to life. As it was stressed in this article it is not enough to merely protect the right to life. It also requires undertaking positive procedural actions. The practical and effective protection of right to life should be – first of all – based on legal and procedural guarantees within the legal system of a State-Party. That is the reason why states should, by all means, concern on practical (and procedural) guarantees within their legal systems.

It is important to stress that the procedural positive obligations within article 2 are still developing, which was proven by Strasbourg case-law. It is also crucial that States-Parties to the Convention are aware of those obligations and that they would satisfy the requirements stressed by the Court.

[62] ECHR judgment *Mahmut Kaya v. Turkey*, 28.3.2000, appl. no. 22535/93, § 124.

* * *

Zobowiązania pozytywne państwa dotyczące art. 2 EKPC. Część II – zobowiązania proceduralne

Europejski Trybunał Praw Człowieka już od lat coraz bardziej rozwija koncepcję zobowiązań pozytywnych państwa w sferze praw człowieka pierwszej generacji. W odniesieniu do prawa do życia, orzecznictwo Trybunału poszło najdalej. W tej sferze bowiem, Trybunał sformułował najbardziej kompleksowy i wyczerpujący charakter zobowiązań pozytywnych Państwa-Strony. Jest to podyktowane koniecznością przyznania szczególnej ochrony prawu do życia oraz konsekwencją ogromnego wpływu ochrony prawa do życia na zapewnienie ochrony pozostałych praw i wolności jednostki.

Zobowiązania pozytywne państwa w zakresie prawa do życia można podzielić na zobowiązania o charakterze materialnym[63] i zobowiązania proceduralne. Zobowiązania o charakterze materialnym stanowią niezwykle ważny fundament na którym *de facto* opiera się ochrona prawa do życia. Trudno jednak byłoby mówić o praktycznym i skutecznym zapewnieniu tego prawa bez realizacji zobowiązań proceduralnych, które wspomagają i uzupełniają zobowiązania o charakterze materialnym.

Zakres zobowiązań proceduralnych jest dość szeroki i w dalszym ciągu się rozwija. Zobowiązania proceduralne w dużej mierze dotyczą pracy i funkcjonowania służb, takich jak policja, służba więzienna itp. Szczególnie ważnym zobowiązaniem proceduralnym jest obowiązek przeprowadzenia adekwatnego i skutecznego śledztwa w przypadku każdej sytuacji, gdy dochodzi do pozbawienia lub utraty życia. Skuteczne zapewnienie zobowiązań proceduralnych jest kluczowe dla praktycznego i skutecznego zapewnienia prawa do życia w systemie prawa krajowego.

[63] J. Czepek, *op. cit*., p. 7-37.

Justyna Krzywkowska[*]
(University of Warmia and Mazury in Olsztyn)

SELECTED LEGAL PROBLEMS OF DOMESTIC VIOLENCE

A family is the most important place for human development, it is a place where his or her personality, worth system and views are shaped. Since parents have conferred life on their children, they are bound by the most serious obligation to educate their offspring and therefore must be recognized as the primary and principal educators. Parents are the ones who must create a family atmosphere animated by love and respect for God and man, in which the well-rounded personal and social education of children is fostered. Hence the family is the first school of the social virtues that every society needs.[1]

Relationship among members of a family play the very important role. Family home ought to be always connected with security and warm of home. It is a pity but for many people around the world – also in Poland – family home is a place of misery, degradation, helplessness and fear.

[*] Ph.D., University of Warmia and Mazury in Olsztyn, Faculty of Law and Administration. Assistant Professor in the Department of Canon Law and Ecclesiastical Law. Member of the Association of Polish Canonists (since 2009) and the Polish Association of Religious Law (since 2011).

[1] II Vatican Council, *Declaration on Christian Education*, *Gravissimum Educationis*, 28.10.1965, No. 3; John Paul II, *Apostolic Exhortation Familiaris consortio*, 22.11.1981, No. 36 [FC]; *Code of Canon Law* 1983, can. 793 and can. 1136 [CIC 1983].

1. Image of the modern family

Family creates optimum conditions for the life functioning of people also in the outside of family and in important roles for society. It also meets the essential needs of the individual human being. The proper functioning of society and the proper functioning of the families living in this society are integrally connected to each other. In the sociological literature dominates the recognition of the family as a social group, which is distinguished from other groups as a community of residence, name, material possessions and spiritual culture as well as biological continuity.[2]

The family is one of the most important educational environments for children and youth, it is an educational institution not to be replaced by other institutions, family introduces the child into the world of culture and social life of adults. In the family clearly the culture is reflected – especially the patterns of behaviour – the society, nation. Family can be considered as an important methodological research unit showing the culture of the particular community. Due to the enormous importance to the society, family is not only a passive object of interest from the society and government. Social moral and legal norms as well as legal sanctions are aimed at regulating the institution of the family and the behaviour of its members in order to comply with existed here interests of society.[3]

The family either large or small, has in society many different functions. These functions can be divided into four groups. The first and main function of family is procreation and maintaining the continuity of the family. The second function is the socialization of children, which is teaching them rules of behaviour, common rules of conduct in a particular society as proper ones and passing the accepted value system. This is a very important role of parental authority. The third function is to protect the family's basic needs (i.e. food, shelter and clothing) for its members. The fourth function is to point out the right

[2] T. Pilch, I. Lepalczyk, *Pedagogika społeczna. Człowiek w zmieniającym się świecie*, Warszawa 1995, p. 18-19.

[3] D. Siemek, *Problemy wychowawcze wieku przedszkolnego*, Warszawa 1987.

place in society. It should be also noted that the family as a social group is by nature cyclical, and renewable. Man, over the years, has been serving following roles in a family.[4]

Contemporary family increasingly loses its traditional character and becomes significantly a cluster of units. If among the members of the family there is not feel that they need each other and there is no strong emotional bond, then strife, conflict and mutual torment occur. Meanwhile, a positive family atmosphere originates from the relationship between husband and wife. Where there is no mutual love and respect between them, it affects even more children. A child instinctively feels a weakness of emotional ties. For the proper psychological development, it is necessary to provide warmth for the child, sense of security and a full understanding.[5]

The case of the family is a matter for all people, wherever in a world they are and no matter what their belief and religion is. The family is therefore an important element of social interaction, from the mode and level of functioning in society depends on a lot, it can create both positive and negative phenomena in society as a whole.

Family so far is irreplaceable and it is impossible to imagine its absence in the society. Humanity has not developed yet other institution that would be able effectively replace the family and its unknown if this can happen in the future. Because of family importance in the society, family should be protected and supported.

2. Causes of dysfunction and pathology in the family

Civilization makes in a growing progress a threat to the family, interfering with its functioning. There is an increasing number of pathological, degenerate, dysfunctional and multi- problem families. The cause of this is an alcoholism, drug addiction, violence, prostitution, abortion. Home with such model has a bad effect on

[4] J. Grudzień, *Wybrane zagadnienia z filozofii i socjologii*, Warszawa 1968, p. 284-287.

[5] H. Mendras, *Elementy socjologii*, Wrocław 1997, p. 140-149.

the child, awake the aggression, rebellion and fear. In a world full of conflicts of norms and values, in which difficult life situations force us to fight for survival and a better life, people are confused and uncertain. Consumptive attitude to life, a difficult economic situation of families is another threat. Parents spend most of their time at work, pursuing for money, that is why they do not adequately meet their duties. Therefore, children who do not have a support from the family very often reach for alcohol and drugs. More children commit suicide or join a sect.

There are many factors contributing to the demoralization and biological destruction of the family and its individual members. We can divide risk into two groups: external threats that attack the family from outside and internal threats inherent in the family. Most often they are closely related, one factor pulls another.

External factors that are threatening the family include: lack of family to ensure appropriate conditions and rights (of employment, housing, maintenance, health and life, raising children), a false image of love, marriage and family promoted in the media, the activities of sects and new religious movements.[6]

There are many internal causes of family dysfunctions. These include: disturbed relations between members of the family (marital misunderstandings, family conflicts), alcoholism of one or both parents, the dissolution of marriage life and family, lack of full families (single mothers, single fathers).

Family in today's world is under the influence of large, deep and rapid social and cultural transformations. There is no worrying signs of degradation of some fundamental values: a mistaken theoretical and practical independence of the spouses in relation to each other, serious misconceptions regarding the authority of parents and children, the practical difficulties that families often face in the transmission of values, there is a growing number of divorces, and more frequent recourse to sterilization.[7] Divorce negates mutual assistance and stabilization of life, breaks the marital community, rather

[6] John Paul II, *Apostolic Letter Evangelium vitae*, 25.3.1995, No. 3-4 [EV].

[7] FC, 6.

than resolving the matter, it multiply new problems and complicates life even more. There are situations that none of the parents wants to take care of the child, because they want to be free. As a result, someone closer or from extended family or children's home looks after the child (children). It is shocking that social orphanhood of children exist. Throughout the world, as well as in our country live a lot of abandoned children, not raised by their own mothers, not in their own families, they are reliant on children's homes, which are social institutions, useful, but it will not replace their own mothers. As a result of divorce in the home there is often a lack of behaviour model, a lack of moral authority of parents. Many of these children go down the criminal road, creating the margin of society, some of them as a result of accumulated unpleasant experience fall into mental illness, end up in correctional facilities, or trying to commit suicide.[8]

A lie, falsehood, hypocrisy in the family is evil. Lack of truth in life kills trust, distorts the spirit of man, disintegrates the society, and it kills what for the humanity is the most specific and relevant.

There are many other threats facing the man in the world today. All threats hit the family, and thus the happiness of the person and human society.

3. Violence in family or domestic violence?

Nowadays, in a concept of family we can find many pathological occurrences: divorces, juvenile delinquency, drug addiction, alcoholism, crime against family. Domestic violence is a phenomenon which touches many families, not only these with pathological background.[9] However many people do not want to confess that there is a violence at home, they prefer to suffer than

[8] *Przyszłość ludzkości idzie przez rodzinę*, W. Szewczyk (ed.), Warszawa 1992, p. 132-135.

[9] In the beginning a term "pathology" was used only in medicine and not before the end of XIX century it started to be used in social occurrences.

tell the truth about their awful life. By a lot of people that problem is conceive as bashful and entirely private.

Occurrence of domestic violence ignores home and social cooperation, moral and legal standards, it causes tragic psychological results and serious injuries. Violence not only offends against a law to live, freedom and a private security, but also it does limit and block benefits of the other people's laws and freedom, which belong to him. Nowadays more and more often frustration occurs. It is the reaction for the unpredictable future because of social changes, common run for money, loneliness in the middle of society or the lack of possibilities of finding a job or home. Frustration supported by the alcohol leads to aggression, and the easiest way is to react to the closest.[10]

We can look at violence from different perspectives. The moral perspective shows us that violence is an evil, a sin when people abuse the weaker person.[11] Psychological understanding of violence has the basic position of help for victims and offenders, to liberate them from violence and repair damages that were done in their lives. From the law point of view domestic violence it is a crime which varieties are mentioned in the Criminal Code.[12] Family issues and family rights protection are included in numerous provisions of conventions, declarations and resolutions of international organizations, including European organizations.

In the Polish dictionary violence is defined as a physical domination used to illegal activities against somebody, impose by force authority, domination.[13] I. Pospiszyl proposed this description

[10] S. Kluczyńska, *Ofiara przemocy w poradni odwykowej*, "Niebieska Linia" 4 (1999): „Prawdopodobieństwo wystąpienia aktów przemocy w rodzinach z problemami alkoholowymi jest ponad dwukrotnie większe niż w pozostałych. 70% kobiet dzwoniących do Ogólnopolskiego Pogotowia dla Ofiar Przemocy w Rodzinie doświadcza przemocy, której towarzyszy alkohol", http://www.pismo.niebieskalinia.pl/index.php?id=217 (14.8.2011).

[11] J. Mellibruda, *Przemoc domowa*, "Charaktery" 9 (1997), p. 15; K. Browne, M. Herbert, *Zapobieganie przemocy w rodzinie*, Warszawa 1999, p. 24-26.

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

[13] *Słownik Języka Polskiego PWN*, Warszawa 1993, p. 19.

of violence: violence is all not accidental activities which are against a personal freedom of a person or cause physical or psychical harm of it and they are outside of all social relationships.[14] The Council of Europe set the definition for violence as a domestic violence, it is (...) any act or omission which prejudices the life, the physical or psychological integrity or the liberty of a person or which seriously harms the development of his or her personality.[15] Moreover, in the Recommendation a general strategy to combat domestic violence was adopted. It consists of three spheres of action: prevention of violence, giving notice of such acts, and state intervention in respect of such acts.[16]

According to the definition included in the article 2 paragraph 2 The Act on counteracting domestic violence[17] of 29 July 2005 is one or repeated on purpose activity or giving up broken laws or personal goods of members of the family, especially endanger these people *losing their lives or health, breaking their self-esteem, bodily immunity, freedom (also sexual), causing harm in their physical or psychical health, affliction and moral injustice for people affected by violence.*

In many legal documents and in the literature a family violence expression is used. But, is this expression correct? To be a family, members of it must be related. In *The Family and Guardianship Code*[18] meaning of the word *family* comes from article 23. The main feature of the family are formal links, material and home community and specified set of functions. Both in the family law and ecclesiastical

[14] I. Pospiszyl, *Przemoc w rodzinie*, Warszawa 1994, p. 14.

[15] *Recommendation* No. R (85) 4 of the Committee of Ministers to member states *on violence in the family* of 26.3.1985.

[16] *Ibidem*.

[17] Dziennik Ustaw of 2005 No. 180, item 1493; *Ustawa o zmianie ustawy o przeciwdziałaniu przemocy w rodzinie oraz niektórych innych ustaw*, 10.6.2010 (Dziennik Ustaw of 2010 No. 125, item 842).

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

law a family is a very important unit. The Church considers a family as a sanctity[19].

In connection with violence it very often happens in concubinage[20] better definition is home not family violence.

4. Domestic violence forms

Human inventiveness to harm an other person does not have limits. It spreads from jeers to bestial murder. In subject literature some form of violence are distinguished, for example: physical, psychical, economic and sexual violence. Physical violence may occur actively (i.e. smacks, slaps in the face, pushing, pinches, twisting hands, suffocation, beating, kicking, jerks, attempt to commit or committing manslaughter, scorching and incendiarism, throwing out of windows, pouring boiling water) or passively (i.e. ban on talking, walking). Psychological violence – "brainwashing" – by isolation, constant criticism, degradation, limitation of food, calling names, humiliation, intimidation, destruction of feeling safety and devaluing of sense of ego. Economic violence is connected with forcing a victim to be under worldly dependency, limit of access to common means, collecting earned money, blocking the possibility to work and earn money. Sexual violence is a behaviour when sexual activities are extorted, degrading in intimate situations.[21]

The domestic violence can be in every family, it occurs in all social groups and rarely it is the only one act. Very often it is a beginning of series of accidents.

---

[19] CIC 1983, can. 1055.

[20] A name concubinage describes relationships between a man and a woman, living together as a husband and wife, who do not decide to get married, even for a registry marriage.

[21] K. Browne, M. Herbert, *Zapobieganie przemocy*…, p. 25; *Wobec przemocy*, D. Kubacka-Jasiecka, A. Lipowska-Teutsch (eds.), Kraków 1997; I. Pospiszyl, *Przemoc*…, p. 12-14,

5. The Church teaching about violence problem

The Christian home is a place where children receive the first proclamation of faith. Therefore, the family home is rightly called the "Domestic Church", a community of grace[22]. Parents using words and examples should be for children their first heralds of the faith and should cultivate appropriate reference to each of them with special solicitude and spiritual vocation. According to the intentions of God a family is appointed to fulfil the commandment to love one's neighbour in the most pure and authentic way. Family community is set to talk with God as a whole and not just individually as each particular members.

Proper relation between the members of the family can assure everybody feeling safety. Father and mother during upbringing process bring their children into life showing them the example on how to behave in order to live worthy. Parents are direct and the first educators of children.[23]

Unfortunately in a family, also, clashes and abuses happens. Frequent arguments between parents, torment juveniles and leasing them without any care, seriously[24] disturb family serenity. Violence exerts a pernicious influence on people's minds. There are causes, when the parents, taken up by other interests, leave their children to their own devices. Thus there are thousands of children who can count on no resources except themselves. Some of these children die tragically.[25]

A family in which proper relation and function are disturbed needs a support from the society, government and the Church. This support should not restrain active behaviour of family members from independent realization basic family aims. Jesus in a principle of

[22] *Catechism of the Catholic Church*, Pallottinum 1994, No. 1666 [KKK].

[23] John Paul II, *Letter to Families Gratissimam sane*, 2.2.1994, No. 16.

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

[25] John Paul II, *Message* for the XXVII World Day of Peace *The family creates the peace of the human family*, 1.1.1994, No. 4.

Gospel from the Old Testament "an eye for an eye, a tooth for a tooth"[26] replaces this principle the love of one's neighbour and an enemy.[27] A violence in the family is a proof of misunderstanding matrimonial love and responsible parenthood. Contemporary, secular world of family happiness can only be seen in material of goods satisfaction. The consequence of that is suffering by all members of the family and bad preparation to life.

John Paul II in his messages for the World Day of Peace many times called do to oppose various forms of violence: "Many children end up with the street as their only home. Having run away, or having been abandoned by their families, or never having known a family environment, these young people live by their wits and in a state of total neglect, and they are considered by many as refuse to be eliminated".[28] Sadly, violence towards children is found even in wealthy and affluent families. Sometimes children are taken advantage of and suffer abuse within the home itself, at the hands of people whom they should be able to trust, to the detriment of their development .(…) Children need to 'learn peace': it is their right, and one which cannot be disregarded". [29]

6. Problem of domestic violence in the documents of international law

Violence, also domestic violence, is not only private problem, it is a social and political problem, because it disturbs human rights and his or her basic freedom. The problem of domestic violence makes an important subject of legal control for the countries, members of the European Union, one of the priority in European policy.

[26] *Exodus* 21, 24.

[27] *The Gospel according to Matthew* 5, 39-40.

[28] John Paul II, *Message* for the XXIX World Day of Peace *Let us give children a future of peace*, 1.1.1996, No. 5.

[29] *Ibidem*, No. 6.

A violence phenomena in a category of human law disturbance can be found in many international documents. One of the first documents postulate universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion is the Charter of the United Nations from 1945.[30] In the preamble of the Charter is included to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women[31]. Similarly, in The Universal Declaration of Human Rights[32] from 1948 it is underlined that all human beings are born free and equal in dignity and rights.[33] Everyone is entitled to all the rights and freedom without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[34] Moreover everyone has the right to life, liberty and security,[35] also no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[36] Also the European Convention on Human Rights in the provision of Article 8 of 4 November 1950 provides such protection of family life. Assertion a law to live, freedom, personal security was placed in International Covenant on Civil and Political Rights[37] from 1966. In this same year in virtue of International Covenant on Economic, Social and Cultural Rights[38] the equal right of men and women to the enjoyment of all economic, social and cultural rights are

[30] *The Charter of the United Nations* was signed on 26 June 1945, in San Francisco and came into force on 24 October 1945, the article 55.

[31] *The Charter of the United Nations*, preamble.

[32] B. Gronowska T. Jasudowicz, C. Mik (eds.), *Prawa człowieka. Wybór dokumentów międzynarodowych*, Toruń 1999, p. 11-20.

[33] *The Universal Declaration of Human Rights*, the article 1.

[34] *Ibidem*, the article 2.

[35] *Ibidem*, the article 3.

[36] *Ibidem*, the article 5.

[37] B. Gronowska, T. Jasudowicz, C. Mik (eds.), *Prawa człowieka…*, p. 21-48.

[38] *Ibidem*, p. 61-76.

ensured.[39] Convention on the Elimination of Discrimination Against Women from 1979[40] forbids any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms[41]. It was proclaimed in the Vienna Declaration and Programme of Action from 1993.[42] The document is underlined that the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights.[43] Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated[44].

The next document is the Declaration on the Elimination of Violence Against Women of 20 December 1993[45] gives the definition of "violence" as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[46] It specifies all kinds of violence,[47] women's rights in the political, economic, social, cultural, civil or any other field.[48] It ascertain that violence against women constitutes a violation of the

[39] *International Covenant on Economic, Social and Cultural Rights*, the article 3.

[40] Dziennik Ustaw of 1982. No. 10, item 71.

[41] *Convention on the Elimination of Discrimination Against Women*, the article 1.

[42] *Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights on 25 June 1993.

[43] *Vienna Declaration and Programme of Action*, the article 18.

[44] *Ibidem*, the article 18.

[45] United Nations General Assembly *Resolution* 48/104.

[46] *Declaration on the Elimination of Violence Against Women*, the article 1.

[47] *Ibidem*, the article 2.

[48] *Ibidem*, the article 3.

rights and fundamental freedoms of women.[49] States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.[50] The Beijing Declaration and Platform for Action[51] from 1995 which in details describes what measures against violence averse to women should be done by member countries.[52] It obliges member countries to strengthen the women's position in all spheres of society, including participation in the decision-making process and access to power.[53] Platform for Action shows the areas which have significance for fight with the women discrimination and says what activities ought to be done in these spheres.[54] Children protection against the violence Convention on the Rights of the Child[55] adopted by General Assembly of the United Nations in 1989 guarantees. Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human Family were accepted in it[56] and emphasized that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.[57] That is why the article 19 of Convention says "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (…)".

[49] *Ibidem*, preamble.

[50] *Ibidem*, the article 4.

[51] Adopted on 15 September 1995.

[52] *Beijing Declaration and Platform for Action*, the article 21.

[53] *Ibidem*, the article 13.

[54] *Ibidem*, the article 36.

[55] Dziennik Ustaw of 1991, No. 120, item 526 with subsequent amendments. Adopted by General Assembly *Resolution* 44/25 of 20 November 1989. Entry into force 2 September 1990.

[56] *Convention on the Rights of the Child*, preamble.

[57] *Ibidem*.

Moreover, according to Charter of Fundamental Rights of the European Union[58] from 2000 – human dignity is inviolable, it must be respected and protected.[59] Every person has the right to respect for his or her physical and mental integrity[60] and to liberty and security of person.[61] Charter forbids torture and inhuman or degrading treatment or punishment[62] as well as trafficking in human beings.[63] Very important is the recommendation of the Committee of Ministers of the Council of Europe on domestic violence towards women from 3 April 2000.[64] During last years The Council of Europe published a great amount of documents about counteracting domestic violence: Parliamentary Assembly Resolution 1624 (2008) – Preventing the first form of violence against children: abandonment at birth of 27 June 2008; Council of Europe Convention for the Protection of children against sexual abuse and exploitation for sexual purposes of 12 July 2007; Parliamentary Assembly Recommendation 1666 (2004) – Europe-wide ban on corporal punishment of children of 23 June 2004[65]; Recommendation Rec (2002) 5 of the Committee of Ministers to member states on the protection of women against violence of 30 April 2002, Convention on Cybercrime of 23 November 2001 or Recommendation Rec (2001) 16 of the Committee of Ministers to member states on the protection of children against sexual exploitation adopted on 31 October 2001.

---

[58] Official Journal of the European *Communities* 2000/C 364/01. Signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000.

[59] *Charter of Fundamental Rights of the European Union*, the article 1.

[60] *Ibidem*, the article 3.

[61] *Ibidem*, the article 6.

[62] *Ibidem*, the article 4.

[63] *Ibidem*, the article 5.

[64] *Recommendation* 1450 (2000) Violence against women in Europe.

[65] Referring to decison of the European Court of Human Rights on A. v. United Kingdom, application no. 25599/94, judgment of 23.9.1998.

From 1997 an initiative ratified to realization by The European Commission is The Daphne Programme. The Daphne III[66] programme aims to prevent and combat all forms of violence, especially of a physical, sexual or psychological nature, against children, young people and women. The European Parliament keeping in mind necessity constant action to fight with violence against women introduced Resolution on the current situation in combating violence against women and any future action.[67] European Parliament Resolution calls on the Member States to establish partnership schemes between the law-enforcement authorities, NGOs and other appropriate authorities and to intensify cooperation to ensure the effective implementation of laws aimed at combating men's violence against women and sensibilize clerks of all grades about this subject.[68]

The next important step towards combating and preventing violence against women is Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of April 6th 2011.

7. Polish law in the fact of domestic violence

The most important legal document, which touches basic point of human rights is The Constitution of the Republic of Poland[69] of April 2nd 1997 (especially article 18, 30 and 47). Chapter II is devoted to "the freedoms, rights and obligations of persons and citizens". It

[66] *Decision* No. 779/2007/EC of the European Parliament and of the Council of 20.6.2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme Fundamental Rights and Justice.

[67] Date of adoption of *the Resolution*: 2.2.2006. EP No: A6-0404/05/P6_TA-PROV(2006)0038.

[68] *European Parliament Resolution on the current situation in combating violence against women and any future action*, the article 3.

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

regulates the rules which can provide to everyone personal inviolability and security[70] and puts in charge public authorities. The Constitution acknowledges everyone to have the right to demand from public organs authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense.[71]

The next document which regulate action relating to domestic violence is The Act on Counteracting Domestic Violence of 29 July 2005[72] It states the activity of the organs of government administration and units of local government in the domain of a prevention domestic violence, rules of procedure towards people who experience violence and the rules of procedure towards the violence offenders. The Act imposes upon the local government duty to formulate the frame programme of violence victims protection, a corrective-educational programme for people who use violence and to organize training for people who realize tasks connected with prevention against domestic violence. Because violence appears where, very often, is the problem with alcohol drinking, prevention against domestic violence occurrence is included in the act of 26 October 1982 The Act on upbringing in sobriety and counteracting alcoholism.[73] Also Social Welfare Act of 12 March 2004[74] describes units and social welfare workers competence whose duty is to help people touched by domestic violence. According to Polish Criminal Code violence against the closest persons is prosecuted ex officio.[75] All state and local institution, which in connection with their job, know about committing the crime prosecuted ex officio have to inform police or prosecutor

[70] *The Constitution of the Republic of Poland*, the article 41.

[71] *The Constitution of the Republic of Poland*, the article 72 para. 1.

[72] Dziennik Ustaw of 2005 No. 180, item 1493.

