

# Access to Justice: Human Rights Abuses Involving Corporations

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POLAND



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Access to legal remedies and justice has become a crucial element in today's work protecting human rights in the context of business activities. It is also an area of primary importance for judges and lawyers who work promoting the rule of law and human rights. Despite its importance, access to remedies is hindered by a number of obstacles that acquire particular dimensions in the context of human rights abuses involving, directly or indirectly, business enterprises and corporations. The study and understanding of state practice in relation to the international legal obligation to provide an effective remedy reveals not only obstacles but also the potential of existing instruments to ensure the realization of this right that may help the international community in its quest for new answers to the challenges of transnational corporate human rights abuse.

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Polish law provides victims of human rights abuses involving corporate entities with remedies. Criminal prosecution as well as civil remedies are important legal tools that can be used to redress human rights violations committed by companies. At the same time, there are numerous legal and practical obstacles, which can render the process of pursuing justice difficult and/or ineffective. Disputes between individuals and/or groups and corporations share common barriers regarding access to justice. The realisation of the procedural principle of "equality of arms" is one such example: the frequent disparity of arms is aggravated when the victim (claimant) lacks high-quality legal advice and has limited resources, both in regards to time and money, whilst the defendant is a powerful corporate entity.



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**Poland**

**A Project of the International Commission of Jurists**

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This study was drafted by Katarzyna Szymielewicz (ICJ Poland) and reviewed by Barbara Nita, Maciej Bernatt and Carlos Lopez. Wilder Tayler made the final review. It is part of a larger ICJ project on Access to Legal Remedies for Human Rights Abuses involving Corporations, under the coordination of Carlos Lopez. Priyamvada Yarnell assisted in the production.

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## Introduction

Access to legal remedies and justice has become a crucial element in today's work protecting human rights in the context of business activities. It is also an area of primary importance for judges and lawyers who work promoting the rule of law and human rights. Despite its importance, access to remedies is hindered by a number of obstacles that acquire particular dimensions in the context of human rights abuses involving, directly or indirectly, business enterprises and corporations. The study and understanding of state practice in relation to the international legal obligation to provide an effective remedy reveals not only obstacles but also the potential of existing instruments to ensure the realization of this right that may help the international community in its quest for new answers to the challenges of transnational corporate human rights abuse.

To contribute to the understanding of the problem and to assist in the formulation of a new agenda to strengthen access to legal remedies in the context of business abuse, the International Commission of Jurists (ICJ) carried out a project on Access to Justice for victims of corporate human rights abuse. This project comprises a series of country studies (Brazil, Colombia, People's Republic of China, Democratic Republic of the Congo, India, The Netherlands, Nigeria, the Philippines, Poland and South Africa) and questionnaires for additional countries. The present study is one of the country studies. This study addresses issues relating to access to justice or legal remedies for human rights abuses committed with the involvement of corporations in Poland. It focuses particularly on access and barriers to justice encountered during court proceedings (including the preparatory stage and the execution of the judgment) while other avenues within the Polish legal system (in particular administrative measures) are dealt with less detail.

The study follows the definitions and methodology adopted by the broader ICJ Access to Justice Project. The present study is based on in-country research, consultation with a number of experts and institutions, one expert seminar (with some 15 experts) and a national workshop held on 29-30 October 2009 in Warsaw, to which more than 45 judges, lawyers and human rights experts contributed. The study also draws from written submissions from practitioners on the basis of a detailed questionnaire.

While the intention was to get direct access to the primary source of information, this was not always possible. The vast majority of cases are handled by district courts whose rulings are not easily accessible to the public. The statistical data on cases gathered by the Ministry of Justice is not organized according to legal issues nor the type of claimant or defendant. Due to limitations of time, an in-depth analysis of court files could not be carried out, although a number of cases were analysed on the basis of publicly available information and consultations with victims and/or their legal representatives. It should also be noted that many of these cases are still pending.

The first section describes the general framework for legal liability of corporations in national law. The second section deals with available legal remedies for corporate human rights abuses. It discusses standard civil and criminal law procedures allowing victims to obtain certain redress from the company (or its subsidiary) and to seek criminal liability of a person directly responsible for their harm. It also looks at sanctions that can be imposed on a corporation or its officers and implementation procedures (focusing on its application to corporations in the context of their economic position). The third section, constituting the core part of this study, discusses legal and procedural obstacles to pursuing justice in disputes involving corporations. Section four contains concluding remarks and recommendations. In the same way as other country studies, the present study concludes with a series of recommendations to strengthen the domestic legal and judicial system in Poland with a view to providing increased opportunities for people to obtain judicial protection of their rights when these are violated by third parties.

# 1. Legal Liability of Corporations Under National Law

## 1.1 Human Rights Framework

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### 1.1.1 State of Ratification of International Instruments

Poland is a party to most international and regional (European) human rights instruments. They include: The International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the European Convention on the Exercise of Children's Rights; the Charter of Fundamental Rights of the European Union; and the Rome Statute of the International Criminal Court.

### 1.1.2 Human Rights Protection in the Domestic Legal Order

The protection of human rights has been introduced as one of the fundamental principles in Polish legal order.<sup>1</sup> At least in doctrine, this principle manifests itself not only vertically (between an individual and public authorities) but also horizontally (between individuals and private entities).

A comprehensive list of human rights is contained in the Constitution of the Republic of Poland ("the Constitution").<sup>2</sup> All fundamental rights are reflected and developed in lower-rank legislation, in particular: the Civil Code (protection of private property, right to fair compensation), the Criminal Code (right to life, personal liberty), the Labour Code (right to healthy and safe working conditions),<sup>3</sup>

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1. It is envisaged in the Preamble to the Constitution of the Republic of Poland and confirmed by the doctrine. See for example, M. Safjan, *Efekt horyzontalny praw podstawowych w prawie prywatnym: autonomia woli a zasada równego traktowania*, Kwartalnik Prawa Prywatnego, Volume 2, 2009.
  2. The Constitution of the Republic of Poland of 2 April 1997 (Official Journal No 78 item 483), Articles 38-76.
  3. The Act of 26 June 1974 (with subsequent changes) Labour Code (Official Journal of 1998 No 21 item 94). Section X, Article 207 – 237 (Right to healthy and safe work conditions)

procedural provisions (fair trial guarantees),<sup>4</sup> provisions on personal data protection (right to privacy) and environmental law (right to a healthy environment).<sup>5</sup>

The Constitution provides for international law and international custom,<sup>6</sup> as well as the supremacy of its own provisions, over lower-ranking domestic legislation.<sup>7</sup> This principle entails the indirect horizontal effectiveness of the Constitution and international treaties, meaning that provisions of lower-rank legislation governing relations between private parties must be interpreted in accordance with these instruments (i.e. in a manner that ensures the maximum level of protection for fundamental rights contained therein). Through this mechanism, human rights standards become a significant element in the interpretation of law.<sup>8</sup> This is particularly important with regard to so-called “general clauses”, i.e. open-ended provisions in civil law, that leave considerable scope for interpretation. For example, there is a principle that one cannot exercise a right in a manner that would contradict the “socio-economic purpose” of the norm itself, or “the principles of social coexistence.”<sup>9</sup> This principle may, to some extent, be considered a direct reference to the rules enshrined in the Constitution and international treaties.

Finally, all domestic legal texts may be scrutinized from the point of view of their compliance with human rights guaranteed under international treaties or the Constitution. This is done frequently by the Constitutional Tribunal under a constitutional complaint procedure or upon a request filed by authorized entities, including courts. Compliance of national legislation with human rights may also be subject to review by international bodies, in particular, the United Nations treaty-bodies and the European Court of Human Rights.

Issues regarding the possibility of direct horizontal application of human rights will be discussed further below.

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4. The Act of 6 June 1997 Code of Criminal Procedure (Official Journal No 89 item 555); the Act of 6 June 1997 Criminal Code (Official Journal No 88 item 553);
  5. The Act of 27 April 2001 Environmental Protection Law (Official Journal of 2008 No 25 item 150); the Act of 29 August 1997 Banking Law (Official Journal of 2002 No 72 item 665); the Act of 30 June 2005 on Public Finance (Official Journal of 2005 No 249 item 2104); the Act of 20 July 2001 on Consumer Credit (Official Journal of 2001 No 100 item 1081); the Act of 16 February 2007 on Consumer Protection and Competition (Official Journal of 2007 No 50 item 331); the Act of 12 December 2003 on General Product Safety (Official Journal of 2003 No 229 item 2275); the Act of 25 August 2006 on Food and Nourishment Safety (Official Journal of 2006 No 171 item 1225); the Act of 2 March 2000 on Consumer Protection and Liability for Dangerous Products (Official Journal of 2000 No 22 item 271); the Act of 16 July 2004 Telecommunication Law (Official Journal of 2004 No 171 item 1800).
  6. Article 9 of the Constitution.
  7. Article 10 of the Constitution.
  8. See for example, Supreme Court Judgment of 26 June 2007 (I PK 11/2007).
  9. Article 5 of the Civil Code and Article 8 of the Labour Code.



