Ius Matrimoniale
28 (2017) No. 3
DOI: 10.21697/im.2017.28.3.04

Aleksandra Brzemia – Bonarek
Wydział Prawa Kanonicznego UPJPII

Zakaz łączenia stanowisk w procesie małżeńskim według art. 36 Instrukcji „Dignitas Connubii" – kilka uwag o charakterze deontologicznym

Prohibition on combining functions in the matrimonial proceedings pursuant to Article 36 of Instruction *Dignitas Connubii* - few deontological remarks

Introduction

The principle of the prohibition on combining offices (*incompatibilitas*) is one of the guiding principles of the static part of the Church's procedural law. In Article 36 § 3 of the proceedings instruction in matrimonial matters entitled *Dignitas Connubii*[1], it is forbidden for the court staff to act as an attorney or lawyer in courts bound by the right of appeal. The standard in Article 36 § 1, which prohibits the permanent exercise of powers related to various offices in courts bound by the right of appeal, is in line with this prohibition. From time to time, however, the canonist circles are informed that a judge in some diocese - with the consent of his bishop - „makes money on the side" as a church lawyer or legal representative in the courts of other metropolitan areas, or is engaged in business activities involving cooperation with lay lawyers in the field of consulting. Should such a phenomenon be classified as undesirable, because it violates the judge's independence and his freedom from subordination to other entities? Or, following the literal wording of Article 36 § 3 of the DC, should we assume that opposition to the extrajudicial activity of a church judge in dioceses unrelated to the right of

[1] Hereinafter: DC

appeal is nothing more than an unreasonable blockade on the development of canon law services for the faithful concerned?

This problem, together with the facts, was presented on 23 January 2015 by the author in the form of a scientific report at the scientific congress devoted to the 10th anniversary of the promulgation of the Instruction *Dignitas Connubii* on marriage proceedings, organised by the Pontifical Gregorian University in Rome[2], This article constitutes an extended version of the oral presentation addressed , in particular, to a Polish-speaking reader. The topic is not abstract in the environment of Polish church courts. The author's aim is to draw attention of a reader to the topicality of discussions of an ethical nature that have been going on for years on the question of the identity of a church judge in matrimonial matters and to stimulate the canonistic community to carry out intensified activities that contribute to the ethical sensitivity of church judges also within their own community.

1. Case report

The reflection on the correct interpretation of procedural norms in matrimonial matters is well illustrated by the specific situation in the form of an interpretation dispute between two metropolitan tribunals concerning the discrepancies in the correct interpretation of the prohibition on the combination of judicial offices (Article 36 § 3 of the DC).

In case of declaring the nullity of marriage, an official of the diocese of one country asked the official of the diocese of the other country to approve *ad casum* as a representative of one of the judges, who knew both languages well. *Salus animarum* expressed by a female claimant unfamiliar with matrimonial procedural law was right. An official of the court that conducted the case agreed to this because of the nature of the petitioners of both courts – emigrant ones. In addition, these courts have been cooperating harmoniously with each other for years on the issue of inter-judicial (rogatory) assistance. However, over the course of several weeks, this *ad casum representative* applied for further powers of attorney in several subsequent cases. At the same time, without waiting for the court's decision, it filed pleadings on behalf of the parties represented, and sent correspondence with a letterhead and a sound stamp: „*ad casum representative*". In the course of the instruction, it requested information about the process to

[2] *Divieto del cumulo degli uffici (DC, art. 36): l'applicazione per analogia ad altre fattispecie*, Międzynarodowy Kongres Prawa Kanonicznego: *Dignitas Connubii a 10 anni dalla pubblicazione: bilancio e prospettive*, Papieski Uniwersytet Gregoriański, Rzym 22-24 January 2015.

the extent that the Code allows lawyers, not representatives. Finally, he began to exceed his powers by formulating and signing pleadings reserved for lawyers (e.g. defence letters).

The Court, which agreed to approve it in the first case, had sent a letter to the official court expressing its concern about this development. There, it was pointed out that the work of an attorney, which was performed by that judge of the other court - although formally exceptional - with the acceptance of commissions for other matrimonial cases, began to bear the hallmarks of a permanent attorney representation which, in turn, increased the likelihood of a breach of the sanctioning rule contained in Article 36 of the DC.