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

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

[75] Prosecuted ex officio means that public prosecutor and police conduct inquiry independently of a will and agreement of a wronged person.

about it. The Criminal Code[76] in article 207 § 1 claims that domestic violence is a crime. "Whoever mentally or physically mistreats a person close to him, or another person being in a permanent or temporary state of dependence to the perpetrator, a minor, or a person who is vulnerable because of his mental or physical condition, shall be subjected to the penalty of deprivation of liberty for a term of between three months and five years." Other rules of the Criminal Code used against domestic violence are: serious injuries, serious injuries lasting for more than seven days of body damage (art. 156), leaving a person on herself/himself if that person should be under protection and if her/his health or life is in danger (art. 160 § 2), threatening to commit a crime disserviced another person or a very close person – if there is justified anxiety that it will be done (art. 190), forcing to behave in a special way (art. 191), imposition and making to harlotry using dependence relations (art. 199), leading a person under 15 if sexual associate or undergo another sexual activity, or consolidation juvenile pornography (art. 200), sexual associate with descending, preliminary, adopted, brother or sister (art. 201), inducing juveniles to drink heavily by giving them alcohol, simplifying or inciting to drink alcohol (art. 208), persistent avoiding paying alimony (art. 209), leaving a juvenile or a helpless physically or mentally person (art. 210), kidnapping or detention a juvenile or a helpless physically or mentally person against a will of a person who is appointed to protection or supervision (art. 211), affront (art. 216 § 1), violation of battery (art. 217), theft to harm a close person (art. 278 § 4) theft and robbery (art. 279), appropriation (art. 284) and destroying property (art. 288).

To realize authority of wronged people are the rules written in The Family and Guardianship Code,[77] whose main principle is to care for the family and the child welfare. There are put in order: conditions of joint ownership of assets annulment (art. 52), conditions of adjudicating separation from bed and board and divorce (art. 56,

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

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

61), a judgement of guilt in disintegration of marriage breakdown (art. 57), decision of a parental authority, duty to be responsible for living and bringing up a child in the case of divorce (art. 58 § 1), way of using common flat in the case of divorce (art. 58 § 2), conditions demand payment for a living from divorced spouse (art. 60), establish a fatherhood in a court (art. 84) or parents' duty to pay alimony for their child (art. 133).

In Poland there is a National Action Plan for Counteracting Domestic Violence.[78] The Action Plan objectives include: implementation of a wide range of measures intended to draw the public's attention to the domestic violence phenomenon and to counteracting this phenomenon; increasing the level of professionalism of social services in offering assistance to victims of domestic violence and taking necessary actions.[79] To reach mentioned aims serve: 1. *anticipatory actions: diagnostic, informative and educative – aimed at the public at large, as well as at people working with victims and perpetrators of domestic violence*; 2. *intervention actions: care and therapy – aimed at domestic violence victims; education and isolating – aimed at domestic violence perpetrators*; 3. *support actions: psychological, pedagogical, therapeutic and others – aimed at domestic violence victims*; 4. *correction and education actions – aimed at domestic violence perpetrators*.[80] The Action Plan was developed in cooperation with the Ministry of Labour and Social Policy, Ministry of Interior and Administration, Ministry of Justice, Ministry of Health and Ministry of National Education. Apart from The National Action Plan for Counteracting Domestic Violence, for several years there is Government programme for containment of crime and anti-social behaviours "Safer Together", which has to reduce the scale of occurrences awaken public opposition. The target of the

[78] Krajowy Program Przeciwdziałania Przemocy w Rodzinie. Uchwała Rady Ministrów, 25.9.2006, No. 162/2006.

[79] *National action plan for counteracting domestic violence*, introduction; H. Sasal, *Przewodnik do procedury interwencji wobec przemocy w rodzinie*, Warszawa 2006, p. 137.

[80] II. Guidelines for the Action Plan.

programme is prevention of crime and antisocial behaviours through more proactive and dynamic cooperation of the state administration with self-governments, NGOs and local communities.

In 1995 the Polish Declaration on the Prevention of Domestic Violence was decided.[81] According to this Declaration: "Every person has the right to live in a family environment that is free from violence, which constitutes a violation of personal rights and interests. Any person experiencing violence cannot be blamed for it. Children and youth have the right to grow up in a safe and free from violence environment, and it is the duty of adults to ensure that. Every person experiencing violence has the right to obtain legal, social, psychological and medical assistance, without violating their dignity. Every person has the right to knowledge indispensable for dealing with violence. Every person has the right to counteract violence within the family. Every person has the duty to provide assistance to victims of domestic violence".

Reduction the scale of violence may be realized by Operational Programme Human Capital, 2007-2013.[82] In Priority VII Promotion of Social Integration different tools of active integration were foreseen. They will be used during the work with people touched by domestic violence.

8. Help for the victims and offenders of domestic violence

Helping the family holds a special place in the work of professional social services, especially at the basic level of social assistance. Civil welfare is the institution of social state policy which main aim is to help people and families to win hard life situations which they cannot cope with themselves. From the society family expects mostly a recognition of their identity and an acceptance as

[81] The *declaration* was adopted in December 1995 at the 2nd National Conference on Domestic Violence Prevention. K. Kądziela, *Korzystaj z prawa. Poradnik dla osób pomagających ofiarom przemocy w rodzinie*, Warszawa 1996, p. 55-58.

[82] Ministerstwo Rozwoju Regionalnego, *Program Operacyjny Kapitał Ludzki. Narodowe Strategiczne Ramy Odniesienia 2007–2013*, Warszawa 2007.

a social subjectivity. Families have a right to expect from the public authorities a responsible, without any discrimination, a family policy in a matters of legal, economic, social and financial aspects.[83] Families have the right to the economic conditions which will secure them with an appropriate to their dignity a level of life and full development. It is not allowed to deprive them of rights to purchase and hold a private property, which will help them with family life stabilization; rights concerning inheritance and transfer of property must respect the needs and rights of family members. Families have a right to expect that the public, forecasting their needs, should provide them with a help in emergency cases, such as the premature death of one or both parents, the abandonment of one of the spouses, in a case of accident, sickness, unemployment or domestic violence.[84] Family rights have a special closeness to the human rights.

The myths which are in the society[85] very often block quick and sufficient help for the victims, that is why the knowledge about the violence is very important. That is why institutions of states and church and other organizations should have these occurrences under control.[86] Prevention the violence means not to admit to its appearance or counteract repeated violence acts.[87]

Help for the victims is a wide and different sphere of human activity. A strategic aim is to help a beaten person to believe in his or her right to dignity. There are different factors which are responsible for domestic violence. That is why all activities should have differentiated

[83] LE, 10 and 19; FC, 45; *The Universal Declaration of Human Rights*, the article 16.3 and 22; *International Covenant on Economic, Social and Cultural Rights*, the article 10.1.

[84] LE, 10; FC, 45; *The Universal Declaration of Human Rights*, the article 25; *International Covenant on Economic, Social and Cultural Rights*, the article 7a.

[85] The most often meet myths: domestic violence is a private case, nobody should put in one's oars, family secrets are not revealed, if the victims really suffer they will leave the perpetrators.

[86] B. Gruszczyńska, *Przemoc wobec kobiet w Polsce. Aspekty prawnokryminologiczne*, Warszawa 2007.

[87] M. Baranowska, *Przemoc w rodzinie*, I. Wiciak, M. Baranowska (eds.), *Wybrane patologie społeczne. Uwarunkowania, przejawy, profilaktyka*, Szczytno 2009.

quality and surround their range not only victims but also offenders.[88] People who help victims ought to have proper knowledge and all decisions made by them must be complement.[89] Only penalizing offenders will not work, because it does not change his/her way of thinking and acting. After punishment he/she returns home and starts living in a previous way.

Activities taken for the whole society have mainly the form of company, movement increasing level of awareness the event. In the country there are: Polish Nationwide Emergency for Family Violence Victims *Blue Line* and an association called this same which act against domestic violence. Accessible the first aid forms are help lines. In these institutions which are open twenty four hours a day and seven days a week, work social workers, psychologists, lawyers, doctor, educationists, guardians and family advisors. Duty of this call centre is to provide a person who is interested in a subject information about a place and kind of help which he/she can get. Direct intervention are often essential.[90]

Need to introduce preventive activities comes from the level of Polish awareness about domestic violence.[91] Still quite big part of our society regards as normal during family argument: offends and calling names (24%) jerks and pushing (18%). Many people do not see (34%) giving money off and controlling spouse's expenses as a symptom of economic violence. 16% members of the poll claim that if a victim does not ask for help other people should not interfere.

According to mentioned above, all enterprises influence on local societies attitude and increase their willingness to be involved

[88] K. Browne, M. Herbert, *Zapobieganie przemocy*…, p. 50-53.

[89] E. Bielawska-Batorowicz, L. Golińska, *Przemoc w rodzinie*, D. Kubacka-Jasiecka, A. Lipowska-Teutsch (eds.), *Wobec przemocy*, Kraków 1997, p. 83.

[90] I. Pospiszyl, *Przemoc*…, p. 14.

[91] *Polacy wobec zjawiska przemocy w rodzinie oraz opinie ofiar, sprawców i świadków o występowaniu i okolicznościach występowania przemocy w rodzinie*. Wyniki badań TNS OBOP dla Ministerstwa Pracy i Polityki Społecznej, Warszawa październik 2007, http://www.niebieskalinia.org/download/Badania/TNS_ OBOP_2007.pdf. The survey was passed in all-Polish representative group of Polish at the age of 18 and above; 3000 interviews were realized.

in helping people touched by violence ought to be promoted. It is important to connect and strengthen cooperation, not only financial, with the ecclesiastic institutions, non-governmental organizations to realize tasks in the field of counteract domestic violence. Conferences, seminars and workshop to exchange experiences about domestic violence should be organized.

Society should be educated about problem of violence and its causes by editing, publishing and spreading educational and information materials, cooperation with mass media to increase a level of social sensibility towards domestic violence. Preventive programs at schools, which inform and sensibilize young generations about a problem of violence, including the equal age violence also ought to be introduced. It is essential to send information about possibility to help people with their difficulty and misery; if it is possible to create consultation places for people and families who need help, for example at parishes. Local governments should increase commitment to activities which prevent violence occurrence by promoting local programmes counteracting the violence.

The important function is professionalism and skills to cooperate between offices, institutions, organizations which are engaged in work to combat domestic violence.[92] Realizers of all these duties should be units of local government, School Superintendent's Office, non- state organizations, the Catholic and other Churches, religion organizations, mass media (television, radio, the press), police, public prosecutor's office, courts, different institutions.

Helping the family is seen as a task not only necessary but extremely difficult. It requires the opposition to both internal threats, but also external ones towards the family. It requires a defence of a proper, traditional family model because it only guarantees the full personal development of all members of the family.

[92] See D. Jaszczak-Kuźmińska, K. Michalska, *Przemoc w rodzinie*, Warszawa 2007.

9. Summary

Very deep and harmful consequences are derived by domestic violence. That activity expose people touched by violence to jeopardy looping their lives, health, contravenes their dignity, battery, freedom, and also causes torment and moral harm. Domestic violence characterizes by being hidden in four walls of the house and a proper diagnosis of this act is very difficult. Many of these behaviours are hidden because of shame, lack of faith that Police or other institution will be able to help them effectively.

The problem of domestic violence touches people at the different age and sex, coming from different social classes. The most often victims of violence are children, disabled people because of illness or old age and women.[93] Violence is very often observed at schools and in equal age groups.

Domestic violence is not the personal but social problem which may be minimalized by common effort. Violence disturbs basic human law, destroy feeling of dignity, esteem and trust. It is very important to undertake acts not only towards the victims but also towards the offenders, combat the stereotype and bring it to professional perfection offices helping people with violence problem. Everything must be done to help people touched by domestic violence, strengthen and infuse new life. The Civil Service, Local Governments, Church's institution with the whole society have a great part in this process.

Nobody deserves violence. It is not true that beating child is more obedient, maltreated wife is not unfaithful and ill-treated husband takes better care of the family. Violence humiliates, causes harm and uncountable damages, generates abomination and revenge desire, creates vicious circle in mutual relations between people.[94]

In Poland more and more social and Church's organizations, which help the victims of domestic violence, on local and national level. Information about local organizations` activities should be approachable in every local administration of a commune council,

[93] See B. Gruszczyńska, *Przemoc wobec kobiet*…, Warszawa 2007.

[94] I. Pospiszył, *Przemoc*…, p. 5.

surgery, police station an so on. These organizations lead information and consultation points, help lines, supportive centre, shelters common rooms for children. In the frames of their activities they offer: psychological help – individual and in a groups, law help i.e. writing summons, conclusions, supported groups, sociological and therapeutic help for children, take part in intervention, help at the offices.

Activities of proper services should lead to create prevention for young people which help them in future in building their new families. About violence problem we should speak loudly, it cannot be hidden. A good help by, for example, sending home a psychologist in order to avert a quarrel,[95] possibility to make offender leave the flat where they live with a victim, prohibition to be close to the victim in some circumstances.[96] There are also shelters for women, children and other victims of violence where they have home until resolve the problem. In these institution a therapeutic programmes are conducted by psychologists, lawyers and family advisers.

A fact that many people accustom to their position, consider it for normal is a great difficulty. Sometimes victims, although they understand the problem, do nothing to change their lives. Fear of radical changes and difficulty to maintain unaided is very often the main obstacle. Effectiveness of activities depends on victims involvement. There is a great effort and good will from the Civil Service, Local Governments, Social Security, Church's institution, Police and association connected with the domestic violence, in order those families bravely and without shame apply to these units for help, know that they will be listened and help will be effective. It is the offender who has to be afraid not a victim. Dysfunctional home is an evil which must be counteracted because it becomes a source of unpleasantness, tension and frustration.

[95] *Ibidem*, p. 208.

[96] Dziennik Ustaw of 2005 No. 180, item 1493; Dziennik Ustaw of 2010 No. 125, item 842.

* * *

Wybrane problemy prawne przemocy domowej

Coraz częściej w dzisiejszym świecie pojawia się frustracja, która jest reakcją na niepewność jutra, wynikającą ze zmian społecznych, powszechnej pogoni za pieniądzem, samotnością w społeczeństwie czy brakiem perspektyw na znalezienie pracy czy mieszkania. Frustracja wzmacniania przez alkohol powoduje agresję, którą sprawcy najłatwiej odreagować jest na najbliższych.

Zjawisko przemocy domowej narusza zasady współżycia rodzinnego, społecznego, normy moralne i prawne, powoduje tragiczne skutki psychologiczne oraz poważne urazy. Przemoc nie tylko wprost narusza prawo osoby do życia, wolności i bezpieczeństwa osobistego, ale również ogranicza i uniemożliwia korzystanie z innych praw i wolności, które człowiekowi przysługują.

Przemoc domowa nie jest problemem indywidualnym, lecz społecznym, który poprzez podjęcie wspólnego wysiłku może zostać skutecznie zminimalizowany. Trzeba zrobić wszystko, by osoby dotknięte przemocą domową mogły wzmocnić się i odrodzić. W tym procesie wielką rolę mają do odegrania organy administracji publicznej, samorządy lokalne, instytucje kościelne przy współudziale całego społeczeństwa.

W Polsce powstaje coraz więcej organizacji świeckich i kościelnych pomagających ofiarom przemocy domowej, zarówno o zasięgu lokalnym, jak i ogólnopolskim. Organizacje te prowadzą punkty informacyjno-konsultacyjne, telefony zaufania, ośrodki pomocy, schroniska, świetlice dla dzieci. W ramach swojej działalności oferują: pomoc psychologiczną, w grupie i kontakcie indywidualnym, pomoc prawną, w tym pisanie pozwów, wniosków, grupy wsparcia, pomoc socjoterapeutyczną dla dzieci, udział w interwencjach, pomoc w załatwianiu spraw urzędowych. Informacja o działalności takich lokalnych organizacji powinna być dostępna w każdej gminie, przychodni, komisariacie, itp.

Trzeba wiele wysiłku i dobrej woli wielu instytucji i organizacji, aby rodziny, w których występuje przemoc, śmiało i bez wstydu zgłaszały się do tych jednostek po pomoc; wiedziały, że zostaną wysłuchane, zrozumiane.

Dysfunkcjonalny dom to zło, któremu trzeba przeciwdziałać, gdyż staje się on źródłem przykrości, napięć i frustracji.

Aleksandra Bitowt*
(University of Warmia and Mazury in Olsztyn)

ACCESS TO THE TRIBUNAL OF THE CATHOLIC CHURCH IN THE CONTEXT OF THE ACTION FOR NULLITY OF MARRIAGE. SELECTED ISSUES

The right to court is one of the fundamental human rights. It has special significance because it serves to the investigation and protection of other rights and freedoms, to establishing the responsibilities and enforcing their implementation[1].

In every community a man has certain specific rights but also obligations to the others. Different circumstances could cause that their validity or scope will become questionable. They may also be affected as a result of improper activities of other persons or institutions. As noted by T. Pawluk: "We cannot talk about a human dignity or equality of all the people in pursuit to their proper purpose without giving them what belongs to them."[2] But no one should assert their rights by force or administer justice in its sole discretion. In the law-abiding community he should be able to ask the institution

* M.A., an assistant lecturer at the Department of Canon Law and Ecclesiastical Law of the Faculty of Law and Administration at the University of Warmia and Mazury in Olsztyn.

[1] In the *Message for the 1999 World Day of Peace* John Paul II emphasized, that: "The integral promotion of every category of human rights is the true guarantee of full respect for each individual right." – *Acts of the Apostolic See* 91 (1999), 379, para. 3.

[2] T. Pawluk, *Komentarz do Kodeksu Jana Pawła II. Tom IV. Doczesne dobra Kościoła. Sankcje w Kościele. Procesy*, Olsztyn 1990, p. 159.

equipped by the community with the appropriate authority.[3] This may be a judicial or administrative authority. Of particular importance is the possibility to seek the assistance of the court, so it is important the existence and proper functioning of an appropriate judicial system and its availability[4]. The necessary guarantees in this regard are provided under various legal systems – state, international, also in the standards, which are applied by religious communities.

The right to equality before the courts and tribunals and to a fair trial is expressed in art. 14 of the *International Covenant on Civil and Political Rights*[5], which in the paragraph 1 indicates, *inter alia*, that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Human Rights Committee, in the CCPR General Comment No. 32[6]: *Right to equality before courts and tribunals and to a fair trial*, in paragraph 2, indicates that: "The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights." The practical realization of this right requires consideration of a number of potential difficulties, with whom the entity may be confronted in the investigation of own rights and freedoms. Hence "Article 14 is of a particularly complex nature, combining various guarantees with different scopes of application." (paragraph 3).

---

[3] R. Sztychmiler, *Sądownictwo kościelne w służbie praw człowieka*, Olsztyn 2000, p. 19.

[4] *Ibidem*, p. 15.

[5] *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI), 16.12.1966, New York, http://www2.ohchr.org/english/law/ccpr.htm (20.10.2011).

[6] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771 pdf? OpenElement (20.10.2011).

The right to a fair trial is regulated also in the art. 6 of *Convention for the Protection of Human Rights and Fundamental Freedoms*[7] which indicates that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

In the Latin Church the appropriate standards are contained *Code of Canon Law* from 1983[8] and their support is the Magisterium of the Church[9].

In the canon 221 § 1 of the *Code* ecclesiastical legislator provides that: "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." Direct reference to the right to the court are contained in rules expressed in the can.

[7] *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols No. 11 and No. 14, 4.11.1950, Rome, http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (20.10.2011).

[8] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, 25.1.1983, *AAS* 75 II (1983) 1-317. The English text: http://www.vatican.va/archive/ENG1104/_INDEX.HTM (25.8.2011).

[9] "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*, 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 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." – in this address to members of the Tribunal of the Roman Rota, delivered on 29 January 2005, John Paul II explained the importance of this teaching in the context of applying the law of the Church. http://www.vatican.va/holy_father/john_paul_ii/speeches/2005/january/documents/hf_jp-ii_spe_20050129_roman-rota_en.html (20.10.2011); "The value of interventions of the Ecclesiastical Magisterium on matrimonial and juridical issues, including the Roman Pontiff's Discourses to the Roman Rota, (…). They are a ready guide for the work of all Church tribunals, since they authoritatively teach the essential aspects of the reality of marriage." – Benedict XVI, *Address to the Tribunal of the Roman Rota*, 26.1.2008, http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/january/documents/hf_ben-xvi_spe_20080126_roman-rota_en.html (20.10.2011).

1476 CIC 1983: "Anyone, whether baptized or not, can bring action in a trial; however, a party legitimately summoned must respond." The wording of this last provision indicates that the right to a court in the Catholic Church is entitled to every man, whatever his affiliation to the Church. Important is to have a legal interest in the outcome of the case by the ecclesiastical tribunal. The Church is "aware that her essentially religious mission includes the defence and promotion of human rights"[10]. Therefore, the Church "holds in high esteem the dynamic approach of today which is everywhere fostering these rights"[11].

As pointed out by John Paul II in his address to the members of the Tribunal of the Roman Rota in 1983, "The Church has always affirmed and promoted the rights of the faithful, and in the new *Code*, indeed, she has promulgated them as a *fundamental charter*[12] (cf. can. 208-223). She thus offers opportune juridical guarantees for protecting and safeguarding adequately the desired reciprocity between the rights and duties inscribed in the dignity of the person of the *Christian faithful* (*christifidelis*)."[13]. Paul VI, in the *Message for the 1968 World Day of Peace* remarked that, "it would be vain to proclaim rights, if at the same time everything were not done to ensure the duty of respecting them by all people, everywhere, and for all people"[14].

In the address to the members of the Tribunal of the Roman Rota in 1979 John Paul II emphasized that the Church "protects the rights of the individual faithful, but likewise promotes and protects the common good as an indispensable condition for the integral

---

[10] Cf. John Paul II, Encyclical Letter *Centesimus Annus*, *AAS* 83 (1991), 859-860, para. 54. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the modern world *Gaudium et Spes*, *AAS* 58 (1966), 1060, para. 41.

[11] *Gaudium et Spes*, para. 41.

[12] Cf. CIC 1983, cann. 208-223.

[13] John Paul II, *Address to the Tribunal of the Roman Rota*, 26.2.1983, http://www.vatican.va/holy_father/john_paul_ii/speeches/1983/documents/hf_jp-ii_spe_19830226_roman-rota_en.html (20.10.2011).

[14] Paul VI, *Message for the 1968 World Day of Peace*, 15.4.1968, *AAS* 60 (1968) 285.

development of the human and Christian person"[15]. At the same time he highlighted that: "(…) the task of the Church and her historical merit, which is to proclaim and defend in every place and in every age the fundamental human rights, does not exempt her but, on the contrary, obliges her to be herself a mirror of justice (*speculum iustitiae*) for the world. In this regard, the Church has her own proper and specific responsibility.)[16], "Despite the imperfections and difficulties which mark every human legal system, in the Church's experience the words *'law', 'judgment',* and *'justice'* have as their archetype a higher justice, namely the justice of God that is the goal to be reached and the other term in an inevitable comparison. The existence of such an exemplar entails an awesome task for all those who exercise '*justice'*."[17].

This study is devoted to presentation selected issues of the realization of the right to a fair trial in the context of presenting a *libellus* (bringing an action) for nullity of canonical marriage.

In the *Code of Canon Law* of 1983 causes of the nullity of marriage have been regulated in cann. 1671 to 1691. According to the instruction contained in can. 1691 on issues relating to how to proceed, which were not regulated at the indicated canons – "unless the nature of the matter precludes it" – must be applied the canons on trials in general and on the ordinary contentious trial. The legislator added that should be taken to keep "the special norms for cases concerning the status of persons and cases pertaining to the public good"[18]. This is particularly important in the context of the introduction to the judicial forum a case of nullity of marriage, because in relation to a presenting a *libellus* and rule on its acceptance or rejection shall apply mutatis mutandis the norms contained in cann. 1501-1506, and thus norms from a scope of the contentious trial.

---

[15] John Paul II, *Address to the Tribunal of the Roman Rota*, 17.2.1979, http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/february/documents/hf_jp-ii_spe_19790217_roman-rota_en.html (20.10.2011).

[16] *Ibidem*.

[17] *Ibidem*.

[18] CIC 1983, can. 1691.

The importance and universality of marriage nullity cases became the basis for the preparation of Instruction *Dignitas connubii*, entirely devoted to mentioned matters[19]. It is an expression of concern about the "ever better administration of justice"[20]. Benedict XVI has called it "vademecum" – "vademecum which not only contains the respective norms in force on this subject but enriches them with further, relevant measures necessary for their correct application"[21]. The issue of the *libellus* is regulated by the artt. 114-125 of that Instruction.

These provisions include the necessary arrangements for the initiative of the entity entitled to challenge the marriage (CIC 1983, can. 1501; DC, art. 114), present *libellus* (in writing) and approval by the legislature the opportunity to present oral petitions (CIC 1983, cann. 1502-1503; DC, art. 115), necessary elements of *libellus* (CIC 1983, can. 1504; DC, artt. 116-117), establish a tribunal to hear the case (DC, art. 118), activities preceding the decision on the acceptance or rejection of the *libellus* and form of this decision (CIC 1983, can. 1505 § 1; DC artt. 119-120, art. 121 § 2), grounds for rejection of the *libellus* (CIC 1983, can. 1505 § 2; DC, art. 121 § 1 and art. 122),

[19] Pontificium Consilium de Legum Textibus, *Dignitas connubii*. Instructio servanda a tribunalibus dioecesanis et interdioecesanis in pertractantibus causis nullitatis matrimonii, 25.1.2005, Città 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).

[20] John Paul II, *Address to the Tribunal of the Roman Rota*, 17.1.1998, http://www.vatican.va/holy_father/john_paul_ii/speeches/1998/documents/hf_jp-ii_spe_19980117_roman-rota_en.html (20.10.2011).

[21] Benedict XVI, *Address to the Tribunal of the Roman Rota*, 28.1.2006, http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/january/documents/hf_benxvi_spe_20060128_roman-rota_en.html (20.10.2011). In the preparation of Instruction *Dignitas connubii* "(…) seemed necessary that some time would be allowed to pass before that instruction would be prepared (…) so that in preparing the instruction account could be taken of the application of the new matrimonial law in the light of experience, of any authentic interpretations that might be given by the Pontifical Council for Legislative Texts, and also of both doctrinal development and the evolution of jurisprudence, especially that of the Supreme Tribunal of the Apostolic Signatura and the Tribunal of the Roman Rota." – Introduction to the *Dignitas connubii*, http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html (20.10.2011).

possible opportunity to resubmit a new, correctly prepared, *libellus* (CIC 1983, can. 1505 § 3; DC, art. 123), recourse against the rejection of a *libellus* (CIC 1983, can. 1505 § 4; DC, art. 124), circumstances when the *libellus* is to be considered as accepted under the law (CIC 1983, can. 1506; DC, art. 125).