### 1.1.3 Access to Justice and Due Process Guarantees – General Framework

According to the Constitution: “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.”<sup>10</sup> This general rule relates to all kinds of disputes, whether arising between individuals and private entities (notwithstanding their size, structure or legal status) or between an individual or private entity and a public authority. It also means that all judgments are subject to appeal.

The Constitution also provides for more specific guarantees of fair trial:

*“Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Any deprivation of liberty shall be immediately made known to the family of, or a person indicated by, the person deprived of liberty.”<sup>11</sup>*

*“Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself – in accordance with principles specified by statute – of counsel appointed by the court. Everyone shall be presumed innocent of a charge until his fault is determined by the final judgment of a court.”<sup>12</sup>*

Finally, the “right to judicial remedy” and fair compensation can be inferred from Article 77 of the Constitution, stating that: “everyone shall have right to compensation for any harm done to him by any action of an organ of public authority contrary to law. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedom or rights.” The right to fair compensation has been developed further in the Civil Code.

## 1.2 Framework for Liability of Corporate Entities and Company Officers

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In principle, following the equality-before-the-law paradigm,<sup>13</sup> every entity should bear equal liability for its acts, irrespective of its legal form, ownership structure or place of registration. This general principle is, however, qualified by law with regard to corporate entities. In the first place, the law does not provide for criminal liability of legal entities in a strict sense. Secondly, it would be difficult to sue any

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10. Article 45.1 of the Constitution.

11. Article 41.2 of the Constitution.

12. Article 42.2 of the Constitution.

13. This principle can be inferred from Article 32 of the Constitution.

private entity for direct violation of civil, economic, social or political rights only on the basis of constitutional or international norms.

The Section below explores possible grounds for the liability of corporate entities and their officers in accordance with lower-rank legislation.

In general, there are 3 types of liability: civil (for non-performance of an obligation<sup>14</sup> or for a civil law *delict*, damage resulting from a wrongful act); criminal (for the commission of a prohibited act—a *crime* or *offence*); and administrative (for the breach of public law regulations, e.g. work safety standards, environmental law, consumer protection law). These three types of liability function independently, and it is possible for the same individual or legal entity to incur the three types of liability concurrently. It is important to note however that criminal liability, in a strict sense, can be borne only by individuals.

There is a special liability system of quasi-criminal liability of legal entities. This regime has been introduced recently by a separate legal act and the whole concept has not yet been fully integrated into the legal system. While there is not unanimity on the classification of this kind of liability, it seems to present more criminal liability features than other, and so it will be referred to as quasi-criminal liability for the purposes of the present study. The most important feature of this regime is its subsidiary and secondary nature: this type of liability can be triggered only after the criminal liability of an individual who committed a prohibited act has been established (this will be discussed in detail below).

### 1.2.1 Civil Law – General Framework

Under civil law, legal entities and/or individuals can be held liable for non-performance or inappropriate performance of an obligation<sup>15</sup> or damage resulting from a wrongful act (*delict*).<sup>16</sup> Human rights-related abuses may result from a breach of contract (a labour contract guaranteeing certain workers' rights) or damage caused outside any contractual relationship.

**Sources of liability:** The Civil Code differentiates<sup>17</sup> between fault liability, and strict liability based on unlawfulness, which does not depend on fault or intention and applies whenever damage occurs.<sup>18</sup>

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14. Article 471 of the Civil Code *et seq.*

15. Article 471 of the Civil Code *et seq.*

16. Article 415/416 of the Civil Code *et seq.*

17. These two sources are not defined as such in the Civil Code but stem from the drafting of particular provisions, in particular the difference in terms of prerequisites for civil liability. See Article 435 of the Civil Code (strict liability) in comparison to Article 422 (fault liability).

18. Article 435 of the Civil Code.

**Degrees of fault:** The Civil law doctrine<sup>19</sup> recognises various degrees of fault. In the first place, fault may be either intentional or unintentional. Unintentional fault, in turn, may take the form of “gross negligence”, i.e. *culpa lata* whose effects are similar to those of intentional fault, or slight negligence – *culpa levis/levissima*.

**Modalities of liability:** Every legal entity bears liability for “its own acts”, understood as actions that can be attributed to its bodies, acting within their scope of powers. However, there are instruments that allow for holding other persons (natural or legal) accountable for damage caused by a company’s operations.

Generally, vicarious liability or liability for someone else’s action can be borne by a person (legal or natural) who entrusts the performance of a task or action to another person. A typical example is the case of an employee acting for a company (under the supervision and within the scope of his duties). If an employee has caused damage while performing his duties, any claims on these grounds must be directed to the employer.

Moreover, pursuant to Article 422 of the Civil Code, liability can also be borne by a person who encouraged or aided another to commit an offence or who consciously benefited from damage inflicted on another person. This instrument may be considered as the basis for recognising forms of involvement in an unlawful act other than direct perpetration and corresponds to the concept of complicity. However, the prerequisite for establishing this form of liability is that the “accomplice”<sup>20</sup> consciously benefited from damage inflicted on another person, which may be difficult to prove. Its practical applicability to acts attributable to companies or company officers will be discussed below.

The Civil Code also provides that if a number of persons are liable for damage inflicted by a wrongful act, their liability is joint and several. An aggrieved person may, therefore, bring a claim for damages against any single defendant or all of them together.

**Modalities of an act:** Generally, civil law does not differentiate between graded stages of an act (e.g. attempt, preparation, etc). It does, however, provide for legal protection measures if there is a direct threat of damage. On these grounds it is possible to demand that the company take actions necessary to remove the danger or provide appropriate security measures.

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19. These notions are not expressly defined in the Civil Code. See *Prawo cywilne - część ogólna. System Prawa Prywatnego*, edited by prof. dr hab. Marek Safjan, C.H.Beck, Warszawa 2007, p. 125 *et seq.*

20. The concept of “complicity” comes from criminal law doctrine and is not explicitly mentioned in Polish civil law but is used here by analogy.

### 1.2.2 Principles of Company Law

Company law formally constitutes a branch of civil law; therefore, the general concepts of that branch of law also apply to corporations. However, the doctrines of separate legal personality and the corporate veil have important implications for the scope of liability borne by companies in practice. Accordingly, owners and shareholders will normally not be legally responsible for company debts and, vice versa, the company will not be responsible for unlawful acts of owners and shareholders. However, certain acts by individuals within their capacity as company officials will be attributed to the company. In addition, certain civil law concepts can only be applied to natural persons since they require various forms of “intention” or “will”, which may not be attributed to a legal entity.

Legal and practical obstacles to establishing liability of parent companies and company officers will be discussed further below.

### 1.2.3 Criminal Law – General Framework

Under Polish law, criminal liability, in a strict sense, can only be borne by natural persons, a paradigm which limits the potential access to justice for the victims of criminal acts caused by company operations.

**Forms of liability:** The Criminal Code provides for liability of both a person who committed a prohibited act or omission and a person who guided the commission of such act or omission (including abusing another person’s dependency to order him/her to commit such act). Anyone encouraging another person to commit a prohibited act is liable for aiding and abetting.

**Modalities of an act:** Aside from the actual commission, criminal law also provides for attempt and preparation as graded stages of committing an act (however, the preparation of a crime is punishable only in certain cases).

**Modalities of fault:** Criminal law differentiates between intentional fault (i.e. when a perpetrator acts with intent to commit an offence or expects that an offence may be committed and consents to it) and unintentional fault (i.e. when a perpetrator does not have any intent to commit an offence but still commits it as a result of a failure to act with due care and he/she expected that the offence may be committed (recklessness or he/she should have expected it) negligence).

### 1.2.4 Labour Law – “Mixed Liability” Regime

Technically, labour law constitutes a distinct branch of civil law. Therefore, the main civil law concepts discussed above apply to employee-employer

relationships. The core set of regulations regarding employment-related matters is contained in the Labour Code.<sup>21</sup>

Owing to the specificity of employment-related relationships, in particular the inherent inequality between the employer and employee, there are numerous procedural differences that apply in the case of disputes. In general, these differences are meant to provide protection for the weaker party in the proceedings.

Labour law cases are dealt with by labour courts, a special division of civil courts (regional or district).

Apart from general regulations contained in the Labour Code, there is also a separate chapter in the Criminal Code devoted to employment-related crimes and offences.<sup>22</sup> In this context, basic concepts taken from the criminal law framework will be applied. Criminal law imposes sanctions for gross violations of employment law (e.g. forced overtime, violations of work safety regulations, suppressing trade union activity).

The underlying idea behind the criminal law regime being applied to employment-related relationships is that the state should be responsible for ensuring that minimum labour standards are observed across the country and protect employees, as weaker parties, from abuse. Therefore, not all employment-related disputes can be left for the parties themselves. The State Labour Inspectorate is the agency responsible for monitoring whether employers observe labour law. If, in the course of their inspection, the State Labour Inspectorate finds out about a violation of these standards, they are obliged to follow one of the following procedures: impose administrative sanction (fine) – for minor violations; bring the case to a labour court – for more significant violations (threatened with higher fines); notify the prosecution – for criminal violations of labour law.