Since some witnesses were heard in a court where an attorney is a judge, the judges of the court, who conducted the case also feared that this man would have unrestricted access to some of the evidence at the seat of his court, which threatened the principle of the secrecy of the file and distorted the procedural equality of the parties. The breakthrough came when an attorney sent, in a private letter, on the occasion of a case in which he represented a party, an official letter from his home court, signed by the official of that court, concerning a completely different marriage case. Several exchanges of letters, in which the diocesan chiefs were also involved, did not resolve the problem. In the end, the tribunal, which did not want to approve a judge of the other court as an *ad casum* representative for subsequent cases, asked the Supreme Court of the Apostolic Signatura for an opinion on the case.

1. 1. Argumentation of the Courts

In the positions of both tribunals, there was agreement that Article 36 § 1-3 of the DC contains the principle prohibiting combining offices and the performance of exclusive functions by tribunal staff. Both Court „A" and Court „B" noted that when comparing the state of affairs in dispute with the „academic" illustration of the facts of Article 36 of the DC, it can be concluded that both illustrations are both identical and different. The answer to the question was unknown: can the differences taking place in the actual state of affairs (i.e. rogatory relationship and not of the instances between the courts) be ignored in favour of applying the protection of the principle of the prohibition of combining positions? The dispute although, at first glance, local and highly casuistic, was in fact a dispute about the hierarchy and place of legal principles in the Church's system of procedural law, and in a broad sense about the idea of law.

The lack of instability between courts was invoked by a judge who wished to act as a procedural representative in the other court. In his argumentation, he argued that the refusal

of the consent of other official of the court to approve him as a procedural representative to the parties is not anchored in canon law. He referred to a principle known in Western legal culture and relating to civil liberties rights: „what is not explicitly prohibited is permitted". In this respect, in defending his employee, he also pointed out that no standards of canon law have been breached, since Article 36 of the DC explicitly restricts the prohibition on combining positions to the courts bound by the right of appeal, and there was no instinctive link between tribunal „A" and „B".

A judicial vicar of the second court (the one who did not agree with sanctioning the practice of permanent activity of a judge as a procedural representative) presented the charge of applying a formal, instrumental justification of the act, which does not correspond to the spirit and sense of Church law. The application of law - the official objection against the approval of the judge as an attorney was raised - is to be characterised by transparency directed at the reasons for implementing the right to a specific factual reality, and not by considering only the external correctness of the procedures applied. The rather voluminous official argumentation of the second court can be summarised to the sentence of Remigiusz Sobański in his written lectures on canon law methodology: *A person applying law must not be an expert in just one norm or canon - but must see the whole system of ecclesiastical law with its principles and guiding principles when deciding on a particular case - and remember that the norm he is considering is the „atom" of the whole law*[3]. A judge who wanted to practice the law *de facto* on a regular basis at another court was therefore accused of ignoring the intentions and intentions of the legislator and of not applying the interpretative principles laid down in the Code of Canon Law (hereinafter: CIC) in canons 17-19.

The Court, which opposed the practice of hearing cases as a procedural representative by a judge of another court, also drew attention to the specificity of the bond that has existed between the two courts for years. Permanent cooperation between the two courts in cases based on mutual trust, when one of the spouses had their address within the jurisdiction of the other tribunal, was essential for the proper conduct of the procedural instructions - and thus for the delivery of a true judgment. Meanwhile, the content of the pleadings of the *ad casum* representative raised suspicions of a possible infringement of the rule contained in can. 1678 § 1 of the CIC and the corresponding Article 159 § 1 of the DC.

The judicial vicar of the tribunal reluctant to approve a judge of another court as an representative has also expressed his concern about the source of funding for a judge who

[3] R. SOBAŃSKI, *Metodologia prawa kanonicznego*, Katowice 2004, p. 81.

served as a representative in cases heard beyond his court in other dioceses of that country. It was not known whether he receives his remuneration as an attorney from his home court or whether he collects fees from the litigants? However, each of these scenarios raised concerns about maintaining the independence of the church judge from external factors. The Judicial vicar supporting the efforts of the judge replied that the actions of a judge - an employee of his court - as an attorney in the second tribunal are separate and private activities of this man.

1.3. Resolution of the Apostolic Signatura

The Supreme Tribunal of the Apostolic Signatura, having analysed the evidence and heard the arguments of both tribunals, issued on 12 October 2012 *Votum Periti*[4] referring to the disputed case. The concise report presents the decision and the reasons for it.