However, in cases challenging the validity of the marriage implementation of the right to court guarantees a number of other provisions – both the *Code* and Instruction – on issues such as: entities entitled to challenge the marriage, ability to act in court, the structure of the judiciary and the courts competent in cases of nullity of marriage, the tasks of employees of the courts, their responsibilities and actions banned to them, the secret of office, judicial expenses, legal assistance of an advocate or of a stable advocate (an advocate receiving salary from the tribunal), requirements set for procurators and lawyers, the order of proceeding, procedure to assign judges to adjudicate individual cases, the objection against a particular official of the tribunal in a particular case, possibilities entitled to a party against the decree dismissing the *libellus*. It should also take into account adequate norms for cases concerning the status of persons and cases pertaining to the public good.

Supervision over the proper administration of justice in the Church exercised the supreme tribunal of the Apostolic Signatura (CIC 1983, can. 1445 § 3, 1; *Pastor Bonus*[22], artt. 121, 124, 1[23]). As part of its function, this Tribunal has the competence to ensure the right to a court in special situations (CIC 1983, can. 1445 § 3; PB, art. 124[24]).

---

[22] John Paul II, Apostolic Constitution *Pastor Bonus*, 28.6.1988, AAS 80 (1988).

[23] "The Apostolic Signatura functions as the supreme tribunal and also ensures that justice in the Church is correctly administered." (PB, art. 121); "The Signatura also has the responsibility: 1. to exercise vigilance over the correct administration of justice, (…)" (PB, art. 124, 1).

[24] "The Signatura also has the responsibility: 1. to exercise vigilance over the correct administration of justice, and, if need be, to censure advocates and procurators; 2. to deal with petitions presented to the Apostolic See for obtaining the commission of a case to the Roman Rota or some other favour relative to the administration of justice; 3. to extend the competence of lower tribunals; 4. to grant its approval to tribunals for appeals reserved to the Holy See, and to promote and approve the erection of

1. Competence of tribunals in cases of nullity of marriage

To ensure proper administration of justice in the Church are very important rules determining the jurisdiction of the tribunal – its competence to exercise judicial power in a particular case[25]. For realize the right to a court, interested person must apply to the competent court because of a) the subject of the case – marriage, b) the operator of the case – the social position of the person concerned, c) the territorial scope – must exist appropriate legal grounds for the tribunal to rule on the case submitted by virtue of the territorial scope of its activities, d) degree – must be competent to hear the case in the first instance[26].

a) Competence due to the matter of the case

The case should be entrusted to the tribunal, which is well prepared to considering that kind of causes[27]. This may be a tribunal established to consider any cases, or only matrimonial cases[28]. Experience, which can demonstrate the servants of the tribunal, by virtue of its specialization or the actual processing of large number of matrimonial cases, despite the lack of such specialization, undoubtedly affects the quality of the executed judicial power.

If the case of nullity of marriage will be accepted for consideration by the court vested with powers to consider only another

interdiocesan tribunals." (PB, art. 124).

[25] J. Krukowski, *Kompetentne forum sądowe*, J. Krukowski (ed.), *Komentarz do Kodeksu Prawa Kanonicznego. Tom V. Księga VII. Procesy*, Poznań 2007, p. 18.

[26] *Ibidem*.

[27] P. Tuleja, *Prawo do sądu i skarga konstytucyjna jako konstytucyjne środki ochrony praw człowieka*, E. Dynia, Cz.P. Kłak (eds.), *Europejskie standardy ochrony praw człowieka a ustawodawstwo polskie*, Rzeszów 2005, p. 35.

[28] CIC 1983, can. 1423: "§ 1. With the approval of the Apostolic See, several diocesan bishops can agree to establish a single tribunal of first instance for their dioceses in place of the diocesan tribunals mentioned in cann. 1419–1421. (…) § 2. The tribunals mentioned in § 1 can be established either for any cases whatsoever or only for certain types of cases."

type of causes, the incompetence of a judge will be absolute[29], which will result in irremediable nullity of a sentence[30]. In such a case – if competence of a judge by reason of matter is not observed – the Apostolic Signature can, however, with good reason, to entrust the hearing of the cause to a tribunal absolutely incompetent (DC, art. 9 § 3)[31].

b) Competence due to the person qualified to challenge a marriage

Cases of persons holding high offices and positions[32], including those who exercise the supreme authority of the state, are classified as cases of particular importance, which are reserved to consideration and adjudication by the Roman Pontiff[33]. The Roman Pontiff makes judicial decisions "personally, through the ordinary tribunals of the Apostolic See, or through judges he has delegated." (CIC 1983, can. 1442).

However the Roman Rota has exclusive competence in relation to persons who do not have a lower supervisor from the

[29] DC, art. 9: "§ 1. The incompetence of a judge is also absolute: 2° if competence by reason of grade or by reason of matter is not observed (cf. can. 1440). § 2. Thus the incompetence of a judge is absolute (…) by reason of matter if a cause of nullity of marriage is heard by a tribunal which is able to judge only causes of another type."; CIC 1983, can. 1440: "If competence by reason of grade according to the norm of cann. 1438 and 1439 is not observed, the incompetence of the judge is absolute."

[30] CIC 1983, can. 1620: "A sentence suffers from the defect of irremediable nullity if: 1° it was rendered by an absolutely incompetent judge; (…)."

[31] *Pastor Bonus*, art. 124, 2: "The Signatura also has the responsibility: (…) 2. to deal with petitions presented to the Apostolic See for obtaining the commission of a case to the Roman Rota or some other favour relative to the administration of justice".

[32] J. Krukowski, *Kompetentne forum*..., p. 18.

[33] CIC 1983, can. 1405 § 1: "It is solely the right of the Roman Pontiff himself to judge in the cases mentioned in can. 1401: 1° those who hold the highest civil office of a state; (…).". Cf. DC, art. 8 § 1.

Roman Pontiff[34] – in matrimonial cases it may concern the lay faithful moderator of public association when the association is public and its coverage is universal or international[35, 36].

On the one hand it may be deemed to impediment, e.g. because of long distance, language barrier. On the other hand, applies to people whose private life has become part of public life – they life has found at the centre of attention of community of the concrete state or group of the faithful involved in the functioning of the association. Also in regard to the people whose life – because of functions fullfill by them – is often a very important reference as an example for other believers. The process of nullity of marriage in their case becomes a special witness of justice in the Church. The Church watches over reliability and efficiency in the course of any required court procedures, which brings the specific guarantees of the right to a court for the parties of the process of nullity of marriage.

c) Competence due to the territorial scope of activities of the tribunal

Tribunal should consider only those cases that are somehow related to the territorial scope of its activities[37]. To facilitate access to the court for concerned, the basis of such a connection in cases

[34] CIC 1983, can. 1405 § 3, 3 "Judgment of the following is reserved to the Roman Rota: (…) dioceses or other physical or juridic ecclesiastical persons which do not have a superior below the Roman Pontiff."

[35] CIC 1983: can. 312 § 1: "The authority competent to erect public associations is: 1º the Holy See for universal and international associations; (…).", can. 317: "§ 1. Unless the statutes provide otherwise, it is for the ecclesiastical authority mentioned in can. 312 §1 to confirm the moderator of a public association elected by the public association itself, install the one presented, or appoint the moderator in his own right. (…). § 3. In associations which are not clerical, lay persons are able to exercise the function of moderator. (…)."

[36] G. Erlebach, *Niektóre procesy specjalne*, J. Krukowski (ed.), *Komentarz do Kodeksu…*, p. 332.

[37] DC, art. 10 § 1 and CIC 1983, can. 1673.

of nullity of marriage has been determined in a broad manner. The legislature predicted four of the titles of competence: 1) the place in which the marriage was celebrated, 2) the place in which the respondent party has a domicile or quasi-domicile[38], 3) the place in which the petitioning party has a domicile, 4) the place in which actually the greater part of the proofs are to be collected[39].

The use of one of the last two titles of competence requires fulfillment of additional conditions[40]. In this way, the legislature guarantees the right of access to court also for the other spouse – who does not have the initiative to initiate the process on the validity of the marriage[41]. Additional regulations provide for adequate informing the

[38] "Domicile is acquired by that residence within the territory of a certain parish or at least of a diocese, which either is joined with the intention of remaining there permanently unless called away or has been protracted for five complete years." (CIC 1983, can. 102 § 1), "Quasi-domicile is acquired by residence within the territory of a certain parish or at least of a diocese, which either is joined with the intention of remaining there for at least three months unless called away or has in fact been protracted for three months." (CIC 1983, can. 102 § 2).

[39] "§ 1. In causes of the nullity of marriage which are not reserved to the Apostolic See and have not been called to it, the following tribunals are competent in the first grade of jurisdiction: 1º the tribunal of the place in which the marriage was celebrated; 2º the tribunal of the place in which the respondent party has a domicile or quasi-domicile; 3º the tribunal of the place in which the petitioning party has a domicile, (…); 4º the tribunal of the place in which *de facto* the greater part of the proofs are to be collected, (…)." (DC, art. 10 § 1; cf. CIC 1983, can. 1673).

[40] In the event of choice "the tribunal of the place in which the petitioning party has a domicile" – "as long as both parties live in the territory of the same Conference of bishops and the Judicial Vicar of the domicile of the respondent party has given his consent; before doing so, he is to ask the respondent party whether he has any objection to make" (DC, art. 10 § 1, 3; cf. CIC 1983, can. 1673, 3). In the event of selection "the tribunal of the place in which de facto the greater part of the proofs are to be collected" – "as long as the Judicial Vicar of the domicile of the respondent party has given his consent; before doing so, he is to ask the respondent party whether he has any objection to make" (DC, art. 10 § 1, 4; cf. CIC 1983, can. 1673, 4).

[41] Instruction DC, in art. 13, specifies those requirements: "§ 2. In these cases there must be written proof of the consent of the Judicial Vicar of the domicile of the respondent party; such consent cannot be presumed. § 3. The prior hearing of the respondent party by his Judicial Vicar can be done either in writing or orally; if done orally, the Vicar is to draw up a document attesting to this. § 4. Before giving his consent,

respondent party about the consequences of consideration of the case by this tribunal – competent on grounds of domicile of the petitioning party or of place in which the proofs may to be efficiently collected. The importance of this regulation for the protection of judicial positions the other party in cases of nullity of marriage strengthens the provision of article. 13 § 1 Instruction *Dignitas connubii*: "Until the conditions stated in art. 10 § 1, 3-4, have been fulfilled, the tribunal cannot proceed legitimately."

On the other hand, the legislature does not deprive the person concerned in an action for nullity of marriage, the right to choose the proper tribunal because of its domicile or in view of the location of most of the proofs, when it is unknown where the defendant resides. The decision in this matter rests with the judicial vicar of the defendant[42].

The search of the respondent should be careful, taking into account also particular law, as indicated by art. 132 § 2 of Instruction: "Particular law can establish that in this sort of case the citation or communication can be made by edict." and can. 1509 § 1 of the *Code*: "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." The fact and manner of their conduct should be properly and clearly documented[43].

---

the Judicial Vicar of the domicile of the respondent party is to consider carefully all the circumstances of the cause, especially the difficulties of the respondent party in defending himself before the tribunal of the place in which the petitioning party has a domicile or in which the greater part of the proofs are to be collected. § 5. The Judicial Vicar of the domicile of the respondent party in this case is not the judicial vicar of an interdiocesan tribunal but rather the diocesan judicial vicar; if in a particular case there is no such Vicar, it is the Diocesan Bishop."

[42] Cf. R. Sztychmiler, *Właściwość sądu*, T. Rozkrut (ed.), *Komentarz do Instrukcji procesowej „Dignitas connubii"*, Sandomierz 2007, p. 48.

[43] "If the conditions stated in the preceding paragraphs cannot be observed because, after a diligent investigation, it is not known where the respondent party lives, this must be documented in the acts." (DC, art. 13 § 6; cf. CIC 1983, can. 1509 § 2) and "Whenever, after a diligent investigation has been made, it is still unknown where a party lives who is to be cited or to whom some act is to be communicated, the judge can proceed further, but there must be proof in the acts of the diligent investigation

If the judge is not entitled to any of the listed titles, his jurisdiction is relative[44] (DC, art. 10 § 2; cf. CIC 1983, can. 1407 § 2). In accordance with article. 10 § 3 of the Instruction: "If no exception of relative incompetence is filed before the concordance of the doubt, the judge becomes competent *ipso iure*, (…)." This solution is advantageous to the party, because it excludes the invalid of the sentence due to consideration of the case by the improper tribunal[45]. Moreover "In a case of relative incompetence the Apostolic Signatura for a just cause can grant an extension of competence (cf. PB, art. 124, 3)." (DC, art. 10 § 4).

d) Competence due to the grade of the tribunal

In the context of the introduction of a case to a court, this tribunal will be correct which can consider such cases as a first instance. Due to the grade it has in fact determined, specific competence in settle litigation, collecting of documents to identify facts and admission main objections[46].

In the interests of it "that the status of persons – if called into question – does not remain in doubt for very long" the legislature foresaw the possibility that the "at the appellate level for the assigning of competence on new grounds of nullity to be judged *tamquam in prima instantia* ('as at the first instance')[47]".[48]

---

that was made." (DC, art. 132 § 1).

[44] However, subject to the provisions on absolute incompetence.

[45] The judge, because it is obliged to examine his jurisdiction (cf. CIC 1983, can. 1505 § 1 and DC, art. 119 § 1), if he neglects this duty can be punished by the competent authority "with fitting penalties, not excluding privation from office" (cf. CIC 1983, can. 1457).

[46] Cf. J. Krukowski, *Kompetentne forum…*, p. 32.

[47] "If a new ground of nullity of the marriage is alleged at the appellate grade, the tribunal can admit it and judge it as if in first instance." (CIC 1983, can. 1683).

[48] John Paul II, *Address to the Tribunal of the Roman Rota*, 22.1.1996, http://www.vatican.va/holy_father/john_paul_ii/speeches/1996/documents/hf_jp-ii_spe_

After a definitive sentence has been issued, the same cause cannot be heard again in the same instance[49] – the incompetence of a judge is absolute by reason of grade (DC, art. 9 § 1, 2 and § 2; CIC 1983, can. 1440) causing – as in the case by reason of matter – irremediable nullity of sentence[50]. But even if does not respect the competence by reason of grade, the Apostolic Signature can, for a just cause, "entrust the hearing of the cause to a tribunal otherwise absolutely incompetent". (DC, art. 9 § 3; cf. PB, art. 124, 2).

e) Competence due to introduce the cause anew

As mentioned above, after a definitive sentence has been issued, the same cause can not be heard again in the same instance. However, the situation is shaped differently, when an instance has finished through abatement or renunciation. Precise regulation provides Instruction *Dignitas connubii* in art. 19: "§ 1. Once an instance has finished through abatement (*peremptio*) or renunciation, a party who wishes to introduce the cause anew or pursue it can approach any tribunal which is competent at the time of resumption. § 2. If the abatement or renunciation or desertion (*desertio*) took place, however, before the Roman Rota, a cause which was either entrusted to that same Apostolic Tribunal (…) can be resumed only before the Rota."

If the case has not previously been conducted in the Roman Rota, the change in the properties of the new tribunal at the time of anew introduce the cause, may be results of the change of residence or change of location of most of the proofs[51] – e.g. due to change of domicile by persons who will be called as witnesses in the case.

19960122_roman-rota_en.html (20.10.2011).

[49] Unless the sentence happens to have been declared null (DC, art. 9 § 2).

[50] "A sentence suffers from the defect of irremediable nullity if: 1° it was rendered by an absolutely incompetent judge (…)" (CIC 1983, can. 1620).

[51] Cf. R. Sztychmiler, *Właściwość sądu*, p. 54.

f) Exceptions to the court proceeding

The legislator points out two exceptions to the court proceeding.

In cases of the nullity of marriage in which the nullity appears evident and they do not require a more detailed study or investigation, the Apostolic Signatura enjoys the faculty of deciding by decree[52].

In the case of persons, who attempted marriage before a civil official or non-Catholic minister despite the fact that they were obligated to observe the canonical form of marriage[53] – in order to establish the free state of them it is sufficient to use the prematrimonial investigation in accordance with cann. 1066-1071[54].

2. Access to the proper tribunal

The issue of effective access to a competent tribunal is dependent on the specific structure of the judiciary. The basic condition is to have a sufficient number of qualified persons who are likely to work in the tribunal in the dimension that provides its the appropriate functioning. An additional problems for ecclesiastical authorities are how to provide suitable premises (rooms), funds for their maintain and funds for costs associated with the functioning of the court. Because not all expenses will cover by the court fees paid by the parties[55]. Adaptation of these charges to the actual needs of the court could make impossible for many people access to justice. The structure of the judiciary, however, is largely dependent on the number

[52] DC, art. 5 § 2. But if they need investigation "the Signatura is to remit them to a competent tribunal or another tribunal, if need be, which is to handle the cause according to the ordinary procedure of the law" – *ibidem*.

[53] According to CIC 1983, can. 1117.

[54] DC, art. 5 § 3. Cf. Pont. Comm. for the Auth. Interp. of the CIC, Resp., 26.6.1984, AAS 76 (1984) 747.

[55] But they are very important support for the operation of the tribunal. A small number of the faithful, and therefore the cases submitted in the court may result that the establishment of a separate court in a diocese will not be possible.

of the faithful and the number of cases, with which they turn to the ecclesiastical tribunals.

a) The structure of the courts of first instance

In each diocese should be established a diocesan tribunal. The obligation in this regard rests with the diocesan bishop[56]. In his diocese he is "the judge of first instance for causes of nullity of marriage not expressly excepted by law" [57].This power can, in accordance with the law, exercise personally or through others[58].

The legislature, however, recommends that, he not do this personally, unless special causes demand it[59]. It is also dictated by the good of the faithful asking for resolution of their cases. Diocesan bishop is a person to whom is entrusted the care of whole diocese[60]. His duty is "to govern the particular church entrusted to him with legislative, executive, and judicial power according to the norm of law" (CIC 1983, can. 391 § 1). Appropriate exercise of this power requires a great deal of commitment and sometimes – for the proper

[56] "(…) all Bishops must establish a diocesan tribunal for their respective dioceses." (DC, art. 22 § 3).

[57] DC, art. 22 § 1; CIC 1983, can. 1419 § 1.

[58] *Ibidem*.

[59] DC, art. 22 § 2.

[60] "In exercising the function of a pastor, a diocesan bishop is to show himself concerned for all the Christian faithful entrusted to his care, of whatever age, condition, or nationality they are, whether living in the territory or staying there temporarily; he is also to extend an apostolic spirit to those who are not able to make sufficient use of ordinary pastoral care because of the condition of their life and to those who no longer practice their religion." (CIC 1983, can. 383 § 1), also "If he has faithful of a different rite in his diocese, he is to provide for their spiritual needs" (CIC 1983, can. 383 § 2), "He is to act with humanity and charity toward the brothers and sisters who are not in full communion with the Catholic Church and is to foster ecumenism as it is understood by the Church" (CIC 1983, can. 383 § 3), and "He is to consider the non-baptized as committed to him in the Lord, so that there shines on them the charity of Christ whose witness a bishop must be before all people." (CIC 1983, can. 383 § 4).

implementation – support other people and institution[61]. Involvement, whose requires proper exercise of judicial power, could distract the diocesan bishop from the other obligations incumbent upon him, or the administration of justice would be harmed in face of the need to realization by the bishop also his other commitments.

If the establishment the diocesan tribunal encounters difficulties, it may be helpful, good cooperation among the diocesan bishops of one ecclesiastical province, region or a country[62]. The legislature provides that they can – by common agreement[63] and with the approval of the Apostolic See – "establish a single tribunal of first instance for their dioceses, in accordance with can. 1423, in place of the diocesan tribunals described in cann. 1419-1421". (DC, art. 23 § 1; CIC 1983, can. 1423 § 1) [64].

In a situation where it is not possible to establish any of the above-mentioned tribunals, so as not to deprive the faithful of access to the court, the diocesan Bishop "can request from the Apostolic Signatura an extension of competence for another nearby tribunal, with the consent of the bishop moderator[65] of that tribunal" (DC, art. 24 § 1).

---

[61] "The bishop exercises legislative power himself. He exercises executive power either personally or through vicars general or episcopal vicars according to the norm of law. He exercises judicial power either personally or through the judicial vicar and judges according to the norm of law." (CIC 1983, can. 391 § 2).

[62] Cf. R. Sztychmiler, *Trybunały*, T. Rozkrut (ed.), *Komentarz do Instrukcji…*, p. 59.

[63] In this case, aforesaid bishops must express the unanimous decision – R. Sztychmiler, *Trybunały*, *op. cit.*, p. 59.

[64] "The tribunals mentioned in § 1 can be established either for any cases whatsoever or only for certain types of cases." (CIC 1983, can. 1423 § 2). Cases concerning the marriage, constitute a majority among the cases submitted in tribunals, and this may justify establishment of a common tribunal to consideration only the matrimonial cases. This decision belongs to the diocesan bishops concerned, but must be approved by the Apostolic See.

[65] "The Bishop Moderator is understood to be the diocesan bishop in regard to a diocesan tribunal and the designated Bishop, mentioned in art. 26, in regard to an interdiocesan tribunal" (DC, art. 24 § 2). "In regard to the tribunal mentioned in art. 23, (…) or the bishop designated by either body, has all the powers which pertain to a diocesan bishop in regard to his own tribunal." (DC, art. 26; cf. CIC 1983, can. 1423 § 1). Bishop Moderator manages the work of the tribunal. – R. Sztychmiler,

Instruction *Dignitas connubii* takes up also issue the Catholics of another Church *sui iuris*. The structure of the judiciary hearing the case of Catholics of another Church sui iuris is regulated in the *Code of Canons of the Eastern Churches* of 1990[66].

However, for the situation, when the number of the faithful of the Church sui iuris in a given area is not sufficient to establish their own tribunal, and there are courts of the Latin Church, is applied art. 16 § 1 of Instruction:

"§ 1. A tribunal of the Latin Church, without prejudice to artt. 8-15, can hear the cause of the nullity of the marriage of Catholics of another Church *sui iuris*:

1° *ipso iure* in a territory where, besides the local Ordinary of the Latin Church, there is no other local Hierarch of any other Church *sui iuris*, or where the pastoral care of the faithful of the Church *sui iuris* in question has been entrusted to the local Ordinary of the Latin Church by designation of the Apostolic See or at least with its assent (cf. can. 916 § 5, CCEO);

2° in other cases by reason of an extension of competence granted by the Apostolic Signatura whether stably or *ad casum*."

Resolving the question of law which should apply the tribunal of the Latin Church in such cases, Instruction indicates that he "must proceed according to its own procedural law, but the question of the nullity of marriage is to be decided according to the laws of the Church *sui iuris* to which the parties belong" (DC, art. 16 § 2)[67].

Because of membership to the Church to each faithful is granted specific right to the court – the right to ask the entity which

---

Trybunały, *op. cit.*, p. 61.

[66] http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19901018_in dex-codex-can-eccl-orient_lt.html (20.10.2011).

[67] The use of own procedural law of the Latin Church by the tribunal ensures the proper conduct of the case, while the application of the laws of the Church *sui iuris* to the question of the nullity of marriage guarantees that the case will be examined according to the standards applicable to people interested in the question of the validity of their marriage.

has a highest judicial authority in the Church[68]. As indicated in CIC 1983, can. 1417 § 1: "By reason of the primacy of the Roman Pontiff, any member of the faithful is free to bring or introduce his or her own contentious or penal case to the Holy See for adjudication in any grade of a trial and at any stage of the litigation."

J. Krukowski however, notes that the exercise of this right cannot be understood in a literal sense, because a personal examination by the Roman Pontiff each of case brought by the faithful Christian would be physically impossible[69]; among the matters covered by concern of the Bishop of Rome there is an obligation to establish such an order in the functioning of justice in the Church, which will provide consideration of every question directed to Him by each of the faithful – in accordance with the principle of subsidiarity – by the appropriate tribunal in accordance with the law[70].

By virtue his authority, the Roman Pontiff – in addition to cases reserved to Him by the law – may call to his own judgment any other cases[71].

The Roman Pontiff "renders judicial decisions personally, through the ordinary tribunals of the Apostolic See, or through judges he has delegated" (CIC 1983, can. 1442).

Nevertheless, Benedict XVI stressed the importance of local tribunals pointing out that they "are called to play an indispensable role in rendering the administration of justice immediately accessible, and in being able to investigate and resolve practical cases at times linked to peoples' culture and mentality"[72].

---

[68] "The Roman Pontiff is the supreme judge for the entire Catholic world (…)."(CIC 1983, can. 1442).

[69] Cf. J. Krukowski, *Różne stopnie i rodzaje trybunałów*, J. Krukowski (ed.), *Komentarz do Kodeksu*…, p. 30-31.

[70] *Ibidem*, p. 31.

[71] "It is solely the right of the Roman Pontiff himself to judge in the cases mentioned in can. 1401: 4° other cases which he has called to his own judgment." (CIC 1983, can. 1405 § 1, 4).

[72] Benedict XVI, *Address to the Tribunal of the Roman Rota*, 26.1.2008.

Except for secure an appropriate structure of the judiciary of the first instance, access to the proper tribunal must also be ensured by providing for permanent location of any tribunal, open during stated hours[73].

b) Offices and functions in the tribunal

The establishment of the tribunal is dependent on whether the bishop has at his disposal persons with appropriate qualifications to perform the functions of different agencies and in a court. And whether these people will be able to undertake the work in this tribunal, i.e. whether their other duties will not negatively affect to work in the justice system. In relation to some functions and offices of reason for the elimination from the group of candidates to work in a particular tribunal may be their actual involvement in work in another tribunal.

Realization of the right to a court requires not only ensure that in the tribunal were planted all required by law offices and functions, but also that the number of persons holding them was adjusted to the number and seriousness of the cases.

In accordance with art. 34 § 1 of the Instruction *Dignitas connubii*: "Ministers of a diocesan tribunal are named by the Diocesan Bishop; ministers of an interdiocesan tribunal, unless otherwise expressly determined, are named by the *coetus* of Bishops[74] or, as the case may be, by the Conference of Bishops.". To protect the right to justice, the legislature has committed under § 2 of this article: "In an urgent case the ministers of an interdiocesan tribunal may be named by the Bishop Moderator until the *coetus* or Conference provides."