### **1.2.5 Quasi-Criminal Liability of Legal Entities**

A regime of quasi-criminal liability for legal entities was introduced in the Polish legal system in 2002 by the Act on the Liability of Collective Entities for Acts Prohibited under Pain of Penalty.<sup>23</sup> According to this law, in order to establish quasi-criminal liability of a collective entity (e.g. a company) all three of the following prerequisites have to be satisfied:

- (a) the proving of the existence of a specific relationship between the collective entity (company) and the natural person – the perpetrator of the act;

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21. The Act of 26 June 1974 (with subsequent changes), Labour Code, Official Journal of 1998 No 21 item 94.

22. Article 215 ff of the Criminal Code.

23. The Act of 28 October 2002 on the Liability of Collective Entities for Acts Prohibited on Pain of Penalty (Official Journal No 197 item 1661).

- (b) the ascertaining of the fault of the perpetrator of the act in the form of a final court ruling; and
- (c) the ascertaining of the “fault” of the collective entity (company).

In order to satisfy the first condition, the natural person must act in one of the following functions/situations:

- (a) act in the name of or in the interests of the collective entity within the scope of an authorisation or obligation to represent it, to undertake decisions on its behalf or to conduct and internal audit, or in the event of exceeding this authorisation or failure to perform this obligation;
- (b) be allowed to act exceeding his/her authorisation or as a result of the failure by the collective entity to perform his/her obligations; or
- (c) act in the name of or in the interests of the collective entity, with the consent or knowledge of the collective entity.

Moreover, it is necessary for the behaviour of such natural person to actually result in or potentially result in a benefit for the collective entity (even if the benefit is a non-economic benefit).

The requirement of “fault” from a collective entity has been interpreted to include a lack of due diligence in the choice of or supervision over the natural person referred to above. Therefore, the liability of a collective entity on these grounds may also concern acts perpetrated by persons to whom certain tasks were entrusted or who were permitted to act; it does not apply to persons who independently manage the activities of the company.

Finally, this type of liability is limited to certain categories of crimes and offences as enumerated in the Act. At present these include: fiscal offences, corruption and prohibited acts provided for in the banking law, intellectual property law, environmental law, financial services regulation, company law, regulations on public trading in financial instruments and public health regulations.

It follows that the liability of a collective entity for the illegal acts of the persons acting on its behalf is of a subsidiary and secondary nature, and is limited to a category of persons that are in a subordinate position in relation to the company.

## **1.2.6 Administrative Liability – General Framework**

The company, as a legal entity, can also be subject to administrative liability for the breach of various regulations applicable to businesses, in particular: financial services regulation, consumer and competition protection, labour law (work safety regulations, protection of trade unions, working time norms etc.), product

quality regulations (food safety, liability for defective and dangerous products), telecommunications law, and environmental law.<sup>24</sup>

## 1.3 Jurisdictional Issues

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### 1.3.1 Establishing Jurisdiction

The jurisdictional framework under civil law is to a large extent based on EU legislation (i.e. the Brussels Convention<sup>25</sup> and EC Regulation 44/2001). Under Article 2 of the Brussels Convention, when a company is based in Poland, Poland judges have jurisdiction under the *forum rei* principle (i.e. the domicile of the defendant). When a company is registered in another EU country, the Brussels regulations apply to determine jurisdiction. When the company is registered outside of the EU, Polish conflict of law rules will apply.

Basic grounds for establishing jurisdiction in civil matters are:

- location of the real estate (if the case concerns real estate);
- place of residence or registered office of the defendant (at the time the claim was made and delivered to the defendant);
- location of the defendant's assets or proprietary rights (if the case concerns this object or proprietary right); and
- the fact that an obligation arose or is to be performed in Poland (if the case concerns this obligation).

In the case of liability for wrongful acts (*delicts*), the law applicable will usually be the law of the state where the damage occurred or where the event that gives rise to the obligation occurred (in compliance with the so-called Rome II Regulation, which determines the law applicable to non-contractual obligations).<sup>26</sup>

In criminal matters, the main basis for establishing the applicability of Polish law and the jurisdiction of Polish courts is the territoriality principle. In general,

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24. See respectively: the Act of 27 April 2001 Environmental Protection Law (Official Journal of 2008 No 25 item 150); the Act of 29 August 1997 Banking Law (Official Journal of 2002 No 72 item 665); the Act of 30 June 2005 on Public Finance (Official Journal of 2005 No 249 item 2104); the Act of 20 July 2001 on Consumer Credit (Official Journal of 2001 No 100 item 1081); the Act of 16 February 2007 on Consumer Protection and Competition (Official Journal of 2007 No 50 item 331); the Act of 12 December 2003 on General Product Safety (Official Journal of 2003 No 229 item 2275); the Act of 25 August 2006 on Food and Nourishment Safety (Official Journal of 2006 No 171 item 1225); the Act of 2 March 2000 on Consumer Protection and Liability for Dangerous Products (Official Journal of 2000 No 22 item 271); the Act of 16 July 2004 Telecommunication Law (Official Journal of 2004 No 171 item 1800).

25. The Convention 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention)

26. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

criminal law is applicable to a perpetrator who committed a prohibited act in Poland, or on a Polish vessel or aircraft (unless an international treaty provides otherwise). A prohibited act is considered to have been committed at the place where the perpetrator did or failed to do a particular act, or where an effect that is a feature of a prohibited act occurred, or was to occur, according to the perpetrator's intention.

Moreover, criminal law is applicable to Polish nationals in the case of offences committed abroad, provided the act is also punishable in the place where it was committed (the so-called *double criminality* principle, i.e. the requirement that the act is regarded as prohibited in both legal orders).

### 1.3.2 Extraterritorial Jurisdiction

Polish criminal law can be applied to foreigners for acts committed outside of Polish territory in essentially two categories of cases:

- (a) when a prohibited act was directed against the interests of the Republic of Poland, a Polish national or a Polish legal person and it constitutes a crime or an offence under both the law of a respective foreign country and Polish law (double criminality principle);<sup>27</sup> and
- (b) when Poland is obliged to prosecute a Polish citizen or a foreigner abroad on the basis of binding international agreement, even though it would not prosecute it otherwise, and the perpetrator is in Polish territory.<sup>28</sup>

Under international treaties (in particular the 4th *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* and the *UN Convention against Torture*) Poland is bound to ensure effective legal measures for persecuting crimes against humanity, including when committed by foreigners. Although there are no procedural provisions dealing with criminal persecution beyond Polish borders, the universal jurisdiction principle can be inferred from material provisions of the criminal law. On one hand, Polish criminal law does provide for sanctions for all acts defined as “crimes against humanity” under international law. On the other hand, there is an explicit provision whereby Polish criminal law should apply to both citizens and foreigners with regard to their acts committed abroad if Poland is obliged to persecute such acts under international treaties.

There is, however, one important limitation, which may raise doubts as to whether Poland endorses the universal jurisdiction principle in a so-called absolute sense (i.e. allowing state authorities for persecution of crimes against humanity abroad regardless of local laws). According to Article 133 of the Criminal Code, Polish criminal law can be applied (and, consequently, Polish jurisdiction extended) if

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27. Article 110 par. 1 of the Criminal Code

28. Article 113 of the Criminal Code



a foreign country refuses to extradite the alleged perpetrator of the crime. It is not clear whether Poland could take legal steps against an individual residing abroad if a crime in question did not affect a Polish citizen and it was not committed within Polish territory. A sector of the legal doctrine considers prosecution in such circumstances would not be possible.<sup>29</sup> Notably, there have been no instances of applying the universal jurisdiction principle in Poland.

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29. Grenich P., Uniwersalna jurysdykcja a odp. karna za zbrodnie wojenne, *Przegląd Prawniczy UW*, 2005, nr 3.

## 2. Available Legal Remedies for Corporate Human Rights Abuse

### 2.1 Overview of Available Remedies and Types of Proceedings

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Essentially, legal measures available under Polish law can be divided into those pursued before common courts (both civil and criminal) and administrative bodies.

#### 2.1.1 Civil Law: Compensation and Damages

While civil law provides for a broad range of compensatory measures, only some of them can be applied to redress the consequences of wrongful acts and human rights violations. There are two basic legal remedies available for a victim of a wrongful act:

- damages, claimed on the grounds of material loss (i.e. economic and financial harm, including loss of profit);<sup>30</sup> and
- compensation, claimed on the grounds of moral damage and/or pain and suffering (e.g. harassment, discrimination, humiliating treatment, loss of health, disability, death of a close person).<sup>31</sup>

Personal injury (e.g. damage to health), often leads to both kinds of damage: (i) material loss related to the cost of treatment and loss of earnings resulting from impaired ability to work; and (ii) mental and physical suffering related to pain. In such cases, both kinds of legal measures are available for the victim.

In specific circumstances (e.g. defamation) it is also possible to demand a specific action that is deemed necessary to eliminate the effects of a violation (e.g. making a press statement), as well as payment of a suitable amount for a specified social purpose. These measures can be used in cases involving violations of personal interests (e.g. health, freedom, dignity, freedom of conscience, confidentiality of correspondence, protection of a scientific work, etc.).