The Supreme Tribunal of the Apostolic Signatura has recalled the immovability of the rules on the right to appoint a representative and/or a lawyer by a procedural party and the need to approve these persons for the function of procedural assistance or defence in matrimonial matters as long as the conditions required by law are met. The rights of the defence are one of the fundamental procedural principles. However, it has been pointed out that both courts have lawyers and representatives approved for matrimonial matters who can serve the procedural parties in both courts without prejudice to their ethical nature. These, in turn, are encouraged to cooperate in the mutual acceptance of trusted canonists' lawyers as representatives and/or *ad casum* lawyers if they present an order to the principal.

With regard to the substance of the problem, the Supreme Tribunal of the Apostolic Signatura found that the practice of a judge as described above has led, in a specific situation, to the permeation of the function of representative with that of judge, which was considered to be *undoubtedly* contrary to the spirit of Article 36 § 3 of the DC[5].

In conclusion, in the case heard, the Supreme Court of the Apostolic Signatura considered it appropriate to apply a teleological interpretation, taking into account the „spirit" of the established law, its source[6] and a place in the system of procedural law and not just a literal understanding of the provision. For the tribunals concerned, this meant that the prohibition on combining the position of a church judge and an attorney of a procedural party

[4] SUPREMUM TRIBUNALE DELLA SEGNATURA APOSTOLICA, *Votum Periti*, Prot N. 46983/12 VT - unpublished.
[5] IBID., n. 4.
[6] Art. 9 *Normy Sygnatury Apostolskiej dla Trybunałów Interdiecezjalnych i Regionalnych*, AAS 63 (1971), p. 489; (*Canon Law Digest* VII, 923).

should be extended to the case in question, and the tribunal that sent a question to the Supreme Court of the Apostolic Signatura received the confirmation of the legal possibility of refusing to accept a power of attorney order by a judge who wanted to act as an attorney.

2. The principle of *incompatibilitas* for the office of judge in modern legal culture

In the legal culture of today's world (not just Europe), judge is required to maintain absolute transparency and the highest ethical standards. Nowadays, individual national standards impose high requirements on their judges, not only intellectual, but also moral, for the performance of their functions. The implementation of these requirements of society for judges in state laws is a codified prohibition or injunction referring to the person of a judge[7]. One of the basic principles derived from the deontological view of the arbitrator is the principle of incompatibility of the office of a judge with other functions and professions, expressed, among other things, by the impossibility of taking up additional work without the consent of superiors or a statutory prohibition on working in certain sectors (e.g. in business).

The aim of this prohibition is to prevent a judge from finding himself in a relationship of subordination or dependence or in a situation that conflicts with his duty of impartiality, and such a situation could threaten to entangle judges in economic and social relations. The additional occupation of a judge must also not prevent him from assuming his basic duties as a judge. Therefore, limiting the possibility for a judge to take up additional employment is one of the more important guarantees of judicial independence and presented to society as values protected by law at the level of the Basic Law (the Constitution). It is also worth pointing out that, from a sociological point of view, there is a lack of social consent for a situation in which a judge „makes money on the side" to his salary[8].

A brief glance at the legislation of some countries shows that the principle of *incompabilitas* is a fundamental and unquestionable case in the exercise of the function of a judge. Under Polish law, the principle of the incompatibility of offices is expressed in relation to judges and prosecutors in Articles 102 and 103 § 3 of the Constitution of the Republic of

[7] For example: the inability to work in the same court (district) with a spouse who also works in the justice system, or the need to publish tax returns.

[8] All interested in this topic are invited to read the Polish article by M. ŚLADKOWSKI, *Podejmowanie dodatkowego zatrudnienia przez sędziów w świetle Konstytucji Rzeczpospolitej Polskiej*, Studia Iuridica Lublinensia 22 (2014), p. 363.

Poland, and this prohibition is absolutely binding. In the Act on the system of common courts, in Article 86 § 1-6, the legislator introduced a limitation of the possibility of additional employment by a judge in an active and retired state to any activity that would prevent him from performing his function in accordance with the law and dignity. That normative act also formulated a detailed catalogue of inadmissible acts relating to judges. Apart from the prohibition on political activity, a judge may not take up any additional employment, except for scientific and academic work, with the consent of the president of his own court, with the proviso, however, that this will not interfere with his professional duties. Nor may the judge take up any other occupation or way of earning a living. This applies, in particular, to the prohibition on being a member of the management board, a member of the supervisory board, a member of the audit committee, a member of the management board of a foundation which carries out business activities. Acquisition of holdings larger than 10% of shares or stocks with a value greater than 10% of the share capital is also classified as a prohibited activity. It is prohibited to conduct business activity on one's own account or together with other persons. In the Rules of Professional Ethics for Judges and Assessors adopted in 2003 by the National Council of the Judiciary[9] with a similar content can be found in Chapter 1 § 3a and Chapter 3 § 17. On the issue of parallel legal activity that interests us most, Polish judges are explicitly forbidden in § 21 (we would like to add: with a minimum number of words with a maximum content, according to the best models of Roman law): *a judge may not provide legal services*[10].