In each tribunal – diocesan and interdiocesan – should be appointed one judicial vicar (officialis) with the ordinary power of

[73] Cf. CIC 1983, can. 1468.

[74] "Several Diocesan Bishops, however, with the approval of the Apostolic See, can by common agreement establish a single tribunal of first instance for their dioceses, in accordance with can. 1423, in place of the diocesan tribunals described in cann. 1419-1421." (DC, art. 23 § 1).

judging[75]. The diocesan bishop should not entrust this office of vicar general, "unless the small size of the diocese or the small number of cases suggests otherwise" (CIC 1983, can. 1420 § 1; DC, art. 38 § 1).

If necessary, "The judicial vicar can be given assistants, called adjunct judicial vicars or vice-officiales." (DC, art. 41 § 1; CIC 1983, can. 1420 § 3).

The legislature expects the following qualifications of candidates for the indicated positions: "must be priests[76], of unimpaired reputation, doctors or at least licensed in canon law, and not less than thirty years of age" (CIC 1983, can. 1420 § 4; DC, art. 42 § 1) and should have experience of tribunal work[77].

For the tribunals, both diocesan and interdiocesan, should be appointed diocesan judges[78]. They should be clerics[79], but if necessary, "The conference of bishops can also permit the appointment of lay persons as judges; when it is necessary, one of them can be selected to form a college." (CIC 1983, can. 1421 § 2; DC, art. 43 § 2).

Applicants for judges should be "of unimpaired reputation and to have a doctorate or at least a licentiate in canon law" (DC, art. 43 § 3; cf. CIC 1983, can. 1421 § 3); they should also have work experience in an ecclesiastical court[80].

In each diocesan and interdiocesan tribunal for all causes of the nullity of marriage must be appointed at least one defender of the

---

[75] "Every diocesan bishop is bound to appoint for his tribunal one judicial vicar or officialis with the ordinary power of judging; (…)." (DC, art. 38 § 1), "A judicial vicar is also to be appointed for each interdiocesan tribunal; to him those things concerning the diocesan judicial vicar are to be applied in an appropriate manner." (DC, art. 39). Cf. CIC 1983, can. 1420 § 1.

[76] Accordance of DC, art. 42 § 1: "priests or bishops (*sacerdotes*)".

[77] "It is strongly recommended that no one lacking experience of tribunal work be appointed a judicial vicar or adjunct judicial vicar." (DC, art. 42 § 2).

[78] DC, art. 43 § 1; cf. CIC 1983, can. 1421 § 1.

[79] *Ibidem*.

[80] "It is also recommended that no one be named a judge who has not already carried out another function in the tribunal for a suitable period of time." (DC, art. 43 § 4).

bond and promoter of justice[81]. If necessary, and only to particular cases, to carry out the function of defender of the bond or promoter of justice may be appointed other person[82]. Staffing problems solves, to some extent, an indication of the legislature, that "The same person, but not in the same cause, can carry out the office of defender of the bond and promoter of justice." (DC, art. 53 § 3; cf. CIC 1983, can. 1436 § 1). In case of obstacles that could arise in a particular case, they may receive substitutes[83].

Candidate for the defender of the bond, and as the promoter of justice, can be cleric or layperson "of unimpaired reputation, having a doctorate or at least a licentiate in canon law, and of proven prudence and zeal for justice" (DC, art. 54; CIC 1983, can. 1435).

In order to ensure realization of the right of access to court on the organizational level, the Apostolic Signature[84] often dispenses judicial vicars, diocesan judges, promoter of justice and defender

[81] DC, art. 53 § 1. "A promoter of justice is to be appointed in a diocese for contentious cases which can endanger the public good and for penal cases; the promoter of justice is bound by office to provide for the public good." (CIC 1983, can. 1430), "A defender of the bond is to be appointed in a diocese for cases concerning the nullity of sacred ordination or the nullity or dissolution of a marriage; the defender of the bond is bound by office to propose and explain everything which reasonably can be brought forth against nullity or dissolution. (CIC 1983, can. 1432).

[82] DC, art. 53 § 2.

[83] "The judicial vicar can name substitutes for the defender of the bond and promoter of justice from among those named in accordance with art. 53 §§ 1-2; this is to be done by a decree to be mentioned in the acts, and can be done either from the beginning of the process or during it. The substitutes are to stand in for those who were originally named whenever the latter are impeded." (DC, art. 55).

[84] Dispensation from the behavior of the procedural laws is reserved to the Apostolic See – "A diocesan bishop, whenever he judges that it contributes to their spiritual good, is able to dispense the faithful from universal and particular disciplinary laws issued for his territory or his subjects by the supreme authority of the Church. He is not able to dispense, however, from procedural or penal laws nor from those whose dispensation is specially reserved to the Apostolic See or some other authority." (CIC 1983, can 87 § 1).

of the marriage bond from the requirement of having a licenciate or doctorate in canon law[85].

Very important is the presence of a notary – "A notary must take part in every process, so that acts (*acta*) which have not been signed by the same are null." (DC, art. 62 § 1; CIC 1983, can. 1437 § 1). The head of the tribunal chancery is also a notary[86].

The requirements for candidates for notary, the legislature determines as follows: "The head of the chancery and the notaries must be of unimpaired reputation and above all suspicion (cf. can. 483 § 2)." (DC, art. 63).

Furthermore, the legislator indicates that "At every tribunal there is to be an office or a person available so that anyone can freely and quickly obtain advice about the possibility of, and procedure for, the introduction of their cause of nullity of marriage, if such should be the case." (DC, art. 113 § 1). This office is not mentioned in the provisions of Instruction *Dignitas connubii* relating to the employees of the tribunal (*Chapter II*, art. 33-64), but court staff can exercise it in addition[87]. Similarly, within each court, however, depending on of the capabilities of the particular tribunal, "there are to be stable advocates designated, receiving their salary from the tribunal itself, who can carry out the function described in § 1[88], and who are to exercise the function of advocate or procurator for the parties who prefer to choose

[85] A. Stankiewicz, Komentarz do art. 1 Instrukcji *Dignitas connubii*, T. Rozkrut (ed.), *Komentarz do Instrukcji…*, p. 24.

[86] Cf. DC, art. 61 § 1. "(…) unless otherwise determined, it pertains to this person: to record in the protocol book all the acts which arrive at the tribunal; to note in the protocol book the beginning, the progress and the end of causes; to receive documents exhibited by the parties; to send citations and letters; (…) to keep the original copy of acts and documents in the archive; to authenticate a copy of any act or document at the legitimate request of an interested party; (…)." (DC, art. 61 § 2). "If the head of the chancery is absent or impeded, another notary for judicial acts is to take care of all these matters." (DC, art. 61 § 4).

[87] DC, art. 113 § 2.

[88] "If the function described in § 1 is entrusted to a stable advocate, he cannot take on the defense of the cause except as a stable advocate." (DC, art. 113 § 4).

them" (DC, art. 113 § 3; cf. can. 1490). Regulations concerning these attorneys also found outside the *Chapter II* of the Instruction.

In assessing the difficulty in ensuring adequate filling of offices in the ecclesiastical tribunal should be taken into account the following provisions of art. 36 of Instruction *Dignitas connubii*:

"§ 1. The Judicial Vicar, Adjunct Judicial Vicars, other judges, defenders of the bond and promoters of justice are not to exercise the same function or any other of these functions in a stable manner in two tribunals which are connected by reason of appeal.

§ 2. The same officials are not to exercise simultaneously two functions in a stable manner in the same tribunal, without prejudice to art. 53 § 3.

§ 3. It is not permitted for the ministers of the tribunal to exercise, at the same tribunal or at another tribunal connected with it by reason of appeal, the function of advocate or procurator, whether directly or through an intermediate person."

The ministers of the tribunal may not participate in a particular case as judge or as a defender of the bond, if earlier gave advice on the possibility of challenging the marriage and how to proceed[89].

In order to provide transparency in administration of justice in the Church, the legislature reserves: "No other minister of the tribunal can be established besides those listed in the *Code*." (DC, art. 37).

An efficient administration of justice is guaranteed by the adequate – to the needs of a particular tribunal – number of persons appointed to particular offices.

c) Establishment of the tribunal in a particular case

Given the importance of the institution of marriage – not only in a private dimension but also in a public – dealing with cases of nullity of marriage requires a special commitment, accuracy and integrity. Therefore, a cases of nullity of marriage are reserved to a

[89] DC, art. 113 §§ 1-2.

collegiate tribunal of three judges[90]. And according to art. 30 § 2 of the Instruction *Dignitas connubii*: "The bishop moderator can entrust more difficult or more important causes to the judgement of five judges (cf. can. 1425 § 2)."

The legislature foresaw two situations which allow for consideration by the single judge. This solution has view to the good parties of cases of nullity of marriage – one of the signaled situation guarantees the right to a court in specific, exceptional circumstances, the second follows from the possibility of faster hear the case. In accordance with art. 30 § 3 of the Instruction: "In the first grade of trial, if it happens that a college cannot be formed, the Conference of Bishops, as long as this impossibility persists, can permit a bishop moderator to entrust causes to a single clerical judge who, when this can be done, is to employ an assessor[91] and an auditor[92]; to the same single judge, unless it is determined otherwise, pertain those things attributed to a college, *praeses* or *ponens*[93] (cf. can. 1425 § 4)." And according to art. 295: "When a petition proposed in accordance with artt. 114-117 has been received, the Judicial Vicar or a judge designated by him, having omitted the solemnities of the ordinary process but with the

[90] "With every contrary custom reprobated, the following cases are reserved to a collegiate tribunal of three judges: 1º contentious cases: a) concerning the bond of sacred ordination; b) concerning the bond of marriage, without prejudice to the prescripts of cann. 1686 and 1688" (CIC 1983, can. 1425 § 1; cf. DC, art. 30 § 1)

[91] "An assessor, who is assumed as a consultant to a single judge in accordance with art. 30 § 3, is to be chosen from among those clergy or laypersons approved for this function by the Bishop Moderator (cf. can. 1424)." (DC, art. 52).

[92] "The *praeses* of the tribunal can designate an auditor to carry out the instruction of the cause, selecting him either from among the judges of the tribunal or from among the persons approved by the diocesan bishop for this function (cf. can. 1428 § 1)." (DC, art. 50 § 1); "The diocesan bishop can approve for his diocese for the function of auditor clerics or laypersons who are outstanding for their upright life, prudence and learning (cf. can. 1428 § 2)." (DC, art. 50 § 2).

[93] "The ponens, or presenter, designated by the *praeses* from among the judges of the college, is to present the cause in the meeting of the judges, to write down the decision in the form of a response to the proposed doubt, as well as to draw up in writing the sentence and decrees in incidental causes (cf. can. 1429; artt. 248 §§ 3 and 6; 249 § 1)" (DC, art. 47 § 1).

parties having been cited and with the defender of the bond having taken part, can declare the nullity of the marriage by a sentence if, from a document which is subject to no contradiction or exception, there is established with certainty the existence of a diriment impediment or of the defect of legitimate form, as long as with equal certainty it is clear that a dispensation was not granted, or the lack of a valid mandate of a proxy (cf. can. 1686)."

To avoid suspicion of partiality of the court, but also spread the work evenly between the judges of the tribunal, a judicial vicar appoints judges by turns, according to the established order. Also in a situation permitting the establishment of the single judge, must occur according to previously established order[94]. The legislature does not prescribe on what conditions should be established order, a decision in this matter shall take a judicial vicar. Specified by him criteria should be transparent and ensured elimination of bias in the selection of persons to consider a particular case[95]. In anticipation of specific situations, the legislature indicates that in individual cases, the bishop moderator may decide on another way of selection of judges[96]. The requirement to obtain permission from the bishop for depart from the established order is to prevent abuse of this possibility[97].

The collegial tribunal is to be presided over by the judicial vicar or adjunct judicial vicar[98]. Such a solution undoubtedly favors the implementation of the duty which rests on the judicial vicar – "to render an account concerning the state and activity of the tribunal to the bishop"[99]. However, if this is not possible, one of the listed vicars

[94] DC, art. 48 § 1: "The judicial vicar is to assign judges in order by panels to judge each individual cause or, as the case may be, to assign a single judge according to a pre-established order."; CIC 1983, can. 1425 § 3: "Unless the bishop establishes otherwise in individual cases, the judicial vicar is to assign the judges in order by turn to adjudicate individual cases."

[95] Cf. R. Sztychmiler, *Trybunały*, p. 98.

[96] *Ibidem*.

[97] *Ibidem*.

[98] DC, art. 46 § 1; CIC 1983, can. 1426 § 1.

[99] DC, art. 38 § 3.

shall designate another member of the college – but only cleric – to the preside of the tribunal[100].

In addition to judges, to the case should be designated a notary[101] and a defender of the marital bond[102]. These people are the basic composition of the tribunal in cases of nullity of marriage. The share of the promoter of justice depends on the circumstances of the case – when the threatened may be a public good, including when it is a matter of safeguarding a procedural law[103].

Judicial vicar should not replace once appointed judges[104]. This could cause delays in processing the case, and even undermine the confidence of the parties to the tribunal – to arouse suspicions of incompetence of persons who are members of the tribunal or about manipulating the composition of the tribunal because of the favor for the other side, etc. The suspicion must not be reasonable to adversely affect the overall assessment of administration of justice. Therefore, any ground for changing of a judge must be a very important and must be submited to the parties[105].

It is also important preventing such changes. Therefore, the legislator obliges each of staff tribunal to abstain from participation in a particular case if the share of one of them might be considered as a prejudicial to the impartiality of the decisions of the tribunal. in accordance with art. 67 § 1 of Instruction *Dignitas connubii*: "A judge is not to take up a cause in which he has some interest by reason of

[100] DC, art. 46 § 1; CIC 1983, can. 1426 § 1.

[101] DC, art. 62 § 1; CIC 1983, can. 1437 § 1.

[102] DC, art. 56: "§ 1. In causes of the nullity of marriage the presence of the defender of the bond is always required. § 2. The defender must participate from the beginning of the process and during its course, in accordance with the law."

[103] DC, art. 57 § 2: "The promoter of justice, by virtue of a decree issued by the judge, whether ex officio or at the instance of the defender of the bond or a party, must take part when it is a matter of safeguarding a procedural law, especially when the question concerns the nullity of the acts or exceptions.". The promoter of justice takes part in the case also when he challenges a marriage – cf. DC, art. 57 § 1.

[104] DC, art. 49 § 1; CIC 1983, can. 1425 § 5.

[105] *Ibidem*.

consanguinity or affinity in any degree in the direct line and up to the fourth degree in a collateral line, or by reason of guardianship or tutelage, close personal relationship, great hostility, gain to be made or damage to be avoided, or in which any other sort of founded suspicion of favoritism could fall upon him (cf. can. 1448 § 1).". Moreover: "In the same circumstances the defender of the bond, promoter of justice, assessor and auditor, and the other ministers of the tribunal must abstain from exercising their office (cf. can. 1448 § 2)." (DC, art. 67 § 2).

The issue of impartiality of the tribunal cannot be dependent only on the conscience of the court staff who – the reasons mentioned above – should not participate in the case. If themselves do not withdraw, the party may request for their exclusion[106]. This case must be resolved as soon as possible[107]. After admitting the objection, the persons must be changed[108].

The legislator provides that such situations may give rise to additional difficulties – of an organizational nature – and constitutes: "If the tribunal cannot take the cause due to a lack of other ministers and there is no other competent tribunal, the matter is to be deferred to the Apostolic Signatura so that it may designate another tribunal to handle the cause." (DC, art. 69 § 2). So, in assessing whether the

[106] DC, art. 68 § 1: "In those cases mentioned in art. 67, unless the judge, defender of the bond, promoter of justice or other tribunal minister abstains, a party can object to them (cf. can. 1449 § 1)." In accordance with further provisions: "The Judicial Vicar hears an objection (*exceptio*) against a judge; if the objection is against himself, the Bishop Moderator is to deal with the matter (cf. can. 1449 § 2)." (DC, art. 68 § 2), "If the Bishop is the judge and the objection is filed against him, he is to abstain from judging (cf. can. 1449 § 3)." (DC, art. 68 § 3), "If the objection is filed against the defender of the bond, the promoter of justice or other ministers of the tribunal, the question is heard by the *praeses* in a collegial court or by the judge himself, if he is a single judge (cf. can. 1449 § 4)." (DC, art. 68 § 4).

[107] "The question of an objection is to be decided *expeditissime*, after the parties have been heard, as well as the defender of the bond and the promoter of justice, if taking part in the process, unless they themselves have been recused (cf. can. 1451 § 1)." (DC, art. 70 § 1).

[108] "If the objection is admitted, the persons must be changed, but not the grade of the trial (can. 1450)." (DC, art. 69 § 1).

number of persons at provided positions in the tribunal is sufficient to ensure the efficient administration of justice, should be taken into account also the possibility of occurrence of such circumstances. Depending on the case it may have an impact on the actual access to a court as a result of the actual increase in costs associated with reaching the other competent tribunal – more distant from the place of domicile of the parties or witnesses.

d) The judicial expenses

Examination of the case and its solving requires incurring some necessary expenses conditioning proper functioning of the court – they include costs associated with preparation and securing documents, translation of acts and documents, the costs associated with maintaining contact with persons involved in the proceedings (such as postal and telecommunications expenditure), etc. These expenses may also include advocates' fees, costs of an opinion drawing up by the experts or the resources due to the witnesses. All of these expenditure are the judical expenses.

The parties are obliged to pay the judical expenses, but the legislator indicates that this burden should be proportionate to their capabilities (cf. DC, art. 302). These funds often determine the functioning of the tribunal, but their amount and the requirement cannot be a barrier to access to court. This should be ensured by the bishop moderator of the tribunal[109]. The solutions adopted in a particular tribunal must take into account living conditions in areas under the jurisdiction of the tribunal. They should be based on appropriate provisions established: in regard to a diocesan tribunal – by the diocesan bishop, in regard to an interdiocesan tribunal – by the *coetus* of Bishops or the Bishop designated by them[110]. In setting

[109] "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).

[110] Cf. DC, art. 303 § 1.

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" (DC, art. 303 § 2; cf. art. 95 § 1).

In accordance with art. 250 DC, as well as can. 1611 CIC 1983, the cost of the process should be determined in the sentence. But already at the time of learn about the possibility of challenging the marriage an interested person should be informed of the amount of the judical expenses. This person should be aware what are the judical fees provided for in that particular tribunal, to be able, if necessary, to apply for an exemption of them or their reduction or payment in installments. A party may also be required to pay the appropriate deposit as collateral its share of the expenses[111]. Cases connected with the judical expenses, when they was requested from the very beginning, should be heard before setting the formulation of the doubt[112].

Undoubtedly, for the reduction of the judical expenses in cases of nullity of marriage affects that, the party has no obligation to use the assistance of an advocate[113]. Party may itself decide whether he wants to take advantage of professional help or not[114], unless the *praeses* finds that in this case, "the ministry of a procurator or advocate is necessary"[115]. If the parties are convinced of the need for the assistance of a procurator or advocate, and both are asking for a declaration of the nullity of their marriage, they can appoint for themselves a common procurator or advocate[116]. This will affect the distribution of financial

[111] DC, art. 80; cf. CIC 1983, can. 1464.

[112] DC, art. 80; cf. CIC 1983, can. 1464.

[113] "In a contentious trial which involves minors or in a trial which affects the public good, with the exception of marriage cases, the judge is to appoint ex officio a defender for a party who does not have one." (CIC 1983, can. 1481 § 3).

[114] Cf. DC, art. 101 § 1.

[115] DC, art. 101 § 1.

[116] DC, art. 102.

burden between two people. The legislator also provides the possibility of granting a person who needs it, gratuitous legal assistance[117].

3. Attitudes and responsibilities staff and associates of the tribunal

The attitudes of staff of the tribunal and persons cooperating with the tribunal (staff legal clinics, advocates, procuratores, curators, experts) have the actual influence on access to court – their attitude towards people interested in challenging their marriage, their behavior, the relevant theoretical and practical preparation.

Appropriate commitment and skills of members of the judiciary become particularly important when the people, who turn to them for help, struggling with their own limitations – it may be, for example, bad emotional condition, fear of unpredictable behavior of the other spouse, embarrassment resulting from the intimate or sensitive nature of the ground of invalidity of marriage, awkwardness, illiteracy, illness or disability (for example when a person is deaf or hearing, blind, has difficulty with writing or cannot write, has difficulty with speaking or with unequivocal expressing of own will, has problems with the mastery of emotions, etc.) ignorance of the language used by the tribunal, poverty, impossibility of personal action (e.g. due to age, illness, work abroad). This may be the lack of knowledge or possession of false information about the grounds to challenge of marriage, about the procedure for the investigation of the truth about marriage, about required and permissible proofs.

Considering that, the legislator itself draws attention to the attitudes of those involved in administration of justice by virtue of office or function, indicates what actions they are prohibited to them and provides some procedural facilitation for people facing with specific problems in the investigation their rights and in determining the scope of their duties, also in the event of improper operation of the

[117] "If the *praeses* thinks that gratuitous legal assistance is to be granted, he is to request the Judicial Vicar to designate an advocate who will provide the gratuitous legal assistance." (DC, art. 307 § 1). Also cf. DC, art. 303 § 1, 3 and art. 306, 1.

tribunal. It is often associated with the additional responsibilities of staff court.

a) The obligation to further education and improvement attitudes

The legislature points out that "In light of the seriousness and the difficulty of causes of the nullity of marriage, it is the responsibility of Bishops to see to it: 1° that suitable ministers of justice are prepared for their tribunals; 2° that those selected for this ministry each fulfill their respective functions diligently and in accordance with the law." (DC, art. 33). Because the bishop is rarely involved in actual, everyday functioning of his tribunal, the judical icar is obligated by the legislator "to render an account concerning the state and activity of the tribunal to the bishop"[118]. Whereas the wording of art. 308 emphasizes the importance of proper attitudes of persons who participate in administration of justice to the realization of the right to court: "The Bishop Moderator[119] is to see that neither by

[118] "Without prejudice to those things which pertain to himself by right, especially freedom in passing judgement, the judicial vicar is bound to render an account concerning the state and activity of the tribunal to the bishop, who is responsible for monitoring the proper administration of justice." (DC, art. 38 § 3). However, this does not relieve the Bishop from his own initiative out of concern for the proper activity of the tribunal. John Paul II, in his address to the Tribunal of the Roman Rota from 29 January 2005, said: "(…) I have referred several times to the essential relationship that the process has with the search for objective truth. It is primarily the Bishops, by divine law judges in their own communities, who must be responsible for this. It is on their behalf that the tribunals administer justice. Bishops are therefore called to be personally involved in ensuring the suitability of the members of the tribunals, diocesan or interdiocesan, of which they are the Moderators, and in verifying that the sentences passed conform to right doctrine. Sacred Pastors cannot presume that the activity of their tribunals is merely a 'technical' matter from which they can remain detached, entrusting it entirely to their judicial vicars (cf. CIC 1983, cann. 391, 1419, 1423 § 1).".

[119] "The Bishop Moderator is understood to be the Diocesan Bishop in regard to a diocesan tribunal and the designated Bishop, mentioned in art. 26, in regard to an interdiocesan tribunal." (DC, art. 24 § 2).

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." The implementation of these provisions requires not only the selection of those who meet the criteria from the scope of theoretical and practical knowledge and education provided for a given position. Persons holding defined offices and functions in the ecclesiastical tribunal must also properly use their skills to work for justice. They should have appropriate moral qualities and take care of their gain, to avoid a discouragement, impatience, or routine. The oath submitted by staff and associates of the tribunal "to carry out their function properly and faithfully" has to strengthen awareness in this regard[120]. The legislature also emphasizes the need for continuous improvement in the field of matrimonial law and procedural and the broadening of knowledge of jurisprudence the Roman Rota[121].

Numerous indications in this regard can be found in speeches of the Popes to members of the Tribunal of the Roman Rota.

Concern about the appropriate approach to persons applying for judicial assistance express the following words of Pope Benedict XVI: "It is nonetheless a grave obligation to bring the Church's institutional action in her tribunals ever closer to the faithful." [122], "The action, therefore, of those who administer justice cannot prescind from charity. Love for God and for neighbour should inform every activity, even if it appears to be the most technical and bureaucratic. The

[120] "All who make up the tribunal or assist it must take an oath to carry out their function properly and faithfully (can. 1454)." (DC, art. 35 § 1), "Judicial Vicars are bound by the obligation of making personally, before the Bishop Moderator of the tribunal or his delegate, the profession of faith and oath of fidelity, according to the formula approved by the Apostolic See (cf. can. 833, 5)." (DC, art. 40).

[121] DC, art. 35: "§ 2. In order to exercise their respective functions properly, judges, defenders of the bond and promoters of justice are to be diligent in continuing to deepen their knowledge of matrimonial and procedural law. § 3. With particular reason it is necessary that they study the jurisprudence of the Roman Rota, since it is responsible to promote the unity of jurisprudence and, through its own sentences, to be of assistance to lower tribunals (cf. *Pastor bonus*, art.126).".

[122] Benedict XVI, *Address to the Tribunal of the Roman Rota*, 28.1.2006.

perspective and the measure of charity will help focus attention on the fact that the judge is always dealing with people, beset by problems and difficulties. The principle that *charity goes beyond justice* (Encyclical *Caritas in Veritate,* 6) applies equally to the specific sphere of those engaged in the administration of justice. Consequently, the approach towards people, while admittedly observing a specific modality linked to the process, must seek, with sensitivity and concern for the individuals involved, to facilitate contact with the competent tribunal by the parties to the case."[123].

John Paul II stressed whereas: "(…) attitude of reverent respect for man must be maintained even in the conduct of trials."[124], "In the life of communion of the *ecclesial societas* (…) the members are raised by a gift of divine love to the supernatural state (…) that even the *modus* in which ecclesiastical trials are conducted must be translated into forms of behavior suitable for expressing this spirit of charity. How can we not think of the image of the good Shepherd who bends over the lost, wounded sheep when we wish to describe for ourselves the judge who in the Church's name deals with and judges the status of one of the faithful who turns to him in trust?"[125]. He pointed out that the proper performance of judicial functions has a broad reference: "If those who administer the law strive to maintain an attitude of complete openness to the demands of truth, with rigorous respect for procedural norms, the faithful will remain convinced that ecclesial society is living under the governance of law; that ecclesial rights are protected by the law; that in the final analysis, the law is an opportunity for a loving response to God's will."[126], "The striving

[123] Benedict XVI, *Address to the Tribunal of the Roman Rota,* 29.1.2010, http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/january/documents/hf_ben-xvi_spe_20100129_rota-romana_en.html (20.10.2011).