#### 2.1.2 Criminal Law: Punitive Measures and Fines

The three basic types of sanctions that can be imposed on perpetrators of criminal acts are: fines, imprisonment and limitation of liberty (e.g. community service).<sup>32</sup> The sum of the fine is determined on a case-by-case basis within the limits

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30. Article 415 of the Civil Code *et seq.*

31. Article 445 of the Civil Code *et seq.*

32. Article 32-34 of the Criminal Code

provided by the law with respect to a given offence or crime. The same principle applies to the length of imprisonment. For instance, an offence of persistent and wrong-minded violation of employees' rights is punishable with a fine up to PLN 720,000, limitation of personal liberty or imprisonment for up to 3 years;<sup>33</sup> an offence causing a serious environmental damage is punishable with a fine of up to PLN 720,000, limitation of personal liberty or up to 5 years imprisonment.<sup>34</sup> Polish law does provide for various probation measures and other forms of penalties (e.g. limitation of personal freedom) and their use is far more common.

Since these measures are not directly aimed at providing any compensation for the victim, apart from moral redress, they will not be discussed here in further detail. However, what must be considered here with regard to standard criminal sanctions is whether they actually serve the function of punishing the perpetrator and preventing further violations in the specific context of criminal acts attributable to corporate entities.

Criminal law also provides for the possibility of obtaining some form of reparation. The court can adjudicate reparation for the victim if the crime resulted in material or moral loss.<sup>35</sup> Under these provisions, a victim has the possibility to also seek material redress for damage suffered in connection with a criminal act. However, their use and effectiveness remain rather limited due to the focus of criminal trials. An average judge wants to focus on bringing criminal justice in the first place and therefore shows little willingness to consider additional issues related to awarding compensation for material or moral loss (which normally would require consideration of additional evidence, etc.) Usually the judge redirects the claimant to the civil process.

In criminal proceedings it is possible to seek punitive damages from the accused. These measures are perceived as auxiliary to penalties such as fines. It is also possible to raise civil law claims during criminal proceedings. At any time prior to the beginning of the main trial, a victim may also file a civil law claim in order to lodge proprietary claims arising directly from the commission of the offence. In the event of the victim's death, his or her close relatives can exercise this right on the same terms. In practice, this instrument is not used very often, as it requires that a victim join the proceedings in the capacity of an auxiliary prosecutor.

Apart from standard criminal law sanctions, which can be imposed on physical persons only, the law also provides for quasi-criminal sanctions that can be imposed on legal entities. By definition, these sanctions can only take a form of financial penalties (i.e. fines).<sup>36</sup> Notably, the maximum fines provided within this

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33. Article 218 of the Criminal Code

34. Article 181 of the Criminal Code *et seq.*

35. Article 46 of the Criminal Code

36. The Act of 28 October 2002 on the Liability of Collective Entities for Acts Prohibited on Pain of Penalty

regime for quasi-criminal liability of legal entities are much higher than average criminal law sanctions. It is possible to impose a financial penalty of up to 10% of a company's annual revenue.<sup>37</sup> However, the practical significance of this regime is very limited: there have been only 10 instances of its successful application to legal entities since its introduction in 2002, and all of them related to liability for fiscal offences or acts against financial interests of creditors (not human rights-related abuses).<sup>38</sup>

### 2.1.3 Administrative Measures

Legal protection measures available under an administrative procedure include:

- proceedings before central public authorities, whose role is to supervise private entities' compliance with the law in given areas (e.g. The State Labour Inspectorate, Office of Competition and Consumer Protection, Office of Electronic Communication, Energy Regulatory Office, General Inspector for Personal Data Protection); and
- proceedings before local public administration bodies and local government bodies (e.g. municipal and district consumer ombudsmen, regional agricultural and food-quality bodies).

While civil and criminal law provide for mechanisms aimed at resolving a particular issue (e.g. redressing damage or removal of a threat) and obtaining an individual remedy (compensation, reinstatement at work etc.), administrative measures are meant to protect interests of larger groups of citizens or all those affected by certain breaches of law (e.g. proceedings for pursuing practices that violate collective interests of consumers which are instigated by the Office for Competition and Consumer Protection). Consequently, these measures do not provide legal remedies for individuals, in the sense of individual reparation.

Nevertheless, investigative actions taken by public authorities and decisions adopted as a result (e.g. imposing sanctions) can prove very useful in the course of civil law proceedings.

In particular, public institutions, such the State Labour Inspectorate, the Office for Protection of Competition and Consumers, the State Environmental Inspectorate or the State Sanitary Inspectorate, may play an important role in evidence gathering. If, in the course of their controlling activities or complaint procedure, certain facts are established and confirmed with an official document (e.g. a record of inspection and post-inspection conclusions), it can be used as valid evidence in

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37. *Ibid.*, Article 7

38. For example: Judgment of District Court for Wrocław-Fabryczna of 30 June 2007 (File Ref. XII K 620/07). Case file analysis in this scope is very difficult since all these judgments have been made by District Courts and are not published. Data derived from Nita, Barbara, *Postępowanie karne przeciwko podmiotom zbiorowym*, Arche 2008.

court proceedings. This is, however, dependant on whether the court agrees to ask the administrative body for such data; otherwise the claimant will not have access to them, except from the information given in the public version of the administrative decision.

Although formally the value of such evidence is equal to other documents (i.e. counter-evidence is still admissible), concerned business entities tend to accept evidence coming from public authorities. In the case of disputes between an individual and a corporation, where individuals tend to encounter significant obstacles in proving their statements (see below), the impact of such documentary evidence can be crucial. This tendency was visible in all analysed cases.

## 2.2 Access to Legal Remedy: Procedural Aspects

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### 2.2.1 Legal Standing

Legal standing is defined as the capacity of entities participating in a court proceeding to undertake independent procedural actions such as filing claims, appealing court rulings, and filing all types of statements and requests.

Civil law allows a person that suffered detriment to his/her interests (whether proprietary or personal) to seek damages. It is also possible for the victim's relatives to seek redress for any consequential detriment suffered. Generally, the victim's relatives have legal standing to bring claims on the grounds of their own interests being violated (e.g. significant deterioration of their situation in life as a result of the death of a close relative, compensation for sufferings caused by the death of a close relative), but in some cases they may also enter into the rights of the victim (e.g. the claim for redress of material damage).<sup>39</sup>

Criminal law differentiates between two categories of entities: victims seeking compensation in relation to a prohibited act which directly inflicted damage on them, and those not directly affected by a prohibited act but acting for the victim (in particular a public prosecutor, the Ombudsman or a social organization acting in the capacity of a party). As a matter of law, the only active role a victim may take in the criminal proceedings is in the capacity of an auxiliary prosecutor.<sup>40</sup>

If, in the case of an offence that should be pursued *ex officio*, a prosecutor, after completing his investigation, decides not to bring an accusation to the court (e.g. on the grounds that there is insufficient evidence to support it or a harm caused by a criminal act is insignificant), it is still possible for a victim to bring a so-called subsidiary act of accusation.<sup>41</sup> However, it becomes possible only once all the

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39. Article 64 of the Code of Civil Procedure *et seq.*

40. Article 53 of the Code of Criminal Procedure *et seq.*

41. Article 306 of the Code of Criminal Procedure *et seq.*

procedural measures, including appeals against the public prosecutor’s decision not to bring the case, have been exhausted, and the court dealing with the appeal has agreed that the proceedings should be started. This generally translates into lengthy delays.

### **2.2.2 Access to Remedies for Foreign Citizens for Abuses Committed Abroad**

As regards access to Polish courts for foreign citizens, general rules determining jurisdiction apply, and no other criteria hinder their formal ability to bring the case against a Polish company. As explained in the section on jurisdiction, citizenship of the claimant is not among the factors that limit access to Polish courts.

In criminal matters, i.e. the cases of criminal acts committed by Polish nationals (e.g. company managers) abroad, Polish criminal law and the jurisdiction of Polish courts applies according to the principle of personal jurisdiction. In civil matters, which are far more likely to occur in the context of corporate liability, Polish courts will have jurisdiction only if the company has its registered office or main place of operations in Poland.<sup>42</sup> Moreover, as explained above, as a matter of law, one legal entity can only be held liable for its own actions and not those of a separate legal entity. If the corporation in question operates abroad through subsidiaries rather than its own branches, it may be difficult to bring lawsuits against the parent company in Poland. This would be an obvious barrier to justice if a local subsidiary is in fact a “shell” company (i.e. has no own assets) and there is no practical chance of obtaining fair compensation from it. This problem will be discussed further below.

The present research and consultation process found no instances of past lawsuits brought by foreign citizens against Polish companies operating abroad. Such lawsuits are unlikely to have occurred in abundance because: (i) the media would be expected to have reported such cases, which they have not, and/or the NGO community would have been aware, and they are not; (ii) there are very few Polish corporations operating abroad,<sup>43</sup> and, therefore, it is likely there are not many potential cases arising out of their operations; (iii) Poland does not have a reputation for being a “friendly jurisdiction” for lengthy and complex proceedings such as these. Thus, even if there were potential claims against Polish entities, it is likely that aggrieved individuals would choose to seek justice in their home jurisdiction.

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42. Article 1103 of the Code of Civil procedure.