German law is similar to Polish law. The consent of the President of the court where the judge works or of the Minister of Justice is required to start parallel work with the judiciary[11]. In the United States, for ethical reasons, it is forbidden to sit on the supervisory boards of companies but it is also forbidden to work in a university by a judge. In Spain and Italy, judges are not allowed to do business, including other legal activities, either personally or together with others[12].

---

[9] *Zbiór Zasad Etyki Zawodowej Sędziów i Asesorów Sądowych*. Tekst jednolity. Uchwała nr 16/2003 Krajowej Rady Sądownictwa z dnia 19 lutego 2003r., http://krs.pl/pl/dzialalnosc/zbior-zasad-etyki-zawodowej-sedziow/c,18,uchwaly/p,1 (access: 19.09.2017).

[10] The mitigation of this prohibition for retired judges was adopted by Resolution No 29/2003 of the National Council of the Judiciary of 9 April 2003: „A retired judge may, without prejudice to ethical principles, provide free legal advice on a charitable basis, i.e. only to persons who, due to a lack of financial resources, cannot afford to use paid legal services. However, such permitted charitable activities cannot consist in forms of legal services that go beyond simply providing advice". http://krs.pl/pl/dzialalnosc/zbior-zasad-etyki-zawodowej-sedziow/c,19,wykladnia-do-zbioru-zasad-etyki-zawodowej-sedziow/p,1 (access: 19.09.2017).

[11] P. SCHLOSSER, W. HABSCHEID, *Federal Republik of Germany*, in: S. SCHETREET, J. DESCHNÉS (ed). *Judicial Independence. The Contemporary Debate*, Dordrecht – Boston - Lancaster 1985, p. 89.

[12] B. PELAYO, *Spain*, in: S. SCHETREET, J. DESCHNÉS (ed). *Judicial Independence*, op. cit., p. 382.

In countries with well-established democratic traditions and a high social professional status, judges are appointed to this position for whom being a judge is the culmination of their entire professional career. This is the case, for example, in France, where people with many years of university, judicial or administrative work can become judges[13]. Also in Germany, candidates for judges are recruited from experienced ministerial officials[14]. In the United Kingdom, judges must have at least 10 years of experience as a lawyer. However, it must be made clear that none of the countries listed offer the possibility of holding the office of judge at the same time as a combined activity with another legal profession. Generally speaking, in all countries of the European Union, a high standard of behaviour in and out of the service, intelligence, wisdom and reasonableness, responsibility for actions, words spoken and written are qualities as important in the life of a judge as impartiality in decision-making, which is why the Code of Ethics of European Lawyers in Article 2 introduced the term „absolute independence", free from influence not only within but also outside the trial[15].

In the United States of America, lawyers become judges after a long and well-evaluated career in the administration of justice in the broad sense. The prohibition on combining the functions of a judge with other legal activities is very clearly formulated there in the „Model Code of Judicial Conduct": „A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum"[16].

The personal independence of a judge - very much accentuated not only in continental Europe but also in the democratic countries of the world[17], and, in countries with a *common-law* system, additionally highlighted by the impeachment procedure, is a consequence of the

[13] D. B. CASSON, I. R. SCOTT, *Great Britain*, in: S. SCHETREET, J. DESCHNÉS (ed.). *Judicial Independence*, op. cit., p. 147.

[14] W. ODERSKY, *The Structure and Independence of the Judiciary in Germany*, International Review of Penal Law 3-4 (1992), p. 892.

[15] *Such independence is as necessary to trust in the process of justice as the impartiality of the judge*. CCBE 2.1.1. in: J. GOLDMISTH (ed.), *Charter of Core principles of the European legal profession and Code of Conduct for Lawyers in the European Union*, CCBE 2013, www.ccbe.eu, p. 20.

[16] *ABA Model Code of Judicial Conduct (2011 Edition), Rule 3.10: Practice of Law,*: http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_3/rule3_10practiceoflaw.html (access:17.06.2016).

[17] *A contrario*, In countries where the European legal philosophy is not the source of the legal system, such restrictions on the judge do not apply. An example is Uganda in Africa, where judges can carry out business and other professional activities. The author, who writes about it: J. M. N. KAKOOZA, *Uganda*, in: S. SCHETREET, J. DESCHNÉS (ed.). *Judicial Independence*, op. cit., p. 353-354. The author did not manage to get to more recent data on this country.