[124] John Paul II, *Address to the Tribunal of the Roman Rota*, 10.2.1995, http://www.vatican.va/holy_father/john_paul_ii/speeches/1995/february/documents/hf_jp-ii_spe_19950210_roman-rota_en.html (20.10.2011).

[125] John Paul II, *Address to the Tribunal of the Roman Rota*, 17.1.1998.

[126] John Paul II, *Address to the Tribunal of the Roman Rota*, 28.1.1994, http://www.vatican.va/holy_father/john_paul_ii/speeches/1994/documents/hf_jp-ii_spe_19940128_roman-rota_en.html (20.10.2011). "When pastors and ministers of justice encourage

for the common good and toward the co-responsibility of all Church members in building that highly articulated society – which is the bearer of salvation to all mankind – demands respect for the roles of one and all, according to each one's juridical status in the Church, and the effective activity of all public functions imbued with *sacred power* (*potestas sacra*)."[127].

Popes have always pointed to the importance of a continuous improvement of staff of the ecclesiastical tribunals: "The profound respect owed to the rights of the human person, which require urgent and solicitous protection, should motivate the ecclesiastical judge to observe exactly those procedural norms which are intended precisely to assure the rights of the person."[128], "The faithfulness of the judge to the law (…) It will (…) be this same faithfulness that impels the judge to acquire that group of qualities needed to carry out the other duties with regard to the law: wisdom to understand it, learning to illustrate it, zeal to defend it, prudence to interpret it in its spirit beyond the simple facade of the words (*nudus cortex verborum*), careful consideration, and Christian equity to apply it."[129], "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

---

the faithful not only to exercise their ecclesial rights but also to be aware of their own duties in order to fulfill them faithfully, we wish precisely to urge them: to have a direct, personal experience of the *splendor legis*." – *ibidem*; "The spouses themselves must be the first to realize that only in the loyal quest for the truth can they find their true good (…)." – John Paul II, *Address to the Tribunal of the Roman Rota*, 28.1.2002, http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rota_en.html (20.10.2011); "As the Church's self-awareness has developed, the human-Christian person has found not only recognition but also, and above all, an explicit, active, and balanced defense of personal basic rights in harmony with those of the ecclesial community." – John Paul II, *Address to the Tribunal of the Roman Rota*, 17.2.1979.

[127] John Paul II, *Address to the Tribunal of the Roman Rota*, 26.2.1983.

[128] John Paul II, *Address to the Tribunal of the Roman Rota*, 17.2.1979.

[129] John Paul II, *Address to the Tribunal of the Roman Rota*, 4.2.1980, http://www.vatican.va/holy_father/john_paul_ii/speeches/1980/february/documents/hf_jp-ii_spe_19800204_sacra-rota_en.html (20.10.2011).

knowledge – judicial, theological, psychological, social, etc. – he must also acquire a great and habitual self-mastery. He must strive to grow in virtue (…)."[130]

Undoubtedly, dictated by the experiences from the practice of the ecclesiastical tribunals are also warnings resulting from Pope speeches: "The judge who truly acts as a judge, in other words, with justice, neither lets himself be conditioned by feelings of false compassion for people, nor by false models of thought, however widespread these may be in his milieu. He knows that unjust sentences are never a true pastoral solution, and that God's judgment of his own actions is what counts for eternity."[131], "(…) those who make justice possible. I wish to underscore that they must be characterized by the high practice of human and Christian virtues, particularly prudence[132] and justice, but also fortitude. This last virtue becomes more relevant the more injustice appears to be the easiest approach to take, insofar as it implies accommodating the desires and expectations of the parties or even the conditioning of the social context."[133]

---

[130] Paul VI, *Insegnamenti*, IX (1971), 65-66. (28.1.1971, supra p. 110).

[131] John Paul II, *Address to the Tribunal of the Roman Rota*, 29.1.2005.

[132] "Since the abstract law finds its application in individual, concrete instances, it is a task of great responsibility to evaluate the specific cases in their various aspects in order to determine whether and in what way they are governed by what the law envisages. It is precisely at this stage that the judge's prudence carries out the role most its own; here he truly *dicit ius*, by fulfilling the law and its purpose beyond preconceived mental categories, which are perhaps valid in a given culture and a particular historical period, but which cannot be applied a priori always and everywhere and in each individual case." – John Paul II, *Address to the Tribunal of the Roman Rota*, 22.1.1996. "Law cannot be reduced to a mere collection of positive rules that tribunals are required to apply. The only way to give a solid foundation to the jurisprudential task is to conceive of it as a true exercise of *prudentia iuris*. This prudence is quite the opposite of arbitrariness or relativism, for it permits events to reveal the presence or absence of the specific relationship of justice which marriage is, with its real human and saving meaning." – Benedict XVI, *Address to the Tribunal of the Roman Rota*, 26.1.2008.

[133] Benedict XVI, *Address to the Tribunal of the Roman Rota*, 29.1.2010.

b) The obligation to keep the secret of office

An extremely important issue is the obligation to keep the secret of office. The legislator imposes it on the officials and assistants of the tribunal[134], and separately indicates this requirement in relation to advocates and procuratores[135]. Persons turning to the tribunal must feel confident that the information that entrust to members of the judiciary will not be forwarded to unauthorized persons, nor be used for any purpose other than the judicial process in the Church. This information is often very intimate, sensitive, or for other reasons confidential and its disclosure could result in serious harm or even a danger to health or life of the people. Therefore, in accordance with art. 73 § 3 of Instruction *Dignitas connubii*: "Whenever the nature of the cause or of the proofs is such that from the divulgation of the acts and proofs the reputation of others could suffer, an occasion could be given for disagreements, or a scandal or other inconveniences of this type could arise, the judge can bind the witnesses, experts, parties and their advocates or procurators to secrecy by a special oath or, as the case may be, at least a promise, without prejudice to artt. 159, 229-230 (cf. can. 1455 § 3).", and in accordance with art. 91 § 2: "Without the andate of the judge, the head of the chancery and the notaries are prohibited from giving out a copy of the judicial acts and of documents which were acquired for the process (cf. can. 1475 § 2)."

c) The efficiency and fairness of judicial procedures

The condition of efficient administration of justice is to act quickly as possible, without unnecessary delay[136], hence in the many

[134] "Judges and other ministers of the tribunal and assistants are bound to keep the secret of office (cf. can. 1455 § 1)." (DC, art. 73 § 1).

[135] "The advocate and procurator are bound according to their function to protect the rights of the party and to keep the secret of office." (DC, art. 104 § 1).

[136] "At the same time, however, the current legislation of the Church shows a deep sensitivity to the requirement that the status of persons – if called into question – does not remain in doubt for very long." – John Paul II, *Address to the Tribunal of*

provisions of the legislator points to the need for action "urgent", "immediately", "*expeditissime*", "as soon as possible", or within the prescribed period[137]. Due to the circumstances of the case, provides

the Roman Rota, 22.1.1996. "(…) the Judge who seeks to be just and wishes to live up to the classic paradigm of 'animate justice' (cf. Aristotle, *Nicomachean Ethics*, V, 1132a), has the grave responsibility before God and men of his function, which includes due timeliness in every phase of the process: *quam primum, salva iustitia* [as soon as possible, while safeguarding justice] (Pontifical Council for Legislative Texts, Instruction *Dignitas Connubii*, art. 72)." – Benedict XVI, *Address to the Tribunal of the Roman Rota*, 29.1.2010. "(…) the truth sought in processes of the nullity of marriage is not an abstract truth, cut off from the good of the people involved. It is a truth integrated in the human and Christian journey of every member of the faithful. It is very important, therefore, that the declaration of the truth is reached in reasonable time." – Benedict XVI, *Address to the Tribunal of the Roman Rota*, 28.1.2006. "I know very well that the duration of a trial does not depend only on the judges who have to decide: there are many other factors which can cause delays, but you – to whom the task of administering justice has been entrusted, so as to bring inner peace to so many faithful – ought to commit yourselves to the utmost in order that the course of the process shall proceed with that solicitude which the good of souls requires and which the new *Code of Canon Law* prescribes when it states: 'They are to see to it that in the tribunal of first instance cases are not protracted beyond a year, and in the tribunal of second instance not beyond six months' (c. 1453). May none of the faithful take the excessive duration of the ecclesiastical court process as grounds for not presenting his own cause or for giving up on it and choosing solutions in clear contrast with Catholic doctrine." – John Paul II, *Address to the Tribunal of the Roman Rota*, 30.1.1986, http://www.vatican.va/holy_father/john_paul_ii/speeches/1986/documents/hf_jp-ii_spe_19860130_ roman-rota_en.html (20.10.2011).

[137] For example: DC, art. 34 § 2: "In an urgent case the ministers of an interdiocesan tribunal may be named by the Bishop Moderator until the *coetus* or Conference provides."; DC, art. 46 § 2: "It pertains to the *praeses* of the college: (…) 8º to see that the decree of citation is communicated immediately and, if need be, to convoke the parties and the defender of the bond with a new decree (cf. artt. 126 § 1; 127 § 1); (…)."; DC, art. 70 § 1: "The question of an objection is to be decided *expeditissime*, after the parties have been heard, as well as the defender of the bond and the promoter of justice, if taking part in the process, unless they themselves have been recused (cf. can. 1451 § 1)."; DC, art. 72: "Judges and tribunals are to see that all causes are finished as soon as possible, while safeguarding justice, and that they not be prolonged beyond one year in a tribunal of first instance and beyond six months in a tribunal of second instance (can. 1453)."; DC, art. 76: "§ 1. Causes are to be judged in the order in which they were presented and inscribed in the case register (cf. can. 1458). § 2. However if some cause demands a quicker handling ahead of others, that is to be ordered by a special decree containing the reasons (cf. can. 1458)."; DC, art. 82:

the possibility of faster conduct of proceedings "if, from a document which is subject to no contradiction or exception, there is established with certainty the existence of a diriment impediment or of the defect of legitimate form, as long as with equal certainty it is clear that a dispensation was not granted, or the lack of a valid mandate of a proxy (cf. can. 1686)." (DC, art. 295; cf. CIC 1983, can. 1686).

"When the law does not set time limits for carrying out procedural acts, the judge must set them beforehand, having taken into account the nature of each act (can. 1466)."; DC, art. 101 § 2: "If in the judgement of the *praeses* the ministry of a procurator or advocate is necessary and the party has not so provided within a prescribed time limit, the *praeses* is to name them, as the case requires, but they remain in function only as long as the party has not named others."; DC, art. 106: "§ 1. Before a procurator and advocate can take up their function, they must deposit an authentic mandate at the tribunal (can. 1484 § 1). § 2. Nonetheless, in order to prevent the extinction of a right, the *praeses* can admit a procurator even before the mandate has been exhibited, with a suitable guarantee having been offered, if the matter so warrants; any act lacks force, however, if the procurator does not properly present an authentic mandate within the peremptory time limit to be set by the same *praeses* (cf. can. 1484 § 2)."; DC, art. 118: "§ 1. Once a *libellus* has been exhibited, the Judicial Vicar must constitute a tribunal as soon as possible by his decree in accordance with artt. 48-49. § 2. The names of the judges and the defender of the bond must be communicated to the petitioner immediately."; DC, art. 119 § 1: "The *praeses*, once he has seen both that the matter is within the competence of his tribunal and that the petitioner does not lack legitimate standing in the trial, must either admit or reject the *libellus* by his decree as soon as possible (cf. can. 1505 § 1)."; DC, art. 121 § 2: "The decree must express at least in a summary manner the reasons for the rejection and must be communicated as soon as possible to the petitioning party and, if need be, to the defender of the bond (cf. can. 1617)."; DC, art. 125: "If within a month of the *libellus* having been presented the judge does not issue a decree by which the *libellus* is accepted or rejected, the interested party can insist that the judge carry out his duty; if the judge nonetheless should remain silent, once ten days from the presentation of the request have passed without a response the *libellus*, if it had been presented legitimately, is considered to have been admitted (cf. can. 1506)."; DC, art. 126 § 2: "If the *libellus* is considered admitted in accordance with art. 125, the decree of citation to the trial is to be issued within twenty days of the request mentioned in the same article (cf. can. 1507 § 2)."; DC, art. 127 § 1: "The *praeses* or ponens is to see that the decree of citation to the trial is communicated immediately to the respondent party and at the same time made known to the petitioning party and the defender of the bond (cf. cann. 1508 § 1; 1677 § 1).".

The speed of the proceedings, however, should not be at the expense of fairness[138]. In some situations, the legislature simply points to the need for additional or very scrupulous action. This can happen e.g. when a person interested in challenge to his or her marriage will be require special support; or when the participation of the other spouse will be require security so that both of parties have had real access to justice. The legislature provides for, among others, the ability to accept an oral petition with requests the services of the judge[139], the concern for prudent consideration the question of the acceptance or rejection a *libellus*[140], the possibility to use by the party with professional legal assistance[141], the possibility present a *libellus* in the tribunal

[138] "(…) the preliminary investigation of the case is an important stage in the search for the truth. The very reason for its existence is endangered and degenerates into pure formalism when the outcome of the proceedings is taken for granted. It is true that the entitlement to timely justice is also part of the concrete service to the truth and constitutes a personal right. Yet false speed to the detriment of the truth is even more seriously unjust." – John Paul II, *Address to the Tribunal of the Roman Rota*, 29.1.2005. "If it is true that the new Code clearly imposes the obligation of rapidly bringing all processes of first and second instance to completion (see c. 1453), this must not result in the detriment to justice and protection of the rights of all the parties to the cause and the community of which they are members." – John Paul II, *Address to the Tribunal of the Roman Rota*, 26.2.1983.

[139] DC, art. 115 § 2: "An oral petition can be admitted, whenever the petitioner is impeded from presenting a *libellus*, in which case the Judicial Vicar is to order the notary to draw up the act in writing, which is then to be read to the petitioner to be approved, and which then takes the place of a *libellus* written by the petitioner, for all legal effects (cf. can. 1503)."; CIC 1983, can. 1503: "§ 1. The judge can accept an oral petition whenever the petitioner is impeded from presenting a *libellus* or the case is easily investigated and of lesser importance. § 2. In either case, however, the judge is to order the notary to put the act into writing; the written record must be read to and approved by the petitioner and has all the legal effects of a *libellus* written by the petitioner."

[140] DC, art. 120: "§ 1. The *praeses* can and must, if the case requires, institute a preliminary investigation regarding the question of the tribunal's competence and of the petitioner's legitimate standing in the trial. § 2. In regard to the merits of the cause he can only institute an investigation in order to admit or reject the *libellus*, if the *libellus* should seem to lack any basis whatsoever; he can do this only in order to see whether it could happen that some basis could appear from the process."

[141] DC, art. 101: "§ 1. Without prejudice to the right of the parties to defend themselves

of the place in which the petitioner has a domicile or in the tribunal of the place in which in fact most of the proofs must be collected[142], the concern for participation in the proceedings the other spouse[143] and for the reconciliation of parties in a various possible and relevant areas[144].

---

personally, the tribunal is bound by the obligation to provide that each spouse is able to defend his rights with the help of a competent person, most especially when it concerns causes of a special difficulty. § 2. If in the judgement of the *praeses* the ministry of a procurator or advocate is necessary and the party has not so provided within a prescribed time limit, the *praeses* is to name them, as the case requires, but they remain in function only as long as the party has not named others."

[142] DC, art. 13: "§ 2. In these cases there must be written proof of the consent of the Judicial Vicar of the domicile of the respondent party; such consent cannot be presumed. (…) § 4. Before giving his consent, the Judicial Vicar of the domicile of the respondent party is to consider carefully all the circumstances of the cause, especially the difficulties of the respondent party in defending himself before the tribunal of the place in which the petitioning party has a domicile or in which the greater part of the proofs are to be collected."

[143] DC, art. 138: "§ 1. 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 declare that party absent from the trial and decree that the cause, with due observance of those things to be observed, is to proceed through to the definitive sentence (cf. can. 1592 § 1). § 2. However, the *praeses* or ponens is to make an effort to have the party withdraw from the absence. § 3. Before the decree mentioned in § 1 is to be issued, 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. 11 § 3: "A spouse separated for whatever reason either permanently or for an indefinite time does not follow the domicile of the other spouse (cf. can. 104)."

[144] DC, art. 65: "§ 1. A judge, before he accepts a cause and whenever he perceives the hope of a good outcome, is to employ pastoral means to convince the spouses, if this can be done, to convalidate the marriage and reestablish conjugal life (can. 1676). § 2. 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. § 3. 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."; CIC 1983, can. 1676: "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

4. Summary

Analysing the provisions of canon law, which regulate access to the competent tribunal in cases of nullity of marriage, must be noted that the legislator takes into account all the requirements for exercising the right to court – one of the fundamental human rights – defined also the *International Covenant on Civil and Political Rights* or in the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

Appropriate guidelines are contained, *inter alia*, in the CCPR General Comment no. 32 of the Human Rights Committee[145] that interpret the meaning of art. 14 of the *International Covenant on Civil and Political Rights*.

For the realization of the right to the court is necessary to establish a competent tribunal[146]. According to the General Comment: "The notion of a 'tribunal' in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature."

Access to the relevant proceedings or to participate in it is often dependent on the availability of legal assistance[147], as well as the imposition of fees on the parties[148]. The legal assistance may be important not only in criminal cases, so the state are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it[149].

---

living."

[145] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement (20.10.2011).

[146] Cf. General Comment No. 32, paragraph 18.

[147] *Ibidem*, para. 10.

[148] *Ibidem*, para. 11.

[149] *Ibidem*, para. 10.

In accordance with paragraph 13: "The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. (…) In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.".

In the sense of article 14, paragraph 1, the requirement of competence, independence and impartiality of a tribunal is not subject to any exception[150]. Among the independence requirements are listed the procedure and qualifications for the appointment of judges, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature[151]. Furthermore, "it is necessary to protect judges against conflicts of interest and intimidation"[152]. As regards the requirement of impartiality "judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. (...) the tribunal must also appear to a reasonable observer to be impartial."[153]

Similar guidance can be found in jurisprudence issued under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

In accordance with art. 6 of the *Convention*, the court must be established by law. This requirement includes the establishment of the tribunal and determination its jurisdiction and the appointment of

[150] *Ibidem*, para. 19.

[151] *Ibidem*. Judges may be dismissed, but only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the law. – *ibidem*, para 20.

[152] *Ibidem*.

[153] *Ibidem*, para. 21.

the composition of the tribunal in particular cases[154]. Tribunal must be independent, impartial and must be competent to examine all issues relating to the facts and laws relevant to the pending proceedings[155]. The tribunal may be composed – fully or partly – with non-professional judges[156].

Impartiality means a lack of prejudice or bias. Applying a subjective criterion should be presumed personal impartiality of the judge, unless there is proof to the contrary. The judge should be excluded from review the case in case of reasonable doubt in this regard. Objective criterion focuses on hierarchical relationships or others between a judge and the others participants in the proceedings. Requires an assessment in each individual case, whether their nature and degree of pointing to a lack of impartiality of the court. The problem in this background is, for example, the relationship between the judge and the advocate of the party[157].

As regards access to the proper tribunal – actual limitation may be height of judicial expenses, which determine such initiation of proceedings. In some cases, condition of effective exercise of the right to a court is free legal assistance[158].

Many other solutions and interpretation indicates the convergence of efforts of legislators in the Catholic Church and secular legislators to promote and protect the right to the administration of justice.

---

[154] M.A. Nowicki, *Komentarz do art. 6 Konwencji o ochronie praw człowieka i podstawowych wolności*, para. 6.1.3., 1.6.2010, *Lex*.

[155] *Ibidem*, para 6.1.4.

[156] *Ibidem*.

[157] *Ibidem*.

[158] *Ibidem*, para. 6.1.3.

* * *

Dostęp do trybunału Kościoła katolickiego w kontekście skargi o nieważność małżeństwa. Zagadnienia wybrane

W każdej społeczności człowiek posiada określone uprawnienia i ciążą na nim określone zobowiązania wobec innych. Różne okoliczności mogą sprawić, że ich obowiązywanie bądź zakres staną się wątpliwe. Nikt jednak nie powinien dochodzić swych praw przemocą lub wymierzać sprawiedliwość według własnego uznania. Właściwą drogą rozwiązania problemu jest zwrócenie się do organu wyposażonego przez daną społeczność w odpowiednią władzę. Szczególne znaczenie w tym kontekście ma prawo do sądu – jedno z podstawowych praw człowieka. Służy ono bowiem dochodzeniu i ochronie innych praw i wolności, ustalaniu zakresu obowiązków i egzekwowaniu ich realizacji.

Niezbędne gwarancje prawa do sądu przewidziane są w różnych systemach prawnych – państwowych, międzynarodowych, także w normach, którymi kierują się wspólnoty religijne. Niniejsze opracowanie poświęcone jest realizacji prawa do sądu w kontekście wniesienia do trybunału Kościoła łacińskiego skargi o nieważność małżeństwa kanonicznego. Odpowiednie normy zawarte są w *Kodeksie Prawa Kanonicznego* z 1983 r. oraz w Instrukcji procesowej *Dignitas connubii*, a ich wsparciem jest Magisterium Kościoła. Zakres przewidzianych tam gwarancji odzwierciedla szczególną troskę Kościoła o propagowanie i ochronę podstawowych praw człowieka. Podstawowym jej wyrazem jest wskazanie prawodawcy kościelnego, że prawo do sądu przysługuje nie tylko każdemu wiernemu, ale także każdemu człowiekowi.

Praktyczna realizacja prawa do sądu wymaga dostrzeżenia szeregu ewentualnych trudności, wobec których może stanąć podmiot dochodzący swych praw i wolności. Opracowanie obejmuje

zagadnienia związane z dostępem do trybunału wobec realizacji prawa do skargi o nieważność małżeństwa.

Osoba zainteresowana realizacją przysługującego jej prawa do sądu musi mieć możliwość przedłożenia swojej sprawy w trybunale właściwym do rozpatrywania danego rodzaju spraw. Ogólne podstawy właściwości trybunału wynikają z przedmiotu sprawy (małżeństwo), podmiotu sprawy (pozycji osób, których sprawa dotyczy), zakresu terytorialnego działania danego trybunału oraz stopnia, w którym trybunał ten sprawy rozpatruje (I instancja). Prawodawca podejmuje też kwestię kompetencji trybunału wobec sprawy wnoszonej na nowo, gdy wcześniej zakończenie instancji nastąpiło przez umorzenie lub zrzeczenie się.

Faktyczny dostęp do właściwego trybunału zapewnia istnienie odpowiedniej struktury sądownictwa, dysponowanie odpowiednią kadrą warunkującą utworzenie i właściwe funkcjonowanie trybunału, właściwa organizacja pracy sądu, jak również odpowiednie regulacje w zakresie kosztów sądowych, by nie stały się one barierą w realizacji prawa do sądu. Szczególne znaczenie mają tu także postawy i zachowania pracowników oraz współpracowników trybunału wobec osób zainteresowanych zaskarżeniem swojego małżeństwa. Niewłaściwe mogą utrudniać dostęp do trybunału lub nawet przyczynić się do zaniechania dochodzenia przez zainteresowanego swoich uprawnień na drodze sądowej.

Sebastian Ożóg*
(University of Warmia and Mazury in Olsztyn)

MONITORING OF THE EMPLOYEE IN THE COMPUTER NETWORK[1]

The need for privacy has always been one of the most natural and basic needs of every human being. As well has it been the need of an individual to integrate with the community within which one lives and operates. Only balancing of these two opposing needs allows the proper development of an individual and keeping its emotional balance.

Also, since the dawn of history, from the time when some individuals began to exercise authority over others, some of them wanted to penetrate the sphere of privacy of people under their authority. It was variously justified: by reference to the validity and superiority of certain ideas, necessity of punishing certain "abnormal" behaviours, some more or less real threat to society or lack of productivity. Control measures of the conduct of individuals or groups of individuals have long tradition in human history, albeit with varying degree of success. Somewhat in response to such attempts the individuals began to seek protective measures to ensure a certain minimum of privacy, trying to keep it shielded from anyone's control.

At present, threats to privacy and its possible violations are increasing with the increase in mobility and technological development of modern societies. New technologies nowadays provide us with the tools, which could be a "dream" of erstwhile rulers or other supervisors

*Author is an assistant lecturer at the Department of Human Rights and European Law of the Faculty of Law and Administration at the University of Warmia and Mazury.

[1] Following article is an updated translation of the article of Sebastian Ożóg, *Monitoring pracownika w sieci komputerowej*, "Polski Rocznik Praw Człowieka i Prawa Humanitarnego", Olsztyn 2011.

of various forms of mass social behaviours. Modern governments within their intelligence services have an infrastructure that allows to capture virtually all forms of communication. Actually there are no security measures available to private individuals that could make them absolutely certain of complete confidentiality of information exchange between them.

These communication technologies, as well as measures of its interception, change our world – this is an obvious truth, which in the era of information society does not need to be proven to convince anyone. Access to the information through the Internet-connected devices (not only computers but also mobile phones or even more sophisticated TV sets) is common. In June 2009 the Internet penetration factor for Polish households was established at level of 36,7% for the stationary networks and 13,3% for mobile networks.[2] The benefits of such direct access to information is also appreciated by employers, increasingly creating more sophisticated corporate computer network systems, providing instant access to the Internet for all the computers and many other electronic devices being a part of such company network. Direct access to almost unlimited informational resources and other benefits of the Internet like VoIP (*Voice over Internet Protocol* – popularly known as the "Internet telephony") or teleconferencing gives employers a number of convenient facilities and enables significant cost savings, in certain situations determining even basic functioning of the employees outside their usual workplace. This enabled the creation of entirely new kind of employment called teleworking, which does not require the presence of an employee at his workplace at all.