43. Major corporations active abroad include: PZU (insurance industry) – Lithuania and Ukraine; PKO BP (banking industry) – Ukraine; Petrolinvest (gas and oil industry) – Kazakhstan; Bioton (pharmaceuticals, biotechnology) – Singapore; Maspex (food industry) – CEE region.

### 2.2.3 Public Interest Lawsuits

Polish law endows certain categories of entities with the right to initiate or participate in the proceedings if it is justified by the public (social) interest or the need to protect human rights. This Section will discuss the powers and potential roles of the Ombudsman, public prosecutor and social organisations, in this respect. Public prosecutors (including the Public Prosecutor General) and the Polish Ombudsman have a vast array of powers to initiate and participate in court proceedings (criminal, civil and administrative courts) and administrative proceedings.

### 2.2.4 The Ombudsman and Public Prosecutor

The Ombudsman<sup>44</sup> is entitled to demand that the proceedings in a given case be initiated and to intervene in pending cases whenever this is justified by the need to protect citizens' constitutional rights.<sup>45</sup> In particular, the Ombudsman can make a formal request to the Prosecutor General that a certain criminal case should be investigated. Nevertheless, in accordance with the division of powers principle, the Ombudsman cannot force the prosecution to investigate a case or bring the act of accusation to court. In practice, the Ombudsman tends to use his authority more often to make general statements or requests directed at other public bodies (e.g. the Parliament, the Office for the Protection of Consumers and Competition, the State Labour Inspectorate), which aim to change the law or practices, rather than intervene in individual cases. There have been a number of interventions concerning such issues as access to legal aid, court fees or length of the proceedings.<sup>46</sup>

Both the Prosecutor General and the Ombudsman have the power to file a cassation appeal (only on law grounds) against a final and non-appealable ruling inconsistent with legal provisions.

A public prosecutor can also play a very important role in civil proceedings. A prosecutor may request that a proceeding be initiated and the permission to participate in any pending proceeding if he believes that the need to protect law and order, citizens or the public interest so requires.<sup>47</sup> The decision to participate in a given case always depends on the prosecutor's independent assessment of whether it is necessary. This decision is not subject to appeal and verification;

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44. The Polish term for Ombudsman is *Rzecznik Praw Obywatelskich*, or, literally, "the Spokesman for Civil Rights."

45. Article 14 of the Act of 15 July 1987 on the Spokesman for Civil Rights, (Dz.U. z 2001 r. Nr 14, poz. 147 and 2007 r. Nr 25, poz. 162).

46. See: *Information about the Ombudsman's activity for 2008*, The Ombudsman's Office Publication Journal, 2009 Nr. 1.

47. Article 60 of the Code of Civil Procedure

therefore there are no legal mechanisms to force the prosecutor's involvement in a given case.

The analysis of cases and consultations with practitioners confirm that it is very unusual for a prosecutor to take part in a civil lawsuit (most of the judges consulted could recall only one or two interventions within a period of a few years). Exceptions to this rule occurred in two cases against Jeronimo Martins Distribution ("JMD"): (Łopacka and Wiktorzak case),<sup>48</sup> where public prosecutors actually joined in the proceedings.

### 2.2.5 Role of Social Organizations

Polish law provides for certain possibilities for social organizations (i.e. organizations whose statutory aim does not consist in carrying on business activity) to initiate and/or intervene in an ongoing case. In general, such intervention must be justified by the need to protect a legitimate interest or value under dispute, which coincides with statutory aims of the intervening organization.

The following possibilities are provided for with regard to civil proceedings:<sup>49</sup>

- Social organizations whose objective is to ensure equality and protection against discrimination may bring lawsuits on behalf of citizens on these matters;
- Social organizations whose objective is to ensure consumer and environmental protection or protection of industrial property rights may bring lawsuits on behalf of citizens on these matters;
- Social organizations whose objective is to provide help to victims of crimes may bring on behalf of victims lawsuits concerning compensation for damage that occurred as a result of a criminal act.

Social organizations can join the proceedings at any stage or submit *amicus curiae* to the court in matters related to their statutory objectives. Such intervention or initiation of the case requires, however, obtaining the consent of the person whose interests are to be protected.

Social organizations can also participate in **criminal proceedings**<sup>50</sup> if there is a need to protect a social interest or an important individual interest, which falls within the scope of the statutory aims of the organization (e.g. protection of human rights). A representative of a social organization admitted to the proceedings may participate in the hearings, express opinions and make written

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48. *Łopacka v. JMD* case file ref III APA 125/04; *Wiktorzak v. JMD* case file ref V P 31/04

49. Article 61 of the Code of Civil Procedure

50. Article 90 of the Code of Criminal Procedure *et seq.*



statements.<sup>51</sup> It is important to note that the participation can take place only during court proceeding, a social organisation cannot initiate penal proceedings.

## 2.3 Enforcement Stage

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### 2.3.1 Enforcement Procedure Within the Country

Enforcement proceedings can be initiated on the basis of an enforcement title that has been assigned in court, with an enforcement clause.<sup>52</sup>

A final and non-appealable judgment issued against a corporation (or any other entity) constitutes an enforcement title. An enforcement clause constitutes an official authorisation of the court to effect enforcement procedure against a specified entity and ultimately confirms its compliance with the law. Court settlements and arbitral awards also constitute enforcement titles.

### 2.3.2 Recognition and Performance of Court Judgments / Arbitral Awards

Poland is a party to many treaties that make execution of foreign judgments possible. The most important treaties are the Brussels Convention,<sup>53</sup> which binds all EU members, and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

In most civil cases, a judgment issued in one EU member state is recognized in other member states without the need to apply any special procedures. A court judgment enforceable in one state is also enforceable in other member states after been assigned an enforcement clause.

In criminal cases, the rules on cooperation between EU member states provide for mutual recognition of judgments; although, as a rule, it is not an automatic process, as in civil judgments.

In the case of judgments issued outside the European Union, it is necessary to carry out a procedure for recognition of the enforceability of the judgment. Judgments are subject to recognition or are declared enforceable on condition of reciprocity. Moreover, it is necessary to meet certain additional requirements. In particular, a judgment must be final and non-appealable (and be subject to enforcement if declared enforceable) in the state where it was issued. Another condition for enforcement is that the case was not subject, pursuant to Polish law or an international treaty, to the exclusive jurisdiction of Polish courts, nor to the

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51. Article 65 of the Code of Criminal Procedure

52. Article 776 of the Code of Civil Procedure *et seq.*

53. The Convention 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

jurisdiction of any state other than the one where the respective judgment was issued. Moreover, in the case of criminal judgments, it must be established that the accused was not deprived of the right of defence and the judgment itself is not inconsistent with fundamental rules of Polish law.

In the case of arbitral awards, whether Polish or foreign, their legal force is equal to that of judgments issued by common courts. On the same grounds, their enforcement requires the recognition procedure to be completed by a Polish court.

### 3. Legal and Procedural Obstacles

#### 3.1 Legal Barriers

##### 3.1.1 Limitations in the Direct Horizontal Application of the Human Rights Framework

Human rights are formally recognized as “commonly binding”<sup>54</sup> within the Polish legal system. It means, essentially, that there is no need for formal implementation of international standards into domestic legal order by means of a special legal act. Ratification by Poland of international human rights treaties makes them applicable and binding domestically. However, this notion is *not* the same as “directly binding” in horizontal relations. Theoretically, this is not excluded, i.e., if a norm is clear and precise and there is no lower rank legislation to rely on, it could be applied directly. However, in practice, fundamental standards contained in the Constitution or international treaties do not serve as a direct basis for claims (there is no jurisprudence based directly on their provisions, although there seems to be a big potential for changes in this respect). This is partly because they are considered too general to be a direct and unequivocal source of rights and obligations for individuals, or are drafted as “programmatic norms”, i.e. norms addressed to public bodies imposing on them further obligation to translate a general standard into more concrete regulations (this applies mainly to social and economic rights including environmental and consumer protection). It is also due to a lack of willingness on the part of some judges to take up this task and a lack of developed jurisprudence to follow. Overall, it is the lower-ranking legislation – not the Constitution or international treaties – that serves as a legal basis for potential claims if a violation occurs. As discussed above, the Constitution is predominantly used only as an indirect source of law, i.e. as a source of interpretative guidelines and as grounds for challenging lower-ranking provisions that are incompatible with constitutional principles (constitutional appeal procedure).

Moreover, even if a certain constitutional right could be applied directly in vertical relations (e.g. right to non-discrimination), its direct application in horizontal relations will normally be refused. For example, with regard to the principle of equality and non-discrimination, it is considered that “the equal treatment postulate, if understood literally as it is set out in the Constitution or international conventions, would in fact lead to undermining the function of private law.”<sup>55</sup> By this, Judge Safjan meant that the direct application of the non-discrimination principle to horizontal relationships (e.g. business to business; individual to business) would contradict the principle of contractual freedom, which constitutes a

54. M. Safjan, *Efekt horyzontalny praw podstawowych w prawie prywatnym: autonomia woli a zasada równego traktowania*, *Kwartalnik Prawa Prywatnego*, Volume 2, 2009, p. 341

55. *Ibid.*

fundamental tenet of private law. At the same time, it is recognised that a certain minimum standard of human rights protection may affect horizontal relations directly. Hence, offering services to the population on a discriminatory basis (e.g. based on criteria such as gender, sexual orientation or race) would be deemed inadmissible. Other examples are freedom of membership in trade unions,<sup>56</sup> or the right to privacy (in particular data protection<sup>57</sup>), which are deemed to bind private entities directly.