Montesquieu separation of powers[18]. It is therefore the ethical duty of a judge to avoid all situations which already have the potential to reduce this independence[19]. In particular, these risks relate to professional activities or other activities. Modern reality is characterised by the permeation of the broadly understood world of business and economic activity with the world of authorities (legislative, executive and judicial). Resistance in the pursuit of private interests, especially of a financial nature, is one of the virtues of a judge in his off-duty conduct[20]. Therefore, special care should be taken with regard to the question of the judge's taking on additional functions, even those performed free of charge.

3. *Incompabilitas* and ethics of a church judge

Paying attention to civil-law aspect when making reflections on the canon law on the principle of *incompatibilitas* has the sense that one must not forget that canon law is an integral part of modern legal culture, as it has always been part of Europe's legal culture. This is not enough. The history of law shows that esteem for judges - it is part of the Judaeo-Christian tradition. In the Judaic tradition, a judge has enjoyed great prestige and respect. In the Old Testament, judges were not only called *szofetim* (שופט) but also *elohim* (אלוהים). This word - combined with the attribute of God as a strict Judge - only appears on the pages of the Old Testament in relation to people when there was talk of judges[21].

---

[18] A brief historical outline and theoretical introduction to the issue of judicial independence can be found on pages 108-111 of the article entitled *Judicial Independence and/or (?) Efficient Judicial Administration* (Juridica International XVII/2010, p. 108-115) by the Estonian criminal law professor Jaan Ginter. A glance from the common-law point of view is found in the book entitled AHARONA BARAKA, *The Judge in a Democracy*, Princeton University Press, New Jersey 2006, p.78-80.

[19] *Zasada 2.2 oraz 2.5 nr 1 3 Kodeksu Etycznego Prawników Europejskich. Charter of Core principles of the European legal profession and Code of Conduct for Lawyers in the European Union*, in: J. GOLDMISTH (ed.), *Charter of Core principles*, p. 21.

[20] A. MACHNIKOWSKA, dictionary entry: *niezależność sądów* in: P. SKUCZYŃSKI, S. SYKUNA (ed.), *Leksykon etyki prawniczej*, Warszawa 2013, p. 235.

[21] S. FOSTER DAMON, *A Blake Dictionary. Ideas and Symbols od Wiliam Blake*, (updated edition by Morris Eaves Hanover, Darthmouth College Press), New Hempshire, 2013., p. 119; MICHAŁ PETER, MARIAN WOLNIEWICZ, *Pismo Święte Starego i Nowego Testamentu*. *Komentarz*, Poznań 1975, p. 127-128, in a reference: JULIUS H. SCHOEPS (ed.), *Nowy leksykon judaistyczny*, Moses Mendelssohn-Zentrum für Europäisch-Jüdische Studien 2007, p. 355; E. GORDON, *613 Przykazań Judaizmu oraz siedem przykazań rabinicznych i siedem przykazań dla potomków Noacha,* Austeria 2009, p. 42; T. MALVENDA*, Commentaria in Sacram Scripturam: unacum nova de verbo ad verbum ex hebr. Translatione,* t. 2, Lugnuni (Lyon) 1650, p. 323 (e-book accessible through digitisation of the Bayerische Staetbibliothek Muenchen collection). On this occasion, it is worth noting the uniqueness of Deborah's Old Testament judge's function, which is recalled by: J. EISENBERG, *Kobieta w czasach Biblii*, transl. I. BADOWSKA, Gdańsk 1996, p. 217 and Polish Biblicist E. ADAMIAK, *Kobiety w Biblii. Stary Testament*, Kraków 2006, p. 77.

Contrary to Rudolf Sohm's thesis that the original Church did not know the law, the sources that have been preserved indicate that from the beginning of Christianity, a new quality of disciplinary, customary, administrative and other regulations (including the hierarchical system and institutions) rooted in an ecclesial structure[22]. As early as 318 years after the birth of Christ, the effectiveness of judgments issued by bishop's courts on the basis of the law applicable to Christians was permitted in civil forums: *lex christianis*[23]. Since the legal culture of the Roman Empire at that time was very high, recognition of the judgments handed down by church arbitrators must have meant that the imperial office valued not only the substance and quality of the judgments but also the qualifications of these judges. The possibility of exclusion, by decision of the participants of the court proceedings (and even against the other party), of submitting to the judgement of the state tribunal in private law cases in favour of the church court resulted in the fact that later imperial constitutions limited the competitiveness of bishop's courts[24]. However, for the growing number of Christians in the empire, this forum has become an interesting alternative, as it was guided not only by the principles of state law but also by the law designated by faith[25]. Since 452[26] A.D., the Church's justice system has become an alternative form of right to a court not only in private but also in criminal matters, which in practice has often meant a lighter punishment, especially for moral crimes[27]. The Church's judiciary was also less costly, and the indigent defendants could count on the help of lawyers[28].