Of course modern technology, neutral in itself, can be used in different ways, not all valued by the employer. Growing negative occurrence among the workers is the so-called *cyberslacking* – the use of the Internet and computer equipment at workplace for private purposes. According to the research conducted by Gemius in November 2007, in Poland 93% of people having Internet access at work admitted to *cyberslacking*, with 74% of respondents not seeing anything

[2] Report of the Office of Electronic Communication (*Urząd Komunikacji Elektronicznej*) *Technologie dostępu do sieci Internet w Polsce* of December 2009, http://www.uke.gov.pl/uke/redir.jsp?place=galleryStats&id=24117 (10.11.2011).

reprehensible in such behaviour.[3] The company's computer network is mostly abused by employees checking private e-mails and browsing web pages, with about 1/3 of respondents also using Internet messaging applications at work and making purchases at digital auctions and online stores all over the Internet.[4] Study conducted by E-marketing – "The Internet at work" – suggests that one-third of employees spend one hour per working day browsing the Internet, and 7% of the employees spend over three hours daily that way.[5] In addition to the "innocent" web browsing, employees also download and distribute through a p2p (*peer-to-peer*) networks illegal (in violation of copyright) software, unlicensed copies of audiovisual works and pornography. Internet is also used for activities directly harmful to the employer, e.g. by giving employer's competitors access to computer files containing his confidential information or even installing software that allows access to employer's computers from outside of the company network (so-called *backdoors*). Besides, even without any malicious intent on the side of the employee, browsing the Internet without precautions can easily become a source of malware infections (so-called *computer worms*, *trojans* and *viruses*) through which unknown individuals can use the corporate network for illegal acquisition of data, sending unwanted electronic mail (*spam*) or launching cyber-attacks against other corporations' computer networks.

In response to such actions, in order to secure corporate networks, employers are implementing systems that monitor usage of corporate computer's resources and actions of the employees within corporate network. Ultimately, monitored devices are the employer's property, and the time spent by employees in the company is paid by him. Thus, understandable is employer's expectation that his corporate equipment and resources, provided to the employees at their

[3] R. Grabarek *Cyberslacking, czyli pracownik się obija*, Gazeta. pl: Technologie. Article available at: http://technologie.gazeta.pl/technologie/1,104584,7571064, Cyberslacking_czyli_pracownik_sie_obija.html (10.11.2011).

[4] *Ibidem*.

[5] J. Kaniewski *Monitoring pracowników*, "Serwis Prawno-Pracowniczy" No. 51/2008 of 16.12.2008, p. 9

workstations, should be used for performing tasks of a professional nature, without abusing them for other purposes.

Towards the needs of employers facing such risks come the software vendors, creating computer applications specialized in supervising programs installed and operated by an employees, analysing the content of the messages entered with their keyboard, monitoring Internet mail (both its content and recipient's address) and websites browsed by employees. These programs allow the employers to virtually track almost every action taken with the use of a specified computer, allowing their recording, storage and subsequent restoration and reviewing. Some manufacturers of such software also warn potential customers that enabling some of the monitoring options without notifying the employee may be illegal and could result in holding the employer liable for infringement of personal rights of the employees.[6]

Corporate computers and other Internet-enabled devices, together with software installed on them, should be treated as a working instruments, made available to the employee to enable him the performance of his professional duties. The employer is therefore entitled to expect that these instruments would be used in accordance with the provisions of the employment contract and has the right to check whether it is so in reality. Each employer should therefore be able to supervise, without exceeding the limits designated by law, the manner and quality of work done by the employees, together with its effects, and also to monitor the performance of the employees and their efficiency. In case of workstations connected to the corporate network with access to the Internet, the employer, according to article 120 of Polish Labour Code (LC),[7] may also be held responsible for the actions of employees against third parties, which further justifies the introduction of some form of supervision.[8]

---

[6] The web sites of developers of such software that contain legal notices indicating the need to inform the employee about the use of surveillance are, e.g.: http://www.okoszefa.pl or http://statlook.pl (10.11.2011).

[7] *Ustawa Kodeks pracy* of 26.6.1974 (Dz.U. of 1974 No. 24, item 141 with changes).

[8] G. Orłowski *Pracownik monitorowany*, "Personel i Zarządzanie" 12/2004, p. 30.

Polish law generally does not regulate the issue of the monitoring of employees. In particular, we will not find any applicable provisions on this issue in the the Labour Code. Residual regulation in this area can be found in the Annex to the Regulation on occupational safety and health at work stations equipped with a display screen.[9] In paragraph 10 letter 'e' of this Annex we find provision stipulating that it is forbidden "to make qualitative and quantitative supervision of the worker's work" without his knowledge. Thus, this regulation requires to keep the employees informed about monitoring of their work performance. However, the regulation does not determine a number of specific issues relating to the means of employee monitoring, their scope and type of data being analysed in such way.[10]

In this situation it is necessary to reconstruct legal substance in the matter on the basis of regulations of more general scope. In particular, considering the appliance of the Polish Constitution and international treaties ratified by Poland, as well as certain provisions of the Labour Code, Civil Code (CC)[11] and other legislation, which, depending on the circumstances, could sometimes be applied. Thus, the final possibilities of monitoring of the employee in his work place is the result of two opposing moral and legal values – on the one hand the right of the employer to supervise the process and organization of work performance in his enterprise and on the other hand the worker's right to protect his privacy.

When it comes to the basic responsibilities of the employee, according to the article 100 § 1 LC, he is obliged to do his work

---

[9] Annex *Minimalne wymagania bezpieczeństwa i higieny pracy oraz ergonomii, jakie powinny spełniać stanowiska pracy wyposażone w monitory ekranowe* to the Regulation *W sprawie bezpieczeństwa i higieny pracy na stanowiskach wyposażonych w monitory ekranowe* of the Minister of Labour and Social Policy (*Minister Pracy i Polityki Socjalnej*) of 1.12.1998 (Dz.U. of 1998 No. 148, item 973).

[10] Given the importance of the issue *de lege ferenda* it should be reconsidered to regulate it in more complete way in act of primary legislation (*ustawa*). Legal basis indicated later in this article are general in nature and necessity of their appliance is caused precisely by the lack of more detailed and complex regulations in this area.

[11] *Ustawa Kodeks cywilny* of 23.4.1964 (Dz.U. of 1964 No. 16, item 93 with changes).

diligently and carefully, following the commands of his superiors on the tasks he is given. In particular, the employee should follow a fixed work time frame (article 100 § 2 item 1 LC), the working order and its rules (article 100 § 2 item 2 LC), as well as take care for the good of the workplace, to protect its property and to maintain the confidentiality of information the disclosure of which could expose the employer to the detriment (article 100 § 2 point 4 LC). Undoubtedly the usage of the Internet at work for private purposes, over the limit set by the employer, may be treated as a violation of both fixed work time and work order. The employee is also obliged to protect the employer's property in the form of a computer made available to him to perform his professional duties and not expose it to any risks such as malware infections originating from the browsed Internet web pages. Such malicious software could potentially allow further abuses and committing crimes via corporate computers by unknown individuals, it could also enable copying confidential data stored within databases inside the corporate network.

With a relatively low awareness of Internet users about the risks involved therein, the natural reaction of the employers in such situation is to install software aiming to protect their networks against malware and unwanted employees' behaviour. These applications protect the computer systems at different levels, often monitoring activities of workers in order to determine the efficiency of their work and eliminate forms of behaviour being unfavourable from the perspective of the employer. However, the employer should begin such actions by shaping clear rules of the Internet access policy in the workplace and determining within them whether and under what conditions it would be allowed (or prohibited) to use the Internet for purposes not related to work activity. Without a clear limitations in this respect in the company's regulations one cannot presume the existence of a total ban on the Internet usage for private purposes at work place, except for the situations where employee's activity would obviously affect the range of his performance and his work efficiency (which would have to be proven anyway in case of a litigation).

In the literature of the field, it is recommended to allow the employees to browse the Internet web pages or to check private

e-mail correspondence.[12] For this purpose it is proposed to the employers to create and maintain for the employees two computer or corporate network accounts with two different levels of supervision – personal and professional level.[13] While the personal one would be monitored only as to the amount of time of its use (and therefore its impact on employee's productivity), the professional one would be subject to wider supervision – also as to the quality of employee's work and its outcomes. In this way, the objectives of the employer, such as maintaining the work effectiveness and supervision over its performance, would still be achieved, and the risk of breaching the privacy of the employee would stay minimized. Of course an employer may resolve this issue in company regulations differently e.g. by completely prohibiting the employees using their work computers for purposes unrelated to their work occupation.

Regardless of the employer's policy on this issue, only with clear rules specifying the use of the Internet the employer can have direct expectations in this regard to employees and, in case some of them would not respect it, apply disciplinary measures. In this case, for purposes of inquiry, it might be necessary to introduce software measures for monitoring, tracing and logging the network activity of an employee in the employer's enterprise network. It should be noted that such computer surveillance must not exceed the limits set in law, in particular, may not violate the right to privacy of the employees.

In accordance with the article 11^1 LC employer is obliged to respect the dignity and other personal rights of the employee. This is one of the fundamental obligations of the employer – the violation of it can result in the termination of a contract of employment by the employee without notice and further lead to litigation for compensatory claims (article 55 § 1^1 LC). Besides dignity, other personal rights are only generally mentioned in the article 11^1 LC, without naming specifically

[12] A. Lach, *Monitorowanie pracownika w miejscu pracy*, "Monitor Prawa Pracy" No. 10/2004, Legalis.

[13] Article 29 Data Protection Working Party, *Working document on the surveillance of electronic communications in the workplace*, adopted on 29.5.2002 (5401/01/EN/Final WP 55), document available online at URL: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2002/wp55_en.pdf (10.11.2011).

any of them, which makes it necessary to prove their existence in the circumstances of a given case, during the litigation. In addition, the regulation of the article 300 LC introduces an obligation to apply to the labour cases, *mutatis mutandis*, the article 23 CC, under which all personal rights of an individual are protected. Provisions of this article do not explicitly indicate the dignity and privacy, as protected values (although they introduce e.g. confidentiality of correspondence). However, because of the exemplary ("*w szczególności*" – "in particular") nature of the enumeration in this provision, its disposition covers all the personal rights that are possible to reconstruct in the way of the interpretation of this legislation on the background of facts of a given case. This is confirmed by the Polish Supreme Court case law, which demonstrated possibility of reconstruction of the protection for values such as privacy and dignity of the individual in the context of the article 23 CC.[14] In one of such judgments[15] the Supreme Court emphasized that every employer should treat his employees with respect and reckoning with their own sense of dignity and personal value, and therefore, he cannot unduly negatively address the employee and express his opinion about him in a humiliating manner, among other employees. On the other hand the Supreme Court considered the employee's personal dignity unharmed in case of the critical assessment of the tasks performed by him, even wrongfully, if it does not unjustly disqualify the employee's professional competence and does not contain unnecessary expressions, that would go beyond need.[16]

In case of violating by the employer rights protected by the provisions of the article 23 CC, because of the regulation of the above mentioned article 300 LC we should also apply, *mutatis*

[14] For example, the Polish Supreme Court judgment of 28.4.2004 (appl. no. CK III 442/02), indicated that processing of certain personal data may be considered a violation of privacy or in the judgment of 21.3.2007 (appl. no. I CSK 292/06) that reconstructed the notion of personal dignity as a human inner perception of his moral and ethical values and honour, as an expression of positive attitude of other people to personal and social values of a particular individual.

[15] Polish Supreme Court Judgment of 3.3.1975 (appl. no. I PR 16/75).

[16] Polish Supreme Court Judgment of 6.12.1973 (appl. no. I PR 493/73).

mutandis, the article 24 CC, under which any person whose personal right is infringed, may demand suppression of the infringing action and performing all actions necessary for removal of all the existing effects of such infringement. Regardless of these claims one may also demand adequate financial compensation for the harm suffered on the basis of the article 448 CC. However, the Supreme Court ruled that in the event of termination of the employment contract (including unlawful terminations) by the employer the subsidiary application of the provisions of the civil law concerning the protection of personal rights is only possible when the employer also violates the employee's personal rights outside the scope of employment relationship, acting outside of the shaped by the legislature legal action of termination of the employment contract.[17]

The right to protection of private life (the right to privacy) of every person in Polish territory has been established in the article 47 of Polish Constitution,[18] which stipulates that "every individual has the right to legal protection of his private and family life, honour and reputation and to deciding about his personal life". The importance of this regulation is emphasized, among others, by the fact that the provision is, according to the article 233 paragraph 1 of the Constitution, inviolable even by regulations restricting other rights issued under martial and emergency law. Additionally, in accordance with the article 49 of the Constitution, Poland "ensures the freedom and protection of confidentiality of communication" and "their limitation can only take place in cases specified by statute (*ustawa*)". Undoubtedly this regulation also applies to computer users and monitoring their communications via Internet. Almost every form of the monitoring of the employee's computer may constitute an interference with his privacy. Although, theoretically there would be no interference when e.g. monitoring actions of an engineer or designer, while overseeing their actions only in specified for work purposes designing application. However, most of the existing applications for supervising employees

[17] Polish Supreme Court Judgment of 16.11.2000 (appl. no. I PKN 537/00).

[18] *Konstytucja Rzeczypospolitej Polskiej* of 2.4.1997 (Dz.U. of 1997 No. 78, item 483 with changes).

does not have such functionality and keeps monitoring all the software being active on specified system.

We should also take into consideration that not every interference entails a violation of the confidentiality of communication. Supervision of software applications running on a computer could sometimes lead "only" to an interference with privacy (e.g. monitoring the addresses of the web pages browsed by the user or the names of files being stored on his computer's hard drive), and sometimes it could also constitute a breach of the confidentiality of communication (e.g. monitoring of the contents of e-mail correspondence, instant messaging clients or IP telephony applications). For this reason, the employer should differentiate his company rules on employee's monitoring and their scope, depending on the type of "computer activity" in the specific workstation and the form of the supervision itself. However, in my opinion, it would be inadmissible to monitor the employee without him being informed beforehand about such supervision being active and the scope of it. Additionally, it must be reiterated that the provision of the article 49 of the Constitution requires that any restriction of the freedom of communication needs to be introduced only in a way of statute (*ustawa*), and as for the issue of the monitoring of the employee it has not yet been regulated in this way. Thus, it is disputable if such supervisory measures, affecting employee's confidentiality of communication, are legitimate at all. It is not only the requirement of the Polish Constitution – in this regard it is consistent with the requirements of the international treaties, appointed later in the article, which require the statutory regulation for every form of interference with the enjoyment of human rights. The only exception to this would be the situation when the employee was clearly prohibited from performing any forms of communication of a private nature at work or when the nature of the information conveyed by the employee would be legally protected (for example under the Act on Protection of Classified Information[19]).

The significance of the above mentioned limitation is clearly visible when we indicate some of the institutions which may,

[19] *Ustawa o ochronie informacji niejawnych* of 2005 (Dz.U. of 2005 No. 196, item 1631, with changes).

by way of exception introduced by law, interfere with the freedom of communication – these are services such as Treasury Inspection (*Kontrola Skarbowa*), the Police or the Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego*).[20] As a part of their operational activities they can use measures including wire-tapping and other recording means, but generally only with the consent of the court. Although, in urgent cases, it is temporarily possible to execute emergency operational control measures without such consent, but it should be subsequently approved by the court within 5 next days. In the event of lack of the approval of the court operational control measures must be discontinued, and all the evidence gathered must be destroyed. It is also important that the information obtained in this manner by these legally authorized institutions should be difficult or impossible to obtain by using other, less intrusive measures.

Comparing above limitations to the current lack of regulation of the employer monitoring the communication of his employees – the employer actually operates without any clear legal basis and, what is even more important, without any supervision over the proportionality of measures taken by him and also without any supervision over the appropriateness of these measures in a particular situation. Undoubtedly the right of the employer to "organize work in a manner which ensures full use of working time"[21] is too general basis for the introduction of measures so deeply interfering with the privacy of the employees.[22] Non-existence of regulation in this area in my opinion is a gap of Polish labour law, and it is difficult to accept the explanation of the Polish Ministry of Labour and Social Policy (*Ministerstwo Pracy i Polityki Socjalnej*), that "the rapid and continuous development of

[20] Appropriate regulations relating to these institutions are contained in: article 237 of the *Kodeks postępowania karnego* (Dz.U. of 1997 No. 89, item 555 with changes), article 19 of *Ustawa o Policji* (Dz.U. of 2007 No. 43, item 277 with changes) or article 36c of the *Ustawa o kontroli skarbowej* (Dz.U. of 2004, No. 8, item 65 with changes).

[21] Article 94 item 2 of *Kodeks pracy*, *op. cit*.

[22] The position of Polish Ombudsman (*Rzecznik Praw Obywatelskich*) cited in the article: *RPO: Pracodawcy nie mogą kontrolować maili pracowników*, http:/wiadomosci.gazeta.pl/wiadomosci/1,114873,4801398.html (10.11.2011).

information technology, telecommunications and electronic media has caused that it is not possible to regulate in labour legislation all the aspects of this matter."[23] Due to the requirements of Polish Constitution and obligations imposed on Poland under international treaties, introduction of the new regulation in this matter is essential. Currently, employers who use the monitoring software and other means of surveillance of computer networks and devices connected to them risk infringement of personal rights of their employees and, depending on the situation, might even be treated as guilty of crime of illegal wire-tapping, as prohibited by the article 267 of the Polish Criminal Code (*Kodeks karny*).[24]

As to this issue the question arises whether, in the absence of legal authorization to interfere with the confidentiality of communication, it is in general permissible to monitor the employee's communication at his workstation. The employers should consider the possibility of enabling the monitoring software with the consent of their employees, e.g. as a condition introduced in their employment contract. Having the consent of an individual generally excludes unlawfulness of the interference. Thus, the consent of the employee to monitoring his communication could entitle the employer to introduce such supervisory measures. However, this solution raises some doubts as to the superiority of the employer over the employee and consecutively the employer's ability to influence the employee to grant such consent. It might seem questionable whether the employee is deciding under no influence or duress when facing the vision of a termination of his employment contract. On the other hand, at some workstations, it might be the exact expectation of the employer that the people working there would start their employment in full awareness of the monitoring of their work performance, expressing full consent to such measures, so that the employer would have full control and

[23] The answer of the Undersecretary of State in the Ministry of Labour and Social Policy (under the authority of the Minister) – to the interpellation No. 12970 of 27.11.2009 on the principles of installation of monitoring in the workplaces, available online at: http://orka2.sejm.gov.pl/IZ6.nsf/main/0F5E9040 (10.11.2011).

24 A. Adamski, *Przestępczość w cyberprzestrzeni. Prawne środki przeciwdziałania zjawisku w Polsce na tle projektu konwencji Rady Europy*, Toruń 2001, p. 28.

supervision over the conduct and quality of the work and its effects. In that case, the employee commencing his employment formally has the free will to consider if he wishes to agree to monitoring of his actions in way specified by employer (it does not, however, mean a complete free will in the material sense). The freedom of consent in such situations is always disputable and has to be assessed individually, depending on the circumstances. For instance, a breach of employee's rights and freedom of expression of his will has been found by the Polish Supreme Administrative Court (*Naczelny Sąd Administracyjny*) in a situation where the employee, at the request of the employer, has agreed to record his fingerprints in order to enable the monitoring of working time with the fingerprint readers, installed at entrances to the building of their work place.[25] So the employer has to make sure that supervisory measures introduced by him are always proportional to the values protected and not excessively invasive.

Assuming that such measures, introduced with the consent of the employee and consideration of their proportionality, would be acceptable, the consent should be expressed *a priori*, preferably under a contract of employment, together with other conditions of employment (although it might also be acceptable as a separate statement). Undoubtedly, both the information about the monitoring and the consent to its exercise should be carried out before its introduction. In addition, the employee should know the exact rules of such surveillance, so that he had no doubts in what circumstances and to what extent he would be the subject of such monitoring.

Regulation of the protection of privacy in the Polish Constitution is essentially identical, as to the scope of protected values,[26] with the article 8 of the European Convention on Human Rights.[27] It is no coincidence, as it was heavily based on the Convention, as to

[25] Polish Supreme Administrative Court judgment of 1.12.2009 (appl. no. I OSK 249/09).

[26] T. Liszcz, *Ochrona prywatności pracownika w relacjach z pracodawcą*, "Monitor Prawa Pracy" No. 1/2007, Legalis.

[27] *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed in Rome on 4.11.1950, ratified by Poland on 19.1.1993 (Dz.U. of 1993 No. 61, item 284 with changes).

the part concerning the human rights. The article 8 of the Convention in paragraph 1 provides that "everyone has the right to respect for his private and family life, his home and his correspondence". In the context of this provision the European Court of Human Rights (ECHR), established under the Convention, explained in details the principles of monitoring of the employee's communication in the *Copland versus the United Kingdom* case.[28] In the time when the events, giving rise to the complaint, occurred in the United Kingdom, as currently in Poland, there were no clear rules regulating the monitoring of employees.[29] In its judgment, the Court clearly confirmed that both: sending of the electronic correspondence (e-mail) as well as browsing of the Internet web pages fall within the scope of protection under the article 8 paragraph 1 of the Convention,[30] and the lack of information from the employer about the monitoring gives ground to employee's expectation that his communication would be private.[31] In the opinion of the ECHR it is irrelevant whether the data collected in such way would be later disclosed in any way or used against the employee, because the very fact of their collection is in itself a violation of privacy.[32]

Moreover, the Court held that the basis for such interference cannot be the legislation which does not meet the requirements of law as to its quality and is incompatible with the rule of law, in particular, a legislation that is not clear and foreseeable enough. "In order to fulfil the requirement of foreseeability, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are empowered

---

[28] ECHR Judgement *Copland v. the United Kingdom* of 3.4.2007 (appl. no. 62617/00).

[29] This issue has been regulated in United Kingdom in 2000 under the *Regulation of Investigatory The Powers Act 2000* and under *The Telecommunications (Lawful Business Practice) Regulations 2000*.

[30] *Copland...*, *op. cit*., para 41.

[31] *Ibidem*, para 42.

[32] *Ibidem*, para 43-44.

to resort to any such measures".[33] The introduction of the relevant provisions is undoubtedly state's duty, but in the lack of regulation in this area cannot be the basis for the actions of the employer that have not been clearly provided within the legislation. If the law did not regulate the matter sufficiently, then under the article 8 paragraph 2 of the Convention it must be assumed that such interference "was not in accordance with the law."[34] In the *Copland* case the lack of legal basis for the introduction of monitoring of the employee the Court considered a breach of the article 8 of the Convention.[35] Due to the similarity of the current state of Polish legal regulations (or rather lack of them) to the legal context in the *Copland* case, it should be assumed that, *de lege lata*, introduction by a Polish employer monitoring of the Internet usage of his employees, without their knowledge, would result in a breach of the article 8 of the Convention.

The right to privacy is also the subject of protection under the article 17 of the International Covenant on Civil and Political Rights (the Covenant).[36] The system of the Covenant (in case of ratification of the Optional Protocol[37] including the right of individual petition) is not strictly a judicial one – the decisions of the Human Rights Committee are not directly binding to the institutions of the states. However, it does not change the fact that, as a ratified international treaty, the Covenant is the binding source of law in Poland and can be invoked as a legal basis for demanding the protection of specific rights provided in the treaty, especially when the national legislation does not comprehensively regulate the issue. Specific (although formally not binding) interpretation of the Covenant, as to the explanation of

[33] *Ibidem*, para 46-47.

[34] *Ibidem*, para 48.

[35] *Ibidem*, para 49.

[36] *International Covenant on Civil and Political Rights*, adopted 19.12.1966, entered into force on 23.3.1976, ratified by Poland on 3.3.1977, entered into force for Poland on 18.6.1977 (Dz.U. of 1977 No. 38, item 167).

[37] *Optional Protocol*, providing the right of individual petition to the Committee on Human Rights, ratified by Poland on 14.10.1991, entered into force for Poland on 7.2.1992 (Dz.U. of 1994 No. 23, item 80).

its provisions, is provided by Human Rights Committee within its General Comments. In the case of the article 17 of the Covenant such is the General Comment 16.[38]

Although the primary role of the Covenant is to prevent violations of the states, in the case of the right to privacy the Committee indicated in its Comments that "this right is required to be guaranteed against all interferences and attacks whether they emanate from state authorities or from natural or legal persons"[39] It is the duty of the state "to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right."[40] Considering the quoted comments of the Committee, taking into account the general lack of national regulation of the monitoring of the employees, one could have doubts whether Poland properly fulfilled its treaty obligations in this regard. The Committee also emphasizes that although the protection of the privacy is not absolute, any interference should be undertaken only if it is necessary in the interest of the society, within the limits of the law and performed by authorized bodies.[41] Moreover, no interference should be allowed, that was not expressly envisaged by the law of the state,[42] which, in the case of lack of the Polish regulation, might question the legality of any forms of the monitoring of the employees in our country. In addition, the Committee indicates that the rules provided for the interference should be as detailed as possible, to eliminate the arbitrariness of authorities decisions. In the case of correspondence (including the electronic one like e-mail or SMS), the Committee expects the state to ensure its confidentiality and integrity – it should be delivered to the addressee "without interception and without being opened or otherwise read",

---

[38] *General Comment 16: the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)* of 8.4.1988, available online at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ 23378a8724595410 c12563ed004aeecd?Opendocument (10.11.2011).

[39] *Ibidem*, para 1.

[40] *Ibidem*.

[41] *Ibidem*, para 8.

[42] *Ibidem*, para 3.

and all "surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited".[43] The Committee does not exclude the possibility of interference in the confidentiality of communication, but indicates that it may be done only by legally authorized entities, to the extent provided by law, that also must comply with the provisions, aims and objectives of the Covenant.[44]

In the light of the foregoing considerations creation of the employer's regulation of monitoring of Internet usage by his employees is not easy. In particular, one cannot *a priori* deny or confirm the right of the employer to introduce such supervision. Of the essence is the scope of such measures and the rules of their exercise. It is on this basis one can determine whether, and under what circumstances, such interference could be assumed admissible.

Essential to the employer in the context of monitoring of the Internet usage of his employees, is to inform the employee of such activity beforehand. The best way to provide it would be to have employee's written confirmation in this respect, e.g. by introducing an appropriate provision in the employment contract or by requiring a separate statement admitting the employee's knowledge of work regulations in this regard. Rules of operation of such monitoring system must also be specified in detail, so that it would be clear when and to what extent the actions of employees would be recorded. One cannot forget that the introduced supervisory measures must be proportionate to the risks on the specified workstation, which should be reflected in different scope of the monitoring, depending on the type of work and range of responsibilities of the employee. In order to avoid doubts as to whether the employer's monitoring of the employee has not exceeded the limits of his privacy one might follow the foregoing suggestions of the Article 29 Working Party on the Protection of Individuals with regard to the processing of Personal Data and introduce into a corporate network a system of separate accounts for personal and

[43] *Ibidem*, para 8.