However, in most cases there is no need to refer to constitutional or international norms since existing lower-ranking legislation serves the same protective purpose. Direct application of the Constitution or international law for individual claims may only arise in exceptional cases, where there is a gap in national legislation or a conflict between norms derived from lower-ranking legislation and directly applicable<sup>58</sup> constitutional or international law provisions. Still, common courts do not have general competence to adjudicate on the basis of an international treaty or the Constitution and ignore lower-ranking legislation. They remain obliged, however, to interpret the statutes in accordance with the constitution in a way that does not render human rights protection illusory or ineffective. If the wording of the law does not allow for such interpretation they have to refer the matter to the Constitutional Tribunal, which is the only court competent to issue a binding ruling on statutory inconsistency with the Constitution.<sup>59</sup>

### **3.1.2 Obstacles in Establishing Legal Liability of Corporations and Its High-Rank Officers – “Piercing the Veil”<sup>60</sup>**

#### **3.1.2.1 Liability of Parent Companies**

As a general rule, a corporate entity cannot be legally liable for acts of another legally different corporate entity. Some exceptions to this rule may arise in situations of complicity, in the case of holding structures, where operations of a local subsidiary are directed by their parent company, or where there is derivative responsibility. There are also certain provisions that make actions of subsidiaries equal with those of dominant entities (e.g. a business concentration effected by a subsidiary is considered a concentration effected by its dominant company<sup>61</sup>).

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56. Article 59 of the Constitution

57. Article 47 and 51 of the Constitution

58. A given norm can be deemed “directly applicable” if it is sufficiently precise and grants particular rights or imposes particular obligations.

59. Article 2 The Act of 1 August 1997 on the Constitutional Tribunal (Official Journal No 102 item 643)

60. As is most commonly understood in corporate law, “piercing the corporate veil” signifies holding a shareholder or director of a company liable for the debts, liabilities or any unlawful activity of the company rather than holding the entire company liable. It can also relate to the attribution of the (unlawful) actions of a subsidiary to the parent company.

61. Article 15 of the Act on Competition and Consumer Protection

Potential claims against a parent company (i.e. direct participation or derivative responsibility) may also be difficult to prove. We are not aware of any successful claims being made on these grounds before Polish courts.

### **3.1.2.2 No Grounds for Liability of Corporations for Wrongful Acts Committed By Their Service-Suppliers**

The principle that the parent company bears no responsibility for the operations of its subsidiaries can pose a considerable barrier to justice in cases of complex corporate structures and supply chains. It is becoming common practice that corporations use small companies to delegate part of their regular tasks as well as the liability that may be associated with them. Such companies are formally independent suppliers but in practice operate as subsidiaries of the corporations. This supply-chain structure is commonly used to employ and manage people further down the corporate chain to circumvent labour and immigration law provisions. In the event of abuses, the effective parent company is free of any liability. There have been two main cases in Poland, reported by the media, which provide examples of these practices.

The first case concerns the alleged systematic exploitation of security guards by a security agency called Ekotrade, which acts as a security service provider for all major shopping centres and banks across Poland.<sup>62</sup> Claims brought against Ekotrade include blocking trade union activity, forced overtime (treated as systematic practice), harassment, and paying remuneration below national minimum wage. In the case of *Stawomir M. v. Ekotrade* the court found that the company dismissed the claimant from work in order to hinder trade union activity in its branch in Warsaw.<sup>63</sup> Notably, no claims or allegations of abuse were made against any of the corporations that benefited from Ekotrade's services, even though their management was arguably aware of the practices applied by the service supplier. Such legal actions would not be possible on the grounds that Ekotrade operated as an independent corporate entity (providing services on its own account), while the other corporations acted as service commissioners only.

The second case concerns illegal workers from Uzbekistan, who were allegedly employed without any contracts and forced to work in conditions of slavery in the construction industry. Their work was arranged by a small company based in south Poland, while the actual beneficiary of their services was the major international developer, J.W. Construction. The case became known when two Uzbeks were caught by the police for stealing a car from the construction site. As this is a recent

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62. Maciej Bernatt, *Działalność związkowa w prywatnych firmach*, Rzeczpospolita, 24 April 2009; Dorota Abramowicz, *Wstrząsający raport NSZZ "Solidarność" o wyzysku pracowników - ochroniarze potrzebują ochrony*, NaszeMiasto 27 October 2007 <http://gdansk.naszemiasto.pl/wydarzenia/783634.html>

63. *Stawomir M. v. Ekotrade*, Regional Court Judgment of 22 December 2008 (File Ref. VII P 5238/06).

case, most of the information comes from media reports.<sup>64</sup> The prosecution has started a criminal investigation against the owner of the company, who arranged the employment of illegal workers. No legal steps against J.W. Construction have been taken or considered.

### 3.1.2.3 Liability of High-Ranking Officers

Formally, it is legally possible to bring civil or criminal suits against corporate high-ranking officers or shareholders. Company law provides for the personal liability of shareholders and company managers in certain circumstances. In particular, company shareholders (as well as a public prosecutor) may sue company managers for acting to the detriment of the company as a legal entity. There are also various possibilities of piercing the corporate veil in the course of insolvency proceedings. However, these legal actions seem to be available in the context of **commercial claims** only (i.e. in cases of insolvency and establishing personal liability for debts).

In doctrine and jurisprudence,<sup>65</sup> the effects of a natural person's actions can be attributed to a legal entity only if the person acts within his/her capacity as the company's legal representative (i.e. expressing the will or knowledge of a legal entity with all the consequences thereof). Therefore, if an action taken by a company's legal representative exceeds this capacity or involves his/her personal input, he/she may not deny responsibility for their own actions.<sup>66</sup> Hence it is not enough to refer in general terms to acting as a member of a legal person's governing body in order to exclude the liability of, for example, a management board member.

In theory, the provisions discussed in section 1 above could constitute grounds for direct civil liability of high-rank officers, such as management board members, if their negligence or decision has led to another person (company employee) to commit a wrongful act.<sup>67</sup> This concept could be applied in cases where it is clear that the management board of the company must have been at least aware of human rights abuses occurring in the company or a direct risk of such abuses. Recently reported abuses involving the supermarket chain belonging to JMD<sup>68</sup> or in the Indesit factory<sup>69</sup> provide such examples. According to testimony given by

64. Piotr Machajski, *Budowlańcy z Uzbekistanu dostawali 1 zł dniówki?*, Gazeta Wyborcza (31.07.2009) [http://miasta.gazeta.pl/warszawa/1,34889,6882949,Budowlancy\\_z\\_Uzbekistanu\\_dostawali\\_1\\_zl\\_dniowki\\_.html](http://miasta.gazeta.pl/warszawa/1,34889,6882949,Budowlancy_z_Uzbekistanu_dostawali_1_zl_dniowki_.html)

65. *Ibid.*, p. 320.

66. Supreme Court Judgment of 21 January 2005, I CK 316/04)

67. Article 422 of the Civil Code

68. Criminal investigation in this case is still pending. There are also civil cases related to the same allegations. See for example, *Tulska, Bażyński v. JMD* IV case file ref P 25/08; *Łopacka v. JMD* case file ref III APA 125/04; *Wiktorszak v. JMD* case file ref V P 31/04; *Glińska v. JMD* case file ref C 110/08.

69. Criminal investigation in this case is still pending and the act of accusation has not been brought to the court (therefore there is no case file reference number).

the witnesses (and as revealed by the media),<sup>70</sup> the main reason for taking large safety risks was to speed up production in order to gain more profit. On these grounds, there is a risk that the management not only accepted but also enforced such policy throughout the company.

However, such inference will not be sufficient to support the claim under Article 422 Civil Code. What would have to be showed is that a member of a management board or other high-rank officer was actually “urging” or “abetting” a prohibited act. In the next step, a direct causal link between such act and a benefit obtained by the board member would have to be established. Evidence of this type may be hard to provide given the way big corporate entities operate in terms of dividing and delegating internal responsibility. Finally, since this legal provision creates an exception from the rule (the rule being that everyone shall be liable for their own acts), possibilities of a broad interpretation of its terms are limited. In particular, according to some doctrine,<sup>71</sup> it cannot be interpreted/applied in a way that would undermine general rules on liability stemming from corporate law (e.g. the rule that company officers are not liable for acts committed by a company’s employees). All successful civil claims discussed in the present study (in particular in the series of cases against JMD) have been made against the companies,<sup>72</sup> as legal entities, not against the managers/company officers.

### **3.1.3 Ineffectiveness of Legal Framework for Quasi-Criminal Liability of Corporations**

Provisions for quasi-criminal liability of corporations were introduced into the Polish legal system in 2002.<sup>73</sup> There seems to be an emerging consensus within the doctrine and legal community that this solution has so far proved ineffective in bringing companies, as legal entities, before criminal courts. This is because of the particular way in which the requirements for the companies’ liability have been formulated.