---

[22] REMIGIUSZ SOBAŃSKI, *Kościół pierwotny bez prawa? Uwagi polemiczne natury metodologicznej*, Forum Iuridicum 3 (2004), p. 101-112.

[23] By order of Constantine the Great, Cod. Theod., 1, 27, 1. *Letter of Constantine to the Catholic Bishops* the Code does not seem to have established an institutional „bishop's court" but refers to a specific procedural „nature" entitled *episcopalis audientia* under current Roman law, many international researchers dealing with Church history, the history of law or the history of ideas write about this text. Among the numerous contemporary literature on the subject, it should be referred: J. C. LAMOREAUX, *Episcopal Courts in Late Antiquy*, Journal of Early Christian Studies, 3/2 (1995), p. 143-167; P. G. CARON, *I tribunali della Chiesa nel diritto del Tardo Impero*, AARC 11 (1996), p. 245-263; O. HUCK, *A propos de Cth 1,27,1 et C. Sirm 1: Sur deux textes controversés relatifs à l`episcopalis audientia constantinienne*, ZSS *Rom. Abt*. 120 (2003), p. 78-105.

[24] C. 1, 4, 7 (the Constitution of emperors Arcadius and Honorius);

[25] At this point .... an excerpt from the first letter to the Corinthians of St. Paul the Apostle (1 Cor 1:4-8), which points to the legitimacy of the formation of ecclesiastical judiciary (in the form of an elected private arbitrator): „You, on the other hand, when you have matters of the past to resolve, address people who are considered to be nothing in the Church! I say this to embarrass you. For is there not someone wise enough among you to settle disputes between your brothers? And yet a brother accuses his brother, even before unbelievers". (quot. from: *Biblia Tysiąclecia. Pismo Święte Starego i Nowego Testamentu*, Pallotinum 2014.)

[26] Nov. Val. 35.

[27] „A public trial, however would have possibly ment more cost, but also higher public exposure and hence potentially greater shame for victim's families". Julia Hillner writes so in monograph: *Prison, Punishment and Penance in Late Antiquity*, Cambridge, 2011, p. 64-65 and 75-76. In pointing to this item, it is important to note the numerous sources quoted by the author and the high quality literature cited.

[28] A. G. MIZIŃSKI, *Status prawny adwokata w Kościele łacińskim*, Lublin 2011, p. 73.

This model has been widely described in the Justinian's novels[29] and the ecclesiastical judge was seen as a just defender of the interests of the poorest[30]. When the crisis of the empire deepened, secular power collapsed and the judiciary and local administration were unable to carry out their duties effectively towards society, then the bishop's courts (*episcopalis audientia*) were naturally appealed to because it was them, as depositaries of Roman law, who became the guarantors of justice, stability and unity[31].

This positive image of a judge rooted in the social memory of the underprivileged strata was maintained by the sense of a unique mission for the community as a whole, by the bishops themselves, often from among noble-born and well-educated people who, familiar with the law and educated in the spirit of seeing the law as the daily regulator of social life, saw it as an ordinary and not an extraordinary means of achieving justice[32].

Legal thought is always about the law passing the ethics test[33]. In case of a person who is a judge (largely identified with the law), „only a daily, consistently ethical attitude"[34] is the realisation of the dignity, honesty and seriousness of the profession, which translates into a growing legal culture in society. A judge is therefore not only a judge; an arbitrator making a fair decision, but also an expert in the law, an active interpreter, as he applies abstract legal norms to a specific situation[35]. In ancient Rome, jurists were called the „priests of justice" (*sacerdotes iustitiae*)[36]. This exaggerated wording is not exaggerated when it comes to the model of a good judge and as such should be reminded[37]. The reference to religion as

---

[29] Nov. 123, 21.

[30] W. ROZWADOWSKI, *Prawo rzymskie*, Poznań 1992, p. 83; W. DAJCZAK, T. GIARO, F. LONGCHAMPS DE BÉRIER, *Prawo rzymskie*, 2009, p. 150-151.