[44] *Ibidem*, para 3.

professional activities of every employee. Only the professional ones should be monitored in detail, as to the content transmitted through the company's network. Use of the personal accounts should be monitored only as to the time of its activity. In this way one can minimize the risk of accidental violation of employee's privacy. An employee's privacy in this situation would be adequately protected against the arbitrary or even accidental interference and in case of employee's business accounts being used for sending private messages all the risk would lie with the employee, who would then be aware of all possible consequences. Obviously it is not possible to predict all possible work situations, but the introduction of appropriate policy of the monitoring of the Internet in the workplace should limit questionable situations to a minimum. Furthermore, we should postulate, *de lege ferenda*, that the Polish legislator would regulate this issue in statute and in more detail – in a way allowing business and private entities to determine in what situations and to what extent the interference with the privacy of the employee would be permitted.

* * *

Monitoring pracownika w sieci komputerowej

Artykuł dotyczy narastającego zjawiska monitorowania internetowej aktywności pracowników w sieci komputerowej funkcjonującej w ramach ich zakładu pracy. Głównym celem publikacji jest zwrócenie uwagi na pewne braki regulacyjne polskiego ustawodawstwa w tym zakresie oraz wskazanie źródeł prawa, na których można się oprzeć, próbując wypełnić przestrzeń pozostawioną przez ustawodawcę.

Na początku artykułu autor przedstawia pewne podstawowe dane statystyczne dotyczące działań pracowników w sieci komputerowej pracodawcy mającej dostęp do Internetu, wskazując przy tym możliwe negatywne konsekwencje wybranych zachowań. Następnie wskazano środki, w postaci wyspecjalizowanego oprogramowania, którymi może posłużyć się pracodawca w celu zabezpieczenia swojej sieci komputerowej, mogące jednakże jednocześnie naruszyć prywatność pracownika.

Następnie zaprezentowano podstawowe przepisy polskiego prawa, umiejscowione w różnych ustawach, dotyczące omawianego zjawiska. Artykuł wskazuje między innymi na regulację kodeksu pracy, kodeksu cywilnego oraz rozporządzenia w sprawie bezpieczeństwa i higieny pracy. Ponadto przywołano propozycję Grupy Roboczej do spraw ochrony danych osobowych – zwanej „Grupą Roboczą Artykułu 29”[45] dotyczącą przydzielenia pracownikowi dwóch kont, o różnym poziomie dostępu i odmiennym zakresie monitorowania wykonywanych z ich pomocą działań.

W dalszej części artykułu autor koncentruje się na możliwościach i ograniczeniach w zakresie monitorowania pracownika w świetle uregulowań polskiej Konstytucji (artykuły 47 i 49), Europejskiej Konwencji Praw Człowieka oraz Międzynarodowego Paktu Praw Obywatelskich i Politycznych.

45 Article 29 Data Protection Working Party.

W ramach analizy artykułu 8 Europejskiej Konwencji Praw Człowieka autor powołuje się między innymi na stanowisko Europejskiego Trybunału Praw Człowieka wyrażone w wyroku w sprawie *Copland przeciw Zjednoczonemu Królestwu*, gdzie szczegółowo rozważono możliwości działania pracodawcy w przypadku braków określonych uregulowań w prawie krajowym.

Odwołując się do treści artykułu 17 Międzynarodowego Paktu Praw Obywatelskich i Politycznych autor bierze pod uwagę wytyczne Komitetu Praw Człowieka wyrażone w Uwagach Ogólnych nr 16, w których Komitet rozważa obowiązki państw-stron wynikające z traktatu oraz ich implikacje dla pracodawcy.

W konkluzji artykułu jego autor wskazuje polskiemu pracodawcy, jak powinien postępować, w szczególności w jaki sposób uregulować kwestię dostępu do Internetu w sieci pracowniczej, by zabezpieczyć zasoby komputerowe zakładu pracy, minimalizując jednocześnie ryzyko naruszenia prywatności swoich pracowników.

Krystyna Ziółkowska[*]
(University of Warmia and Mazury in Olsztyn)

FORMS OF VIOLATIONS OF PERSONAL GOODS IN THE CONTEXT OF EMPLOYMENT ON THE BASIS OF EU LAW

1. Introduction

At present, the relationship between employee and employer leads to violations of personal rights quite often. The provisions of Polish legislation, including the Labour Code, attempt to use international law rules to regulate issues of violations of employees' rights by their employers. Regardless of the progress of the international protection of human rights, the national protection is, and will remain first and foremost a protective front.[1] A response of the Polish legislator was an introduction of the "chapter II a" to the first section of the Labour Code, which refers to equal opportunity employment. The regulations of article 18^{3a} - 18^{3e} in the Labour Code contain many provisions relating to discrimination in employment, ranging from equal treatment in the accepting and terminating the employment contract, conditions of employment, promotion, access to training to improve professional skills, in particular regardless of age, sex, disability, religion, religious denomination, race, nationality, political beliefs, trade union membership, ethnic origin, sexual orientation. Moreover regardless of

[*] M.A., an assistant lecturer at the Department of Labour Law and Social Security of the Faculty of Law and Administration at the University of Warmia and Mazury in Olsztyn.

[1] T. Jasudowicz, *Administracja wobec praw człowieka,* Toruń 1997, p. 20.

employment: a temporary or permanent, full-time or part-time work.[2] In this article I elaborate about sexual harassment and mobbing as a problem in the work environment, indicating norms of international law, European law and the Polish labour law. The phenomenon of mobbing and sexual harassment in the workplace has a significance in legal, psychological and social terms. The Polish legislator introducing a legal regulation, which is not completely finished, took a big step towards the adaptation of Polish law to European standards. It is worth to emphasize, that the legal regulation does not fully solve the problem of mobbing and sexual harassment in the workplace, the sanctions are necessary but preventive actions play a vital role in this. Mobbing and sexual harassment as a negative phenomenon has always existed, but the connection to the working environment is relatively recent. Undoubtedly, the development of civilization has contributed to the emergence of such dysfunctional behaviour in the workplace, which occurs between colleagues, employees, the employer or management. It can be assumed, that it was thanks to the wider life dynamisation in the economic aspects that as a society we have been sensitized to some pathologies which enter into employment relations and we were not remained indifferent to their consequences.[3]

An important document regulating labor issues is International Covenant on Economic, Social and Cultural Rights (ICESCR) from 1966[4] – guarantees the exercise by workers of human rights (in article 6: *1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right; 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic,*

[2] D. Ostrowska, *Zakaz dyskryminacji* [in:] J. Hołda, Z. Hołda, D. Ostrowska, J.A. Rybczyńska *Prawa Człowieka. Zarys wykładu*, Warszawa 2011, p. 140.

[3] M.T. Romer, M. Najda, *Mobbing w ujęciu psychologiczno-prawnym,* Warszawa 2010, p. 11.

[4] Dz.U. of 1977 No. 38, item 169.

social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.).

The right to work is an individual right that belongs to each person and is at the same time a collective right. It encompasses all forms of work, whether independent work or dependent wage-paid work. The right to work should not be understood as an absolute and unconditional right to obtain employment. Article 6, paragraph 1, contains a definition of the right to work and paragraph 2 cites, by way of illustration and in a non-exhaustive manner, examples of obligations incumbent upon States parties. It includes the right of every human being to decide freely to accept or choose work. This implies not being forced in any way whatsoever to exercise or engage in employment and the right of access to a system of protection guaranteeing each worker access to employment. It also implies the right not to be unfairly deprived of employment.[5]

Violations of the obligation to respect the right to work include laws, policies and actions that contravene the standards laid down in article 6 of the Covenant. In particular, any discrimination in access to the labour market or to means and entitlements for obtaining employment on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or any other situation with the aim of impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant. The principle of non-discrimination mentioned in article 2, paragraph 2, of the Covenant is immediately applicable and is neither subject to progressive implementation nor dependent on available resources. It is directly applicable to all aspects of the right to work. The failure of States parties to take into account their legal obligations regarding the right to work when entering into bilateral or multilateral agreements with other States, international organizations

[5] *The right to work*, General comment No. 18, Adopted on 24.11.2005, Article 6 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/18, 6.2.2006, p. 3.

and other entities such as multinational entities constitutes a violation of their obligation to respect the right to work.[6]

The issue of labor rights including the prohibition of forced labor is taken in The European Convention on Human Rights and Fundamental Freedoms (EKCP)[7] from 1950 in article 4 about on the prohibition of slavery and forced labor.[8] With article 4 is not clear what kinds of jobs are covered by the term "forced or compulsory labor". It is therefore involuntary and unlawful work required. It is oppressive nature and causes unjustified suffering.

2. Norms of international and European Union law related to personal rights protection

a. Sexual harassment

The problem of sexual harassment has been known for centuries, but it was not the subject of research by judicature, but rather by sociological, psychological, psychiatric, criminological and victimological studies. The character of the sexual harassment makes it embarrassing problem for the victim, it is difficult to prove, and it is very often kept hidden from the others. Over the period of the last 30 years, the problem of sexual harassment has been regulated in 50 countries and became the subject of criminal, anti-discrimination and

[6] *Ibidem*, p. 9-10.

[7] Dz.U. of 1993 No. 61, item 284 with changes.

[8] *(1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour. 3. For the purpose of this article the term forced or compulsory labour' shall not include: a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service; c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; d) any work or service which forms part of normal civic obligations).*

civil law.[9] The phenomenon of sexual harassment has been described in numerous scientific literature publications and has become a subject to be fought by numerous organizations such as the American National Organization for Women and Women Against Sexual Harassment.[10] The first legal regulation of this phenomenon was reflected in a decision issued by the U.S. court in 1976, which under the Title VII of the Civil Rights Act from 1964 qualifies sexual harassment as a discriminatory behaviour.[11] Generally, it is assumed that victims of sexual harassment are usually women, but there are information about men, who also suffer from this type of behaviour.

In the literature we can find two different forms of sexual harassment in the workplace. The first one is called sexual blackmail or in other words quid pro quo ("a favour for a favour"), the second form of this phenomenon is creation of a hostile working environment.[12] In the first case, the perpetrator of the sexual harassment may be an employer or employer's representative, and in the second case, the perpetrator can be anyone such as co-worker.[13] Under international law, the sexual harassment phenomenon is reflected in the provisions of a sex-based discrimination.[14] In the early 80's of the twentieth century, the problem of sexual harassment was not yet seen by any international organizations and NGOs (such as International Labour Organisation).[15] In the ILO Convention No. 11 concerning Discrimination in Respect of Employment and Occupation it was recognized by the committee

[9] M. Otto, *Modele ochrony pracowników przed molestowaniem seksualnym w wybranych krajach*, "Praca i Zabezpieczenie Społeczne" 10 (2007), p. 10.

[10] J. Warylewski, *Molestowanie seksualne w miejscu pracy*, Sopot 1999, p. 14.

[11] M. Otto, *Standard prawnej ochrony pracowników przed molestowaniem seksualnym w USA*, "Polityka Społeczna" 4 (2008), p. 22.

[12] J. Warylewski, *op. cit.,* p. 20.

[13] *Ibidem*, p. 20 and next.

[14] L. Florek, *Zakaz dyskryminacji w stosunkach pracy,* "Praca i Zabezpieczenie Społeczne" 1 (1997), p. 2 and next; I. Boruta, *Dyskryminacja w zatrudnieniu i wykonywaniu zawodu w świetle dokumentów MOP*, "Praca i Zabezpieczenie Społeczne" 11 (1996), p. 17 and next.

[15] H. Szewczyk, *Ochrona dóbr osobistych w zatrudnieniu,* Warszawa 2007, p. 59.

of experts' report that "Equality In employment and Occupation" considered sexual harassment as the following behaviours: "insults and abuses, insinuation, inappropriate comments about clothing, hairstyle, age, family situation, lascivious looks, different types of fondling (hugging, stroking) or other gestures of a sexual connotation, the introduction of protectionist and paternalistic relationships, which violate the victim's personal dignity".[16] However, the UN's Committee on the Elimination of Discrimination against Women (established under Article. 17 of the Convention on the Elimination of All Forms of Discrimination against Women at 18 December 1979 [17] and ratified by Poland) qualified sexual harassment as a form of sex discrimination and named the "undesirable by the victim (unwanted, unwelcome) sexual behaviour as physical contact (touching, stroking, patting, pinching) or attempt to do it, making sexually suggestive comments, telling jokes in a verbal way or through correspondence (including internal communication in the workplace – via the Internet or via letters), presentation of any pornographic content, making suggestions, or even demand sexual gratification".[18] Sexual harassment is always unacceptable situation by the victim, which does not change the fact that "a breach of personal rights in a specific circumstances is objectively assessed, rather than it is a subjective feeling of the person concerned".[19]

An important document regulating labor issues is the European Social Charter ratified by Poland.[20] However, the Republic of Poland

[16] J. Warylewski, *op. cit.*, p. 22, (*According to J. Warylewski, the fight against sexual harassment is also a protection of physical and mental health as well as human dignity in the workplace)*; H. Szewczyk, *Ochrona dóbr…*, p. 60; A. Lankamer, P. Potocka-Szmoń, *Dyskryminacja w miejscu pracy*, Gdańsk 2006, p. 32 and next.

[17] Dz.U. of 1982 No. 10, item 71.

[18] J. Warylewski, *op.cit*., p. 23.

[19] Judgment of the Court of Appeal in Łódź of 28.8.1996, I ACr 250/96, www.lex.pl. *("A person who is abused should, in an obvious manner to the offender, express their opposition to the undesirable behaviour. From this moment, the perpetrators' behaviour becomes a sexual harassment, and if such behaviour fails to comply with signs of any crime, the victim has the right to act in self-defence")*.

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

has not done the full ratification, and therefore not all aspects of the legislation has been accepted by Poland. The European Social Charter 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.

Matters of the sexual harassment can be found in the Revised European Social Charter, which was adopted on 3 May 1996, and entered into force on 1 July 1999. Revised European Social Charter is intended, eventually, to replace the Charter from 1961, but for the time being both charters are used. Revised European Social Charter was expanded to include aspects related to the rights of protection against poverty, the right to housing, the right to protection against sexual harassment in the workplace. Poland has not yet ratified the Revised European Social Charter, the first attempts of ratification took place on 25 October 2005.[21] The provision of Article 26 ("The right to dignity at work") of the Revised European Social Charter is aimed at preventing sexual harassment, harassment and mobbing in the work environment,

[21] H. Szewczyk, *Ochrona dóbr*..., p. 73, ("The Revised European Social Charter guarantees, in particular the right to protect the dignity at work and protection against sexual harassment [of protection against bad treatment in the workplace and misuse of any employing entities, the prohibition of any forms of employee's exploitation] and the right to fair working conditions. Members of the European Union should pursue policies to prevent violations of the dignity and health of employees by providing a good working environment and remove any threats for their health arising from work in order to ensure that he health and safety conditions exist at work."). See too: A.M. Świątkowski, *Zrewidowana Europejska Karta Społeczna – perspektywy ratyfikacji*, "Monitor Prawa Pracy" 2 (2006), www.monitorprawapracy. pl (28.9.2011).

but does not include the legal definition of sexual harassment.[22] Parties of the Revised European Social Charter, in collaboration with organizations of both employers and employees undertook a support particularly in: alerting, informing, soliciting about sexual harassment in the workplace or in relation to work and taking all appropriate steps to protect workers from such conduct.[23]

In the light of the European Union law, the sexual harassment has been identified in the directive of 9 February 1976 on the application of the principle of equality in access to employment, training, promotion and other conditions (1976/207/EWG),[24] which was amended by directive 2002/73/WE.[25] According to I. Boruta the sexual harassment has happened when followed conditions occurred: violation of dignity, and additionally the intimidating, hostile, degrading, humiliating or offensive atmosphere has been created.[26] Therefore, it was emphasized that the sexual harassment is a violation of the equal opportunity employment principles. Other EU directives contain the indicated definition of sexual harassment. There is a directive of June 29, No. 2000/43/EC on equal treatment related

[22] *Ibidem*, p. 73. W. Sanetra, *Standardy ochrony praw społecznych określone w Zrewidowanej Europejskiej Karcie Społecznej a polskie prawo pracy i zabezpieczenia społecznego*, in: *Dorobek Rady Europy w zakresie kształtowania i ochrony praw społecznych. W kierunku powszechnej ratyfikacji Europejskiej Karty Społecznej,* Warszawa 2005, p. 142 and next. See too: A.M. Świątkowski, *Karta Praw Społecznych Rady Europy*, Warszawa 2006, p. 258-259 ("The European Committee of Social Rights defines sexual harassment as a violation act of the privacy, psychological balance, offends the dignity of the employed person, disturb him/her in work duties, it is inconsistent with socially accepted standards of conduct of employment relations. Sexual harassment is unacceptable, by any person to whom it is addressed, behaviour of a sexual or other conduct of a sexual connotation, that violates human dignity.").

[23] D. Dörre-Nowak, *Ochrona godności i innych dóbr osobistych pracownika,* Warszawa 2005, p. 211.

[24] Dz.Urz. EWG L 39, 10.2.1976; see too W. Schwarz, G. Löschnigg, *Arbeitsrecht,* Wien 2000, p. 403 and next.

[25] Dz.Urz. WE L 269, 5.10.2002.

[26] I. Boruta, *Ochrona przed nękaniem i molestowaniem seksualnym w zatrudnieniu*, "Praca i Zabezpieczenie Społeczne" 8 (2000), p. 3 and next.

to the racial or ethnic aspects[27] and directive of 27 November No 2000/78/EC establishing a general framework for equal opportunity employment and work conditions.[28] Harassment should be regarded as a form of discrimination, when someone conducts an unwanted behaviour related to the grounds of religion or belief, disability, age or sexual orientation. racial or ethnic origin, and it aims or effects the violation of human dignity and an atmosphere of intimidation, hostility and degrading, humiliating or offensive environment is created. [29] It is also worth to mention that the prohibition of harassment and sexual harassment is regulated by directive from July 5 No. 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and work.[30] Considering that harassment based on gender and sexual harassment are contradictory to the principle of equal treatment between men and women, and as one of the forms of discrimination are prohibited within the European Union.[31]

b. Mobbing

In regulation of the mobbing in aspects of the international legal acts ratified by Poland special role is played by the International Covenant on Civil and Political Rights of 16 December 1966.[32] The Republic of Poland is committed under the provisions contained in covenant to secure and ensure all citizens' rights resulted from their

[27] Dz.Urz. UE L 180, 19.7.2000.

[28] Dz.Urz. UE L 303, 2.12.2000.

[29] H. Szewczyk, *Ochrona dóbr*…, p. 91.

[30] Dz.Urz. WE L 204, 26.7.2006.

[31] See too: H. Szewczyk, *Ochrona dóbr*…, p. 95 ("The purpose of harassment and sexual harassment in light of the European Union law must be violating the dignity of the employee. Regardless of this behaviour it constitutes a discrimination on the gender basis. Harassment related to the gender of a person (torment) and sexual harassment are contrary to the principle of equal treatment between men and women.").

[32] Dz.U. of 1977 No. 38, item 167.

dignity.[33] Another important piece of law – making is the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.[34] Poland has committed to produce and provide appropriate working conditions, especially those organized on the principles of occupational health and safety. The right of every person to use any forms of physical health was also outlined as well as mental health hygiene which can cause an improvement of the environment and the prevention of occupational diseases.[35]

Important role in regulating mobbing aspects was introduced by the International Labour Organisation (ILO). This organization has developed a definition of mobbing: it is aggressive behaviour that can be described as cruel, malicious or humiliating, it may harm the individual or group of employees. It includes the arrangement against the chosen employee (or employees), who become the subject of mental torment. Mobbing is characterized by constant, negative comments or criticism addressed at the chosen person by social isolation, gossiping or spreading a false information about him/her.[36] Fundamental importance of the ILO's achievements is also in the Convention No. 111 of 25 June 1958 on Discrimination of Employment and Occupation.[37] The convention mentions the criteria for the unacceptable discrimination. The problem of mobbing was also mentioned in the Revised European Social Charter of 3 May 1996, in which the uncomfortable situation of employees was highlighted, about those who has been harassed in the workplace by other co-workers or supervisors.

Mobbing as a phenomenon threatening work environment has become the interest to the European Union bodies. As a result of new researches carried out on the work environment, it was recognized

---

[33] K. Kmiecik-Baran, W. Cieślak, *Bez zgody na przemoc – w szkole i pracy*, Gdańsk 2001, p. 118 and next.

[34] Dz.U. of 1977 No. 38, item 169.

35 H. Szewczyk, *Molestowanie seksualne i mobbing w miejscu pracy lub w związku z pracą – nowe wyzwania dla polskiego prawa pracy*, "Praca i Zabezpieczenie Społeczne" 6 (2002), p. 3.

[36] H. Szewczyk, *Ochrona dóbr*…, p. 60; see too: http://www.ilo.org (14.10.2011).

[37] Dz.U. of 1961 No. 42, item 218.

that mobbing aspects need to be settled at the European Union level within a coherent employment policy. The result of this work has been published in the resolution of 20 September about harassment in the workplace carried out by the European Parliament. The opinion was expressed about the diversity and the scale of mobbing in the labour market of countries in the European Union. The ground for this could be found in the incomplete information and the omission of occurred irregularities. Legislative differences and civilization differences were also analysed. The resolution of the European Parliament has become an important element for a consideration by the European Union governments to eliminate mobbing from work environments at the national level.[38] The resolution passed by the European Parliament has imposed on the governments of the countries associated with the European Union an obligation to take actions and prevent occurrence of mobbing by verifying the legislation from the point on the reduction of psychological harassment as well as analysis and normalization the concept of mobbing. In reference to the European Commission's work it was strongly emphasized to consider expanding the directive which treats about health and safety in the work environment or to create a new legal instrument which is the genesis to the actual overcoming of the psycho-terror, as well as effective tool in protecting the good name of employees'.[39]

The problem of mobbing in the aspect of its negative effects has been announced in Brussels on 8 November 2007 during autonomous European framework agreement related to harassment and violence in the work place. This document was as a third agreement implemented to national laws in accordance with the procedures set out in the provision of Article 139 paragraph 2 TWE.[40] The authority of those signing relevant document is also important, delegates of both sides; the employees (European Trade Union Confederation) and representatives of the employing entities (Union of Industrial and

[38] M.T. Romer, M. Najda*, op. cit.*, p. 189-190.

[39] *Ibidem*, p. 191.

[40] B. Surdykowska, *Autonomiczne porozumienia ramowe dotyczące nękania i przemocy w pracy*, "Monitor Prawa Pracy" 10 (2007), p. 518.

Employers' Confederation of Europe, the European Association of Craft, Small and Medium-sized Enterprises, the European Centre of Enterprises with Public Participation and Business Europe). Under this initiative, reference was made especially to the size of mobbing practices occurrence. The agreement begins with the introduction done by the commission of the European Council and European Parliament. In its content the European Union efforts has been highlighted in order to ensure the proper functioning of the employee in the workplace.[41]

The deadline, for the inter-professional social partners, was set for 3 years to complete the arrangements contained in the document. Entities negotiating this agreement are required to provide annually to the Social Dialogue Committee the stage of completion of its provisions. The Committee will draw up a protocol from implementation of the agreement in 2011.[42] Simultaneously the need to focus on the activity was signalled, leaving the legislative regulations in the background. It was also noted that the consensus needed to develop at EU level an appropriate legislative tool to clear the obstacles encountered, resulting from the negation of the individual representatives of those employers, as well as leaders of the member countries.[43]

The agreement is divided into five parts. The first part of the agreement contains a statement concerning the possibility of harassment in relation to any workplace and to employees, regardless of the nature and basis of their employment. An increased threat of harassment in relation to certain industry groups and unions was also mentioned. Different norms, of violence and harassment behaviour may determine the status of the work environment, were formulated as well.[44] The next part of the agreement contains its goals. Mostly to increase awareness and dissemination of the violence and mobbing problem among entrepreneurs and those who employ, as well as supply them with the knowledge on how to recognize and prevent this

[41] M.T. Romer, M. Najda*, op. cit.*, p. 193 and 201-202.

[42] B. Surdykowska, *op. cit.*, p. 519.

[43] M.T. Romer, M. Najda, *op. cit.*, p. 193 and 201-202.

[44] B. Surdykowska, *op. cit.*, p. 519.

kind of irregularities.[45] The third part of the agreement deals with the characteristics and terminology of harassment and violence. The aim of these acts is to violate the good mobbing reputation. This really affects the health of employees and the work environment. The fourth part specifies the method to recognize harassment and violence, and to counteract them and method of settlement of disputes arising. A large emphasis has been placed on education of personnel, as well as a strong disagreement with such practices in the workplace. Very important aspect is also the case in the situation to determine the existence of irregularities. The fifth and last part of the autonomous arrangement treats about its implementation and subsequent operations.[46]

The European Parliament introduced to the European Commission a draft, which is suppose to enable mobbing victims to ask the court, because in some national laws it is not comprehensive. Accepted agreement emphasizes more resolving a mobbing problem by different ways other than the official, based on the court. Representative on behalf of the European Union deals with the prevention of harassment in the workplace identifying the important issue, which is fabricating the accusations concerning the existence of mobbing in the workplace. Anti-mobbing legislation should meet the requirement of precision thereby ruling out the possibility of its use in a manner inconsistent with the intentions of the employer. The occurrence of differences in the EU countries at the legislative and cultural level generates a creation of separated anti-mobbing policy for each country. It is also worth to share insights and experience at the international level.[47]

3. Sexual harassment in the Polish labour law

Regulating sexual harassment in the Polish law is related to the implementation to the labour law, the European Union Directive

[45] http://eur-lex.europa.eu (14.10.2011).

[46] B. Surdykowska, *op. cit.*, p. 519-520.

[47] M.T. Romer, M. Najda, *Mobbing...*, p. 202.

1976/207/EWG of 9 February 1976 on the principle of equal treatment between men and women with an access to employment, professional training, promotion and good working conditions.[48] According to article 18^{3a} paragraph 5 point 2 of Labour Code[49] discrimination is "unwanted behaviour, with a purpose or effect of violating the employee's dignity and to the creation of an intimidating, hostile, degrading, humiliating or offensive environment (harassment)". However, in paragraph 6 of article 18^{3a} of the Labour Code, the legislator notes that: "discrimination on grounds of sex shall also include any unacceptable behaviour of a sexual nature or that referring to the employee's sex aimed at or resulting in violation of the dignity or in humiliation or abasement of an employee; such behaviour may include physical, verbal or non-verbal action (sexual harassment)".