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70. See Kozarewska, Małgorzata. W pracy jak na wojnie. *Gazeta Wyborcza* Łódź 1 Jun. 2007; Leman, Helena. Ofiary Biedronki. *Przegląd* 10 May 2006; Śmierć w Indesicie. Inspektor BHP nie pamięta ważnych faktów. *Gazeta Wyborcza* Łódź 1 Nov. 2007; Kobiątka, Marcin. Sąd: pracownica straciła zdrowie w Biedronce. *Gazeta Wyborcza* Rzeszów 21 Jun. 2006.

71. See *Prawo cywilne - część ogólna. System Prawa Prywatnego*, edited by prof. dr hab. Marek Safjan, C.H.Beck, Warszawa 2007, p. 256 *et seq.*

72. Claims against companies were based on the violation of labour law or general civil law provisions (liability for damage caused by the company’s operations). Grounds for company’s liability have been discussed in the text.

73. The Act of 28 October 2002 on the liability of collective entities for acts prohibited on pain of penalty (Official Journal No 197 item 1661), The Act came into force in 2003.

Four major problems with the Act providing for quasi-criminal liability have been highlighted:<sup>74</sup>

- company liability has secondary and auxiliary character, i.e. the fault of a person who acted in the company's name/on the company's behalf is a prerequisite for establishing liability of the company (the concept of "double-fault");
- the company can be held liable only on the condition that there is a final and non-appealable judgment establishing the responsibility of the person acting on behalf of the company. This means that the fault of a particular individual must be proven in the first place and the whole criminal proceedings completed;
- the company cannot be held liable at all for prohibited acts committed by persons serving key managerial positions; therefore, its liability would be limited to acts committed by employees and sub-contractors. This limitation results from the way legal provisions have been designed: while this act provides for personal liability of managing officers (as individuals), it does not provide for a notion of "organisational fault" on the part of the company, which could be the grounds for its responsibility for actions taken by high-ranking company officers. The only notion provided for in this act is the company's responsibility for negligence in choosing or supervising ("culpa in eligendo" and "culpa in custodiendo"), which is applicable to lower-rank officers and employees only<sup>75</sup> and
- the scope of this liability is limited to enumerated types of offences. For example, it does not include offences against work safety or other criminal breaches of labour law.

The above limitations diminish the value of the new legal provisions in practice. Until November 2008, there have been 60 charges brought by the prosecution on the basis of this law, 22 of which were decided on the merits (the rest have been dismissed), and 10 of which ended with judgments against the company. Significantly, the vast majority of these cases concerned fiscal offences and liability for criminal acts committed against financial interests of company creditors<sup>76</sup> – not for crimes or offences against the environment or the collective interests of consumers.

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74. Namysłowska-Gabrysiak, Barbara, *Ustawa o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary komentarz*, Zakamycze 2004; Nita, Barbara, *Postępowanie karne przeciwko podmiotom zbiorowym*, Arche 2008.

75. Supreme Court ruling of 25 May 2009 (IV KK 427/08)

76. Data derived from Nita, Barbara, *Postępowanie karne przeciwko podmiotom zbiorowym*, Arche 2008.



### 3.1.4 Time Limitation as Potential Barrier to Justice

#### 3.1.4.1 Civil Law

A situation of dependency or subordination between the victim and the alleged responsible party can be a serious obstacle for the victim's ability to resort to justice before the claim becomes time-barred. To avoid this situation, civil law provides for the suspension of the application of the Statute on time limitation if a person entitled to bring a claim is at least potentially dependent on the obliged party.<sup>77</sup> For example, time-limit periods are suspended for claims of children against their parents, claims of persons without full legal capacity against their legal representatives, and claims of married persons against each other. However, there is no analogous provision made with regard to employees' claims, even though the employee-employer relationship may well involve various forms of dependency.

Practice shows that employees often do not seek justice for fear of losing their jobs. Whilst under employment the employee is afraid of bringing claims against their employer. This is especially the case where there is a difficult job market, where employers dictate conditions of employment. Lack of economic stability is accompanied by employees' low awareness and lack of access to professional legal advice. A short time-bar on claims for payment, when combined with the lack of knowledge of the law, and a fear of losing their livelihood, may create a serious obstacle to pursuing justice.<sup>78</sup>

For instance, in the series of civil cases against JMD<sup>79</sup> most of the lawsuits for damages concerned payment for overtime work that was not disclosed by the company in the register of working hours. Many of these facts occurred more than three years before the case was filed in court and were, therefore, already time-barred. According to the findings made during the proceedings, the employees had not brought their claims earlier because of fear of losing their jobs and the difficult situation prevailing in the job market at the time of the dispute (2002 – 2005).

#### 3.1.4.2 Criminal Law

With regard to criminal acts pursued *ex officio*, the public prosecutor has sole discretion to bring an act of accusation before the lapse of the time-limit period. While in the case of crimes the prescription periods are long, in the case of offences they can be as short as 5 years. This means that lengthy investigations

77. Article 121 of the Civil Code

78. *Rozpoczęcie biegu przedawnienia roszczenia pracowniczego*. (Commentary to the Supreme Court Judgment of 3 February 2009 (I PK 156/08)), *Monitor Prawa Pracy* (6), 2009

79. *Tulska, Bażyński v. JMD* IV case file ref P 25/08; *Łopacka v. JMD* case file ref III APA 125/04; *Wiktorzak v. JMD* case file ref V P 31/04; *Glińska v. JMD* case file ref C 110/08 and case file ref I II Kp 341/08.

(i.e. before formal preparatory proceedings start, which results in automatic extension of the prescription period) can lead to the impunity of the perpetrator. It is not rare that the prosecution takes a couple of years to complete an investigation and formulate an act of accusation.

In the case of labour-related offences, the preparatory stage takes even longer since there are, as a matter of law, two separate public bodies involved – each of them carrying out their own investigation (from various perspectives). The State Labour Inspectorate, whose role is to monitor employment law violations across the country, is often the first “point of contact” for the victim. They have legal tools and staff necessary to carry out the first investigation and determine the character of alleged violations. If the results of such investigation show that the violation in question can be attributed to a certain individual and has criminal character (i.e. constitutes an offence or a crime pursued *ex officio*), the case will be reported to the public prosecutor’s office.<sup>80</sup> Although there is no legal requirement that the prosecutor must wait for the State Labour Inspectorate to complete their investigation, in practice this is normally the case. This is because the latter is better equipped (in terms of legal powers, knowledge, experience) to determine the character of the violation in question (i.e. whether it is civil or criminal case).

The State Labour Inspectorate’s role ends with this notification of an alleged crime/offence. Although such notification is normally supported with the evidence gathered by the Inspectorate, it is solely for the prosecution to decide whether to further the case and whether to rely on the evidence gathered by the Inspectorate or not. It is within the Prosecution’s discretion to conduct its own independent investigation.

The administrative and criminal proceedings against JMD<sup>81</sup> provide a good example of this process. In these cases, the State Labour Inspectorate carried out a complex investigation all over the country following allegations of systemic labour law violations in the supermarket chain. More than a year passed before the case was even referred to the prosecution.<sup>82</sup> Even though an extensive report was drafted and delivered to the prosecution, a new investigation was started from scratch. After more than two years, the proceedings in this case are still pending. There is a considerable risk that at least some of the offences will be time-barred before the indictment is lodged in the court.

A major problem with this process is that a victim has a very limited influence on the pace and direction of the steps taken by the prosecution, and there is no

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80. In contrast, if a labour inspector finds out that a violation constitutes a labour law offence only, the case against the company will be brought to the labour court.

81. Criminal proceedings – now carried out by the District Prosecution Office in Gliwice – are pending. The act of accusation has not been brought to the court (thus no case file reference).

82. Borys-Szopa, Bożena. *Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy w 2006 roku*. Warszawa 2007.

judicial supervision over this preparatory stage of proceedings. This issue will be discussed further below.

### 3.1.4.3 Adjudicating on a Time-Barred Claim: Judicial Discretion

Jurisprudence<sup>83</sup> and legal doctrine allow for the possibility of adjudicating a time-barred claim if rejecting such a claim would “violate the principles of social co-existence.”<sup>84</sup> In addition, the Labour Code provides that a judge can reject the time-bar argument raised by the employer (to block his employee’s claims) if the judge considers it to be an abuse of law.<sup>85</sup> This tends to occur mostly in employee claims for compensation (e.g. following an accident at work treated as a tort under civil law or particularly blatant cases of discrimination, molestation or harassment). However, the criteria used to assess whether a time-bar argument in a given case violates the principles of social co-existence or constitutes an abuse of law are vague since they need to be interpreted from these general principles. By definition, the application of so-called “general clauses”<sup>86</sup> depends on their interpretation adopted by the adjudicating court under particular circumstances of the case.

For instance, in the whole series of cases against JMD, this reasoning was not applied. Although well justified by the evidence, some of those claims were dismissed because of the lapse of the three-year time-bar; the courts did not find its application to be an abuse of the law or an infringement of the principles of social co-existence.<sup>87</sup>

## 3.2 Procedural and Practical Obstacles

This Section will identify the most important barriers with respect to access to legal protection measures, caused largely by structural problems in the organisation and functioning of the justice system. In the case of disputes between individuals and corporations these potential barriers are very likely to materialise, owing to such factors as the inherent disparity in financial funds, an information deficit on the part of individuals, their relatively poor representation, and limited access to professional legal aid.