[31] A. DĘBIŃSKI, *Kościół i prawo rzymskie*, Lublin 2008, p. 47; R. SOBAŃSKI, *Europa obojga praw*, Katowice 2006, p. 38; C. HUMFRESS, *Orthodoxy and the Courts in Late Antiquity*, part 6: *Ecclesiastics as Forensic Practitioners. Judges* Oxford 2007, p. 153-179.

[32] F. D. GILLIARD, *Senatorial Bishops in the Fourth Century*, Harward Theological Review 77 (1984) n. 2, s. 154-167, 160-162. It should be noted that the entire article is devoted to the social origin of the episcopate in the ancient world of the 4th century and to a critical linguistic analysis of preserved sources.

[33] R. SOBAŃSKI, *Prawo-nieodłączny towarzysz człowieka*, Z dziejów prawa, 12 (2011) t. 4., p. 21-22.

[34] A. MACHNIKOWSKA, dictionary entry: *niezależność sądów* in: P. SKUCZYŃSKI, S. SYKUNA (ed.), *Leksykon etyki prawniczej*, op. cit., p. 235.

[35] On the judge as an interpreter I refer the reader to the monograph by P. KROCZKA, *The Art of Legislation: The Principles of Lawgiving in the Charge*, Kraków 2011.

[36] ULPIAN, *Digesta* 1. 1. 1.

[37] It is appropriate to recall here the conclusion of the article published in Ius Matrimoniale 23 (2012) No. 17, by U. NOWICKA, *Pro veritate et iustitia. Deontologia sędziego kościelnego w procesie o stwierdzenie nieważności małżeństwa*, p. 95: „It is on him [the ecclesiastical judge], on his attitude, on his fidelity to God's natural and positive law, as well as to the canonical material and procedural law, that the future of man and his certainty that he will receive a just and truthful judgment when turning to the ecclesiastical court".

an axiology of law. In case of canon law is absolutely right, since ecclesiastical law is also a message of faith, albeit in a form and language characteristic of social sciences.

4. An argument coming from the principle of legalism?

The judicial vicar described in the case, who defended the situation of his employee's dual activity as both a judge in his home court and an attorney in another court, based his argument on the civil liberties law that exists in democratic states: „what is not prohibited is permitted"[38]. However, based on the same axiological basis (i.e. the idea of the rule of law), there is a principle of legalism in the culture of the law of Western countries, which formally states that state authorities (administrative and judicial) may only act within the limits and forms established for them by law. The application of the principle of legalism is a guarantee that power will not be misused for purposes contrary to the broadly defined social good. In state legislation, the principle of legalism is derived from the Basic Law (the Constitution), and its development is contained in separate legal acts. In the secular judiciary, the principle of legalism serves to implement the rule of law and, by binding the judge, at the same time makes him independent of influence and pressure „from the outside".

The principle of the triple division of powers is fundamentally alien to the law of the Church. However, some of its features are present in administrative canon law, although with limitations resulting from the specificity of the hierarchical system of the Church[39]. In the CIC, the „constitutional" norms are scattered in the Code, and the highest legal norm, namely, *salus animarum* (can. 1752 of the CIC) we find at the end of the Code, like a buckle that binds the law of the Church. There is no doubt, therefore, that in Church law the principle of legalism is weakened in a situation of dispensation and other graces, because the most important good of the Church is the principle of the good of souls[40].

The CIC only in can. 1447 deals with the issue of the prohibition of a judge from adjudicating in a case in which he previously acted as a judge, an lawyer, a defence counsel, a lawyer, an attorney, a witness or an expert. However, as Father Szymon Pikus rightly pointed out in his monograph entitled *Independence of a Church Judge* „there [is] no detailed code

[38] *Quod lege non prohibitum, licitum est*. in: R. TOKARCZYK, *Przykazania etyki prawniczej: Księga myśli, norm i rycin*, 3rd edition, Warszawa 2009, p. 82.
[39] I. ZUANAZZI, *Il principio de legalita nella funzione amministrativa*, Ius Ecclesiae 8 (1996), p. 47-48.
[40] IBID., p. 51.

regulation on the possibility of combining the office of a judge with other judicial or priestly offices"[41].

Supporters of the grammatical interpretation of Article 36 § 3 of the DC of the principle of the incompatibility of the office of a judge with other functions and offices through the need to take into account pastoral specificities and *salus animarum* argue the admissibility of other legal activities of church judges, not excluding private procedural assistance as an lawyer or representative in other courts unrelated to the right of appeal. It seems, however, that this argumentation is aimed at circumventing the prohibition on combining offices, and by invoking the good of souls this is done selectively, without taking into account the deontological aspects of a church judge, his work and his attitude towards the law.