Sexual harassment harms the workplace atmosphere and may have a negative impact on health, self-confidence, morality and productivity of people who are victims of sexual harassment. Employees are affected by the negative effects, not only directly, related to sexual harassment, but also its consequences from short or long term, in the prospect of the career, especially when they are forced to change the job.[50] Sexual harassment is a discrimination, which gives the possibility to extend the catalogue of measures to protect against such behaviour by those that are provided in case of infringement of the equal opportunity employment principles.[51] It should be noted that in the Polish law the definition of harassment does not indicate a direct connection to the "sex" harassment, which guarantees protection against discrimination when a person is abused for the reasons set out in paragraph 1, article 18^{3a} such as: age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin,

[48] Dz.Urz. EWG L 39, 14.2.1976.

[49] Dz.U. of 1998, No 21, item 94 with changes – *Ustawa Kodeks pracy* of 26.6.1974.

[50] A.M. Świątkowski, *Kodeks pracy. Komentarz*, Warszawa 2006, p. 72.

[51] D. Dörre-Nowak, *Ochrona godności…*, *op. cit.*, p. 218.

sexual orientation, and also because of the employment basis such as temporary or permanent, full-time or part-time work.[52]

Directive of Council of the European Union of 15 December 1997 1997/80/WE on the burden of proof based on sex discrimination has established uniform standards on the burden of proof.[53] Polish Labour Code also introduced the legal arrangements for the burden of proof in the case of sexual harassment. Therefore, in accordance with the article 18^{3b} paragraph 1 of Labour Code, the employer is obligated to prove the objective arguments, when the decision was made as a refusal to hire, terminate employment, unfavourable terms of payment for work, other conditions of employment, omission in promotion, avoidance of other work-related benefits, the omission of the selection in participations in training for professional qualifications. Harassment and sexual harassment are behaviours that primarily affect the employee's dignity protected by article 11^{1} of the Labour Code. Article 18^{3a} paragraph 5 point 2 of the Labour Code about harassment, as well as paragraph 6 about sexual harassment refers in its content to the employee's dignity and are specific provisions in relation to article 11^{1} of Labour Code, which talks about the protection of the dignity and other personal rights of the employee.[54]

4. Mobbing in the employment

The normative definition of mobbing was expressed in the provision of article 94^{3} paragraph 2 of the Labour Code,[55] which states that mobbing is as an action or behaviour of an employee or against the employee, consisting of persistent and prolonged harassment or intimidation of an employee, causing underestimated professional usefulness, resulting or intended to humiliate or ridicule the employee, isolate or eliminate him from the team of co-workers. In the literature,

[52] *Ibidem*, p. 219.

[53] OJ 1998 L 14/6.

[54] H. Szewczyk, *Ochrona…*, *op. cit.*, p. 290.

[55] Dz.U. of 1974 No. 24, item 141.

this definition raises a number of questions, therefore there are many shortcomings, such as: logical, structural and semantic, on top of that it is too expanded.[56] To consider existence of mobbing, a necessity of a certain behaviour or action set on a victim will need to happen first. It is extremely difficult to prove a mobber that his actions were based on the implied will expressed by the victim. Therefore, to be able to talk about the expression of the external will, the internal will called decision need to exist first. This assumption is important because to be able to claim on the mobbed person beliefs basis about the presumed oppressor's will, which caused in his conviction about the position of victims of persecution are not enough, in order to fulfil the statutory mark of mobbing in the form of action or behaviour.[57]

Doctrine gives detail that the action by mobber should be persistent in action for at least six months. This is a results from the analysis on clinical tests, however, such a time is the wrong term because of its excessive rigidity. It is advisable to examine each case and the facts on the individual basis and determine whether there has been harassment against the employee or not.[58] Poland judicature does not indicate a rigidity time, so it can be talked about the occurrence of the mobbing in the work place. The Supreme Court of Poland[59] in the thesis concluded that longevity of harassment or intimidation of the employee in article 94^3 of Labour Code must be considered as an individual and take into account the circumstances of the case. It is therefore not possible to rigid identification of minimum period need to the existence of mobbing. The provision of article 94^3 paragraph 2 and 3 of Labour Code indicates that for the assessment of sustainability it is important a moment of occurrence indicating in those provisions of the effects of harassment or intimidation of the employee and the persistence and severity of such action. In support of that, it was

[56] W. Cieślak, J. Stelina, *Definicja mobbingu oraz obowiązek przeciwdziałania temu zjawisku (art. 94^3 k.p.)*, "Państwo i Prawo" 12 (2004), p. 67.

[57] M. Zych, *Mobbing w polskim prawie pracy*, Warszawa 2007, p. 16-17.

[58] M. Zych, *Normatywna definicja mobbingu*, "Monitor Prawa Pracy" 4 (2006), p. 193.

[59] Judgment of Supreme Court of 17.1.2007, I PK 176/06.

highlighted that the sustainability is identified in stretched time, which does not take a specific character and the indication of a specific period of time can be excluded. Thus, deciding about the length of the mobbing practices on its objective consequences, relate to description of the provision of article 94^3 of Labour Code. Therefore, it should be perceived and evaluated by longevity, not rigidly defined from the perspective of time, but in relation to the severity of harassment in the workplace and subjective strength of the employee.[60] The literature also presented another opinion and describe "the behaviour of the mobber in 94^3 paragraph 2 of the Labour Code when the period of hostile influence exceeded at least half the period of the employment with the employer". The length should be related to the experience in that employment.[61]

Another condition, which was introduced by the legislature, that "torment" and "intimidation" refer explicitly to the typical psychological issues. In the semantic meaning of the term torment it is the same as "constantly harass someone", while intimidating means "to bring in someone feelings a strong and constant danger". This explanation indicate that the intimidation has a more pejorative connotation than torment.[62] Therefore, the study on the first part of the mobbing definition, i.e. persistence, is an analysis of the intensity of behaviour, the degree of blameworthiness, and sustainability analysis is a study in terms of time.[63]

Another condition that must meet certain behaviour to gain the title of mobbing is creating in employee a feeling of an underestimated professional usefulness. In the literature there are views that in definition this component was not of prime importance. Besides that, the result of persecution in the work environment is creating in an employee a feeling of his/her usefulness, it can happen that he/she is suffering harassment because of better qualifications to embrace a

[60] M.T. Romer, M. Najda, *op. cit.*, p. 269.

[61] B. Bury, *Uporczywość i długotrwałość zachowania jako elementy składowe prawnej definicji mobbingu*, "Monitor Prawa Pracy" 2 (2007), p. 71.

[62] M. Zych, *op. cit.*, p. 193-194.

[63] B. Bury, *op. cit.*, p. 72.

particular position than his/her superiors.[64] It is also worth to quote the Supreme Court verdict, which states that: "The assessment of whether there was harassment and intimidation of the employee and whether these actions were aimed at and may have led to underestimation or the professional life, to his humiliation, ridicule, isolation or elimination from the co-workers team, should be based on the objective criteria. Isolation of the employee from the group of co-workers does not give a team features of mobbing. Only isolation from the co-workers team, which is a consequence of actions involved with the negative behaviours (harassment, intimidation, humiliation, ridicule) can justify the existence of mobbing. On the other hand, if it is a response to a reprehensible behaviour of the employee in respect to the colleagues, there is no basis to avoid any contact with the employee, therefore there is no sign of mobbing."[65] The court's reasons for the judgement emphasizes that the impression of the employee, that he/she was allegedly mobbed is not sufficient to actually talk about mobbing. It should be assessed on neutral grounds, which are actually the consequence of a rational perceiving the reality, and in an essence lead to accurate opinion about the interpersonal individuals' intentions.[66]

The employer in the workplace should make such decisions and actions to prevent the formation of such a phenomenon as mobbing. The anti-mobbing regulations require from the employer twofold duty. These are preventive actions guarding the environment from unwanted practices, and also the appropriate negation and minimization of already occurred mobbing. Therefore, other tools should be used in the implementation of both these aims. Regardless, on who commits mobbing in the workplace, the employer is responsible for such incidents. However, the employer, in other proceeding, may demand compensation by the offender on the regression basis.[67] The legislature does not fully set the legal definition of mobbing by not emphasizing the nature of the unlawful behaviour of mobber. It can

[64] M. Zych, *op. cit.*, p. 19-20.

[65] Judgment of Supreme Court of 14.11.2008, II PK 88/08, OSPN 2010/9-10/114.

[66] *Ibidem*.

[67] M. Zych, *Mobbing*..., p. 22-24.

be concluded that the behaviour of the psycho-terror offender does not need to directly threat the interests of the employee. This means that the conditions of mobbing also will be completed by the employer, when he will enjoy from the privilege derived from the employment relationship.[68]

Extending the above arguments about mobbing (article 94^3 of the Labour Code). I would also point out the regulations about social life (article 100 paragraph 2 point 6 of the Labour Code) in conjunction with the duty to care for the good work environment (article100 paragraph 2.4 of the Labour Code). In my opinion also employees should prevent from mobbing in their workplace regardless of their position by completing their duty of care for the welfare of the employer. This kind of record is usually included in the work regulation, it aims to eliminate any irregularities in interpersonal contacts by employees, while the employees are obliged not only to refrain from negative actions but also to demonstrate the initiative to combat all forms of harassment or intimidation of the employee. A specific example of mobbing, which has a direct relation with the obligation to care for the good work environment (article 100 paragraph 2 point 4 of the Labour Code), is persistently giving the employee commands which exceed beyond his/her abilities or are within his/her competence, but are unrealistic to perform for other reasons. It is presumed, that supervisor by instructing the employee is intended to implement the interest of the employer, by not performing this tasks the employee is against this interest. In this situation a question arises: who in this case is responsible; the employee who did not perform the task, or the supervisor who knew that the employee is unable to do the task and despite that is giving such command. The answer seems to be obvious; i.e. it is supervisors' blame. However, in this situation the employee can and should refuse to perform the task and inform the employer about the situation. Informing about this type of problem the employee can release themselves from mobbing, which could have far reaching consequences for both the employee and the employer's interests.

[68] W. Cieślak, J. Stelina, *op. cit.*, p. 68.

A characteristic feature of mobbing is persistence and long-lasting action done by the perpetrator or perpetrators. The purpose of the prohibited activities, negatively coloured, is the intention of the perpetrators to cause a damage in the psyche of the person or people being harassed (mobbed) or intimidated.[69] Intentional cause of a pressure on the employee by providing additional stress to improve his performance is not allowed, especially when this is done by people employed on managerial positions.[70] Supervisors agreed that advertising consultant job is stressful and it should be stressful to achieve better results at work. Because of that, many times during the day they controlled the employees by telephone asking them about the work effects; whether the contract was already signed and on what amount. In that conversations they expressed their dissatisfaction with the results of the work, using the words generally regarded as vulgar and offensive. The supervisors' method to increase productivity was creating an atmosphere of tension in the workplace on a daily basis. Employee's direct superiors handed him/her a letter on behalf of the management containing a statement to terminate the contract of employment with notice, but at the same time they declared that this letter is on hold for two weeks by "sending it to the headquarters", expecting an improvement of the work performance. Indeed, despite giving out the notice superiors did not intend to termination the employment.[71] In this kind of situation co-workers should react, when a work colleague's personal rights are affected. Other workers have accepted the fact that the employer, people acting on its behalf, committed an infringement of dignity entitled to every employee as an individual human being. At the same time violating the employee rights and a good work environment (in this case prejudice the good name of the employer, company's signature) in conjunction with

[69] A.M. Świątkowski, *Kodeks pracy. Komentarz*, Warszawa 2006, p. 414.

[70] Psychology has two types of stress: 'eustress' (euphoric stress) and 'destres' (destructive stress). The employer should not allow to a situation where the stress level reaches a destructive state of the employee because the employee acts become ineffective. Keeping permanently the employee in a 'destres' state can cause mental disorders starting from depression.

[71] Judgment of Supreme Court of 21.11.2007, I BP 26/07.

article 100 paragraph 2 point 6 of the Labour Code – The rules of social coexistence. Passive attitude may also constitute misconduct in a work duty.

The article 94^3 of the Labour Code obligate the employer to prevent from mobbing. Originally, its content was formed out from the provisions related to health and safety and personal rights. Additionally, the source of formulated duties should be seen in the ideas treated in terms of mutual obligation, which is based on cooperation during its realisation.[72] An important issue is the protection of the work environment from a pathology in the form of anti-mobbing prevention. It will make assurance for an employer from a wide-ranging responsibilities, and also provides the employees to perform their tasks in decent conditions.[73] It should be emphasized that it is employer's duty to prevent already existed mobbing practices. Standing up to the harassment in the workplace can and should take place also in relation to small companies, it is easier to notice any irregularities in the work environment. However, in relation to employing entities, characterized by a complex and extensive organizational system, it is observed that middle management level of the organization is now competent with limited ability to oversee the lower level of the organisation. This raises an autonomous basis for abuse potential. This type of organization characterized by high rates of powers dispersal is especially vulnerable to mental harassment in the workplace.[74] The employer preventing from mobbing in the workplace should properly formulate a work regulations or labour agreements with the anti-mobbing regulations, which are simultaneously a source of law for both sides of the employment relationship. These regulations should prohibit mobbing practices but also determine which behaviours mobbing related are not allowed.[75] It is worth to summary with

[72] W. Cieślak, J. Stelina*, op. cit.*, p. 69.

[73] M.T. Romer, *Prawo pracy. Komentarz*, Warszawa 2010, p. 710.

[74] A. Sobczyk, D. Dörre-Nowak, *Przeciwdziałanie mobbingowi*, "Monitor Prawa Pracy" 10 (2006), p. 521-522.

[75] A. Rogoyski, *Jak walczyć z mobbingiem? – wyzwanie dla pracodawców*, "Monitor Prawa Pracy" 12 (2004), p. 336.

a participation of supervisors and employees' representatives, about to the results and outcomes of implemented anti-mobbing policies.[76] Another important sphere of reaction on mobbing in the workplace should be a training, which emphasis the practical aspect. Creating an anti-mobbing regulation is just not enough. The most important thing is an implementation of practice through the use of educational opportunities, so employees and employers could learn about the destructive nature of mobbing. Information activities are designed to draw attention to the problem of mobbing in the workplace, and show specific suggestions to resolve them.[77] The employer may also organize company trips or integration meetings to improve the atmosphere in the workplace.

Aspect of the anti-mobbing as an obligation is imposed on employers by the legislature and should be considered in relation to the format of the employing entity and its organization, as well as prior occurrence of mobbing.[78] The employer introducing anti-mobbing regulations is fulfilling its obligation imposed by the legislature.

5. Resolving disputes methods of mobbed and sexually abused workers in the workplace

Polish legislator has imposed on the employer sanctions for breaching the obligation to prevent mobbing in the workplace, emphasizing that in art. 94^3 § 4 and 5 of the Labour Code ("§ 4 an employer who terminates the employment relation as a result of mobbing, may sue the employer for a compensation not lower than the minimum remuneration for work, calculated in accordance with separate provisions; § 5 the employee shall terminate the employment relation in writing and shall provide the reason, referred in § 2, to justify the termination"). Responsibility is seen through the prism

[76] S. Kozak, *Patologie w środowisku pracy, zapobieganie i leczenie,* Warszawa 2009, p. 189.

[77] A. Rogoyski, *op. cit.*, p. 336.

[78] A. Sobczyk, D. Dörre-Nowak, *op. cit.*, p. 522.

of the principles of risk, rather than guilt, even when the mobbing situation occurs from the fault of the employees. Failure by employer to prevent from mobbing at the workplace may be the cause of termination of employment by the employee under the provision of art. 55 § 1^1 of Labour Code. Moreover, the above obligation is one of the basic obligations of an employer included in the Labour Code. The employee must submit a statement in writing and give the reasons related to mobbing, which justifies the termination of employment contract. The reason justifying the termination of the employment is the fact that mobbing practices towards the employee exist.[79] In this case, we deal mainly with the termination of employment without a notice given by the employee for breaching of the employer's basic obligation to prevent from mobbing on the basis of art. 943 of Labour Code as an independent basis for immediate termination of employment.[80] The provisions of the Labour Code also indicate a different way of termination of employment, namely the employee can do so on general principles for maintaining the termination date specified in the legislation. In the case, the employee terminates the employment contract by mutual agreement of both parties, the employee will not be able to claim compensation, because according to Article. 94^3 § 3 of Labour Code, it is essential that it is the employee who terminate the employment from his/her own initiative in the form of a unilateral declaration of will.[81] An employee terminating the employment on the basis of Article. 55 § 1^1 of Labour Code may seek *"compensation in the amount of remuneration for the period of notice and if the employment contract is a fixed term contract or for the duration of a specific job duration- the amount of remuneration is worth a period of two weeks"*. However, an employee terminating the employment based only on article 94^3 of Labour Code without a notice, is only entitled to one compensation. The compensation from article 94^3 of Labour Code should not be counted *towards any possible*

[79] H. Szewczyk, *op. cit.*, p. 492 and next (*Art. 94^3 k.p. the worker is primarily the right to terminate the contract of employment without notice)*.

[80] *Ibidem*, p. 492 and next.

[81] *Ibidem*, p. 494.

compensation, which the employee may claim under the Civil Code for breaching personal rights. The first one is the form of compensation for a lost wages due to termination of employment, and the second one is designed to compensate the damage in the employee's estate that arose as a result of a violation of his personal rights, due to mobbing in the workplace.[82]

Moving on to the subject of sexual harassment in the workplace, the legislature in the provisions of the Labour Code did not introduce separate regulation. The employer's responsibility will look similar but if the perpetrator is another employee, the harassed person may seek property or moral claim based on general principles stated in the Civil Code, in particular under Articles 445 and 448 of Civil Code. Exceptionally, especially when sexual harassment will last for a longer period it may be considered as a manifestation of mobbing.[83]

In terms of resolving disputes about a claim of an employment it should be emphasized that judicial model dominates, which may be dictated by the ignorance of other forms of conciliation. The main difference towards nonjudicial methods of disputes' settlement is the authoritative nature of the examination. In relation to this method obligation of the Labour Code in articles 262 to 265 regulates only: the court's jurisdiction, deadlines for claims and its reschedule. Other that that the proceeding shall be run according to the provisions of the Code of Civil Procedure.[84] In the lawsuit a focus is on the investigation conducted by the court. During the investigation, the court calls the employee to remove any formal deficiencies, if such occurred, as well as seeks to clarify the positions of both parties and determines what the relevant circumstances for the case are between them. Most of all, the court will try to encourage both parties to a settlement.[85] Investigation process in labour law, in a case related to mobbing or

[82] *Ibidem*, p. 496.

[83] J. Unterschütz, *Karnoprawna ochrona praw osób wykonujących pracę zarobkową,* Warszawa 2010, p. 143.

[84] K.W. Baran *Procesowe prawo pracy,* Kraków 2003, p. 62.

[85] *Ibidem*, p. 63.

sexual harassment, is not exempt from court fees. The financial issue is regulated by the Act of 28 July 2005 about court fees in civil cases.[86]

More often, it is emphasized to resolve the labour disputes avoiding the court case, which should be used as a necessity. Legal literature names four methods of nonjudicial settlement of conflicts arising between employer and employee. Most of all, there are: arbitration, conciliation, mediation and jurisdiction. In the current legal system during the dispute resolution in the employment the conciliation assistance can be used, as well as mediator, arbitration or entering into a settlement (judicial or nonjudicial). This does not exclude the possibility of usage a classical solution of the matter, by the court. It should be noted that the advantage of nonjudicial methods of resolution settlement of labour disputes is a possibility to transfer the case almost in any time before the court of law, if both parties agree that there is no hope of agreement.[87]

Arbitration (arbitral tribunal) is one of the methods of settlement in labour disputes to resolve employment relationship introduced by revised in 2005 the Code of Civil Procedure.[88] During the arbitration there is no resolution of the existing dispute between both parties, but it is an imperious decision of the arbitrator. It can be stated that it is an institution between mediation and judicial proceedings. In the arbitral tribunal besides both parties (employer and employee), there is an arbiter. This can be a natural person with a full legal capacity, with the exception of a judge (does not apply to retired judges). Unlike mediation, where on the mediator side can be only one person, in the arbitral tribunal may be more than one arbitrator, as permitted by Article 1169 of the Code of Civil Procedure.[89]

---

[86] Dz.U. of 2005, No. 167, item 1398 with changes.

[87] M. Zych, *op. cit*., p. 65-66.

[88] *Ustawa o zmianie ustawy – Kodeks postępowania cywilnego* of 28.7.2005 (Dz.U. of 2005, No. 178, item 1478).

[89] M. Zych, *op. cit.*, p. 75, *(in terms of scope, and thus the scope of matters that may be settled by arbitration, in cases of employment there is no restriction that they be solved by the procedure, with the provision that the writing for arbitration must be made after the dispute has arisen and must be in writing form. The record should*

The proceedings in front of the arbitral tribunal may end:

1. by remission of the proceeding in the circumstances specified by Article. 1190 and 1198 of the Code of Civil Procedure.
2. or by issuing a sentence, but it should be noted that the crucial moment of release (not the service or validation) the sentence or an order.[90]

The conciliation procedure conducted by a conciliation commissions are also nonjudicial methods of resolving disputes concerning labour relations. These are independent legal bodies, set up to amicable settlements of disputes about claims of workers from employment, in nonjudicial conciliation. They cannot be assigned to the judicial authorities. Their activity does not have the jurisdictional nature of the proceedings, expressed in function of the decision (*ius decise*). These committees do not have a statutory power to set a binding settlement to resolve labour disputes. They do not have a constitutional and organizational features characterizing the courts.[91] It should be emphasized that only the employee is entitled to request permission to proceedings in front of a conciliation commission. It can be done by a written statement addressed to the conciliation commission, which in turn should make every effort to resolve the matter specified, within 14 days. It can be set up in any workplace by the employer and the company's trade union acting jointly, and if such an organization not exist, the committee may be appointed by the employer, but after a favourable opinion of employees. The committee may include people who are not employees, as well as employees, except for: employees managing on behalf of the employer, solicitor, chief accountant and

include an indication of the dispute or legal relationship from which the dispute arose. An arbitration trial can also designate as responsible for the permanent settlement of the dispute. Under Article 1168 of the Code of Civil Procedure, the arbitration trial shall lose the power in the situation when the person appointed as an arbitrator refuses to perform this function or it may not be for other reasons and if specified it will not accept arbitration court to hear the case or it is impossible to be able to recognize it).

[90] *Ibidem*, p. 77.

[91] K.W. Baran, *Postępowanie z zakresu prawa pracy z kazusami,* Gdańsk 1999, p. 16.

a person engaged in personal matters, employment and wages.[92] The result of positively ended conciliation in front of a labour conciliation commission is signing by both parties and members of the settlement an agreement in writing recorded in the protocol. Settlement concluded in front of a conciliation commission is not a final execution. In the case of failure in its complying by the employer is only feasible with the moment the court grants a feasibility clause.[93]

Another, more common way of resolving labour disputes is mediation, which is stated in article 183^1-183^{15} of the Code of Civil Procedure. Mediation may be initiated by both the employee as well as the employer. While the mediator may be a natural person who should be neutral and independent from trade unions, political parties and even from the employer. Mediator or the chosen method of mediation should be included in the agreement for mediation. Mediators can be chosen among the mediators entered on the permanent list of mediators, or from outside the list. Exceptionally, it is the court that can choose, only if the court came up with the mediation, however both parties are not involved with it and can provide another mediator.[94]

The basic principles of mediation are:

1. voluntary (facultative) – it has no pre-jurisdictional conditional character, which means that the parties have no obligation to submit the dispute to mediation before bringing the matter to court;
2. the impartiality of the mediator;
3. confidentiality – which is regarded firstly to a duty of a mediator maintaining confidentiality of facts, which he learned in connection with the mediation (unless the parties have exempted the mediator from this requirement) and secondly, to the ineffectiveness of referencing made in the course of legal proceedings or in front of arbitral tribunal for settlement

[92] G. Jędrejek, *Mobbing – środki ochrony prawnej,* Warszawa 2007, p. 71.

[93] M. Zych*, op. cit.*, p. 68.

[94] *Ibidem*, p. 71.

submissions and other various statements made during the mediation .[95]

After the mediation process a protocol should be drawn up, which will define all the information concerning the conduct of mediation (e.g. place of mediation, the mediator's details, the signatures submitted by the parties). For the effectiveness of mediation approval by the court is required, therefore, the mediator needs to immediately submit the protocol in the court, which would be competent to hear the case according to the general or exclusive jurisdiction, or in the court, which sent the parties to mediation. Settlements which are subjects of execution by the court are approved by giving them a feasibility clause. Such approved settlement has a legally power as settlement concluded in front of the court.

6. Summary

Mobbing and sexual harassment in the work environment is undoubtedly a pathology, which negatively affects interpersonal relationships of the co-workers quite often. Statutory definitions of the concept contain many faults and many unspecified phrases. Not every criticism, bias or behaviour occurring in employment relationships fills signs of sexual harassment or mobbing in the workplace. Polish legislator should seek legal clarifications of definitions and any existed inaccuracies that occur can lead to numerous abuses.

[95] *Ibidem*, p. 72.

* * *

Rodzaje naruszeń dóbr osobistych w kontekście zatrudnienia na podstawie prawa UE

Polska wchodząc w struktury Unii Europejskiej ma obowiązek dostosowania własnego ustawodawstwa do norm europejskich. Problematyka molestowania seksualnego oraz mobbingu w środowisku pracy jest zjawiskiem zdecydowanie negatywnym, toteż na pracodawcę został nałożony ustawowy obowiązek zapobiegania takim zachowaniom wśród współpracowników. W artykule poruszam aspekty wdrażania norm prawnych dotyczących molestowania seksualnego oraz mobbingu w miejscu pracy. Odnoszę się nie tylko do systemu Europejskiej Karty Socjalnej ale również do systemu Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności (EKPC) i Międzynarodowego Paktu Praw Gospodarczych, Społecznych i Kulturalnych (art. 6). Moje rozważania oparte są na przepisach prawa międzynarodowego oraz europejskiego, a także polskiego Kodeksu pracy (art. 94^3, art. 18^{3a}), w tym dodatkowo podkreślam rolę pracowniczego obowiązku dbałości o dobro zakładu pracy (art. 100 § 2 pkt 4 k.p.). Wskazuję na narzędzia, którymi może posługiwać się pracodawca, zapobiegając takim negatywnym zjawiskom, ale również rolę samych pracowników i ich postawę.