A different position is presented in this work. Previously quoted Father Szymon Pikus analysed the issue of *incompatibilitas* as part of the broader issue of the independence of the judge's office and wrote: „By allowing [the ecclesiastical legislature] to combine the office of a judge with other functions related to the administration of justice or extrajudicial functions, such a situation should be considered a solution resulting from a temporary need"[42]. A competent bishop should ensure that this situation does not last long. The author believes that in contemporary canon law, and in particular, in the canon matrimonial trial (which, because of its widest contact with the lay faithful, is part of the canonical law most affecting the People of God and influencing the legal culture in the Church), this „temporary need" is not a sufficient and serious reason for violating the principle which, alongside independence, impartiality and impartiality, is a fundamental characteristic of a judge. At present, there is no obstacle to the aim of transparency in the role and function of the judge, not only in the ecclesiastical process, but of the ecclesiastical judge as the person representing this office in general understanding[43]. In other words, it seems that, in order to harmonise and internally seal the system of ecclesiastical law, it is necessary to require and enforce increased diligence on the part of the judge who passes judgments „in the name of the Holy Trinity", both within and outside of his *munus*. It can also be said in a metaphorical way that this is not just about the „basics" of

[41] SZ. PIKUS, *Niezawisłość sędziego kościelnego,* Sandomierz 2009, p. 262. On pages 261 through 269, the author gives a concise but very interesting overview of the issue of the incompatibility of the office of a judge in the Church.

[42] IBID., p. 268-269.

[43] Apart from this article, I leave it to the question of the responsibility of the Ordinary for the diocese entrusted to him and the priests incardinated to it: can such a well-educated presbyter not be „arranged" in the diocese with the dignity of his profession and priestly vocation?

a judge's work, but about the way in which a judge functions „above the warp" of his work, and the judge himself must be like Caesar's wife - beyond any suspicion[44].

Conclusions

A trial of the nullity of marriage is a trial for the truth about a marriage, which is a matter for the public good of the Church. From the theological point of view, there is no reason why a marriage should be declared null and void within a framework other than that of the specific form of a court trial, with its formalisation, „protagonists" in the form of trial parties, a collegiate (in principle) tribunal, a knot defender and advocates. Having said that, centuries of experience show that we have not yet developed a better way of arriving at an objective truth, respecting the rights of the parties, while preserving the rights of the defence; with a judge being given the freedom to evaluate evidence and an impartial, independent judgment.

Theoretically, one can imagine a situation where someone is simultaneously a judge in one case and a lawyer in another, whether in two different courts or even one. However, it must be made clear that this is an idealistic view of how the courts function in the Church. The so-called „human factor" is both the strongest and weakest link in any legal system. A reasonable legislator takes into account the reality and circumstances in which he or she has to make law. We must also not forget about the imperfections of human nature, not only due to human sinfulness, but also due to the limitations of cognition, negligence, recklessness or error not guilty of bad will. It takes great ethics, knowledge, legal proficiency and great internal discipline to work in two offices (judge and/or representative/lawyer) in the area of church judiciary in the long term to maintain professional independence and independence from influence. The restriction on the freedom to combine judicial functions with those of judicial offices is not so much the result of a lack of confidence on the part of the legislator of court staff, but a sign of realism and protection of tribunal members against possible infringements of the law, even against their will and intentions. That is why this work proposes *de lege ferenda* to rewrite the standard of Article 36 of the DC in such a way that the ban on the merger of offices and court posts will apply to all church courts, and not only those joined by the right of appeal.

[44] PLUTARCH, *Cezar*, 10.

A standard formulated in this way would clearly and distinctly indicate the role and function of the Church judge vis-à-vis the community of the Church as an arbiter who is genuinely nondependent, independent, seeking only the truth and not „vain glory", focused on his or her work and professional development within the judicial function, holding a unique office in a way that makes the transparency of that office and of the person himself or herself clear. An absolute ban on combining positions and functions in church courts would avoid many problematic matters, such as the always delicate financial issue, the loyalty of the lawyer to the client and the loyalty to the court, or the possible violation of procedural confidentiality before other members of the home or second tribunal. This standard would also prescribe the implementation of the highest ethical standards recognised and accepted in modern legal systems around the world, and it should be remembered that, as canonists, we are all the more morally obliged to implement them, since the sources of these standards can be found in the history of Church law.