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83. See: Supreme Court Judgment of 29 March 2007 (II PK 224/06); Supreme Court Judgment of 22 June 2005 (I PK 288/04); Supreme Court Judgment of 8 May 2008 (I PK 277/07); Supreme Court Judgment of 20 October 2004 (III UK 111/04).

84. See: Supreme Court Judgment of 17 September 1997 r. (I PKN 273/97); Supreme Court Judgment of 29 June 2005 (I PK 261/2004); Supreme Court Judgment of 19 March 2009 (IV CSK 492/2008)

85. Article 8 of the Labour Code

86. See explanation in section “Human rights protection in domestic legal order” above.

87. *Jankowska v. JMD* case file ref. IV P 27/04 (District Court in Elbląg) and case file ref. III APa 32/08 (Court of Appeal in Gdańsk) *Tulska v. JMD* case file ref. IV P 7/05 (District Court in Olsztyn), case file ref. III APa 31/06 (Court of Appeal in Białystok), case file ref. I PK 157/07 (Supreme Court - cassation) and case file ref. IV P 25/08 (District Court in Olsztyn – repeated proceedings).

### 3.2.1 Key Challenges to Equality of Arms Principle and Due Process Guarantees

#### 3.2.1.1 Adversarial Trial and Active Role of Judge: Challenges with Reconciling Legal Principles

##### Overview of Legal Principles

One of the foundations of civil proceedings is a principle of the adversarial trial, which means that parties, not a judge, host the proceeding and are responsible for the delivery of arguments, evidence, statements, etc. The principle of an adversarial trial system in civil procedure means that the court has limited possibilities of hearing evidence *ex officio* without the risk of allegations of bias or partiality in favour of one of the parties.

Historically, there was a substantial difference in this respect between procedural rules applicable to employment-related cases and “general” civil cases. In 2005 the Code of Civil Procedure was amended in a way that strengthened the adversarial trial system. The courts’ obligation to act *ex officio* was eliminated in all types of cases. This move was criticized precisely on the grounds that employment disputes tend to involve significant inequality in party resources.

Nevertheless, there seems to be a broad consensus that the adversarial trial model works best in all cases, as long as there are adequate legal judicial powers to support the position of a weaker party. Some of these mechanisms provided by the law will be discussed below.

The role of a judge in an adversarial trial is limited, but his/her active engagement is not entirely excluded. The most important exception is that a judge may allow evidence *ex officio* when it seems essential for explaining the circumstances of the case. The Supreme Court jurisprudence<sup>88</sup> confirms that a judge must not reject a claim on the grounds that it was not supported with adequate evidence if such evidence can be obtained by the court acting *ex officio* (e.g. by requesting a document or a court expert’s opinion). A judgment made without gathering such essential evidence can be repealed on the grounds that “the essence of the matter has not been explained.”<sup>89</sup> This principle does have an impact on judges’ attitude to gathering evidence: judges often request documentary evidence or a court expert’s opinion as a matter of principle, even if this is not entirely justified by the circumstances and even at the risk of delaying the proceedings.

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88. Supreme Court Judgment of 6 May 2009 (II CSK 668/o8); Supreme Court Judgment of 8 April 2009 (V CSK 405/o8); Supreme Court Judgment of 19 March 2009 (IV CSK 492/o8); Supreme Court Judgment of 29 January 2009 (V CSK 257/o8); Supreme Court Judgment of 25 November 2008 (II CSK 335/o8).

89. Article 386 of the Code of Civil Procedure

## Main Challenges

One of the challenges judges face is to reconcile the adversarial trial with the need to provide more advice or information to the “weaker” party if he/she is not represented by a professional attorney. The Code of Civil Procedure does provide for such a possibility; according to Article 5 a judge can advise a non-represented party on procedural matters if he/she considers it to be justified and necessary. This provision can be an important instrument in the hands of a prudent judge. For instance, using this provision as a legal basis, a judge can explain to a non-represented party what evidence is necessary to support the claim, what submissions should or could be made, what the consequences of certain acts or omissions are in the course of the proceedings, etc. However, law practitioners confirm that judges, as a matter of rule, refrain from using this possibility in fear of being accused of lack of impartiality.

A court’s actions *ex officio* may carry the risk of upsetting the balance between parties. They have the potential to create risks of arbitrary procedural decisions, and violations of the rule of equal treatment by public authorities<sup>90</sup> and fair trial guarantees.<sup>91</sup> The challenge of balancing competing values in this respect has also been acknowledged in the Supreme Court jurisprudence.<sup>92</sup> In practice, labour courts tend to take actions *ex officio* more often than “ordinary” civil courts because they were used to doing so under procedural provisions applicable before the reform of the civil procedure in 2005.

Proper and prudent use of the possibility to advise a weaker party on procedural steps or admit evidence *ex officio*<sup>93</sup> could have a significant impact on the realisation of the equality of arms principle. Judges’ reluctance to use these instruments are not based on law but may stem from general risk-aversion and lack of confidence, in particular observed among district court judges. This aversion to acting *ex officio* is reinforced by both legal education and the relatively weak position of judges in the justice system. Finally, another factor might be that the jurisprudence itself – in particular from the Supreme Court – does not give clear guidelines on how to strike the right balance between impartiality and the need to intervene in the process of gathering evidence in the interests of justice. An important Supreme Court judgment on this issue states that:

*“The possibility of allowing ex officio a piece of evidence not submitted by the party constitutes a power of the court that aims at delivering justice [...] unless it leads to the violation of the court’s impartiality, in particular*

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90. Article 32 of the Constitution

91. Article 45 of the Constitution

92. See for example, Supreme Court Judgment of 22 March 2007 (III CSK 375/2006)

93. Article 232 of the Code of Civil Procedure

*unless it constitutes an activity taken in favour of one party's interest and not the interest of justice as such.*"<sup>94</sup>

This reasoning confirms that it is for the judge adjudicating an individual case to create the correct balance between impartiality and the need to protect the interests of justice.

### **"Equalising Mechanisms" Provided by the Law: Practical Concerns**

Generally, proceedings involving a professional entity and a private individual are less formalised and less restrictive. For instance, there is no requirement to gather all evidence supporting the claim at the very outset of the proceedings (which constitutes an important limitation in commercial cases). In fact, there is no legal requirement to support the first brief with enough evidence to justify the claim. At this stage the court will assess only its compliance with formal requirements (e.g. whether the choice of court is correct, whether the other party has been identified and court fees paid).<sup>95</sup> If all formal procedural requirements are fulfilled, it is for the court to send a copy of the brief to the other party and request a response to the allegations. If the other party disputes the claim, the court will summon the first hearing. At this stage, after having heard both parties, the court usually requests that each party provide evidence to support either the claim or the defence within a prescribed time, generally 14 days.<sup>96</sup>

Moreover, a party not represented by a professional attorney enjoys certain benefits. For instance, if one party is not represented by a professional attorney and the claim contains formal mistakes, the judge will only notify the need to correct the brief within a specified time, instead of rejecting it on formal grounds. There is also a range of "privileges" provided for a "weaker" party in other kind of proceedings, such as employment-related cases.<sup>97</sup> An employee who is not represented by a professional attorney is allowed to bring his/her claim to the court orally in contrast to the standard procedure, which requires all submissions to be in writing. Also, standard limitations with regard to the admissibility of evidence from witness testimony and from examination of the parties do not apply in this type of proceedings. Finally, in some situations a judge is even required to act *ex officio* to rectify procedural mistakes made by a "weaker" party in the proceedings. For example, if an employee brings a claim to the wrong court (e.g. by choosing a wrong court district), the court – instead of rejecting the claim because of inadmissibility – will hand the case over to the correct court or other authority.

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94. Supreme Court Judgment of 11 December 2006 (I PK 165/2006).

95. Article 187 of the Code of Civil Procedure *et seq.*

96. Article 267 of the Code of Civil Procedure *et seq.*

97. Article 459 of the Code of Civil Procedure *et seq.*

While the law does provide for important exceptions from the adversarial trial procedure on the grounds that the “weaker” party should be protected, the scope of these exceptions and their practical use remains problematic. There still are many favourable rules provided for in employment-related disputes, but this is no longer the case in “general” civil law claims for compensation when an individual brings a claim against a professional entity. Moreover, all disputes related to the protection of the environment are deemed to be “commercial matters,”<sup>98</sup> which involve severe procedural limitations (such as statutory preclusion on all evidence that was not quoted in the first submission). This solution constitutes a significant barrier to pursuing justice for victims of environmental damage caused by corporate entities.<sup>99</sup>

### **3.2.1.2 Challenges to Impartiality and Independence of Judges and Prosecutors**

#### **(a) Judges**

There are constitutional safeguards in place in order to guarantee judges’ impartiality and allegations of bias are very rare. There is a strict obligation imposed on a judge to disqualify himself if there are any doubts as to his impartiality in the case. The failure to do so constitutes one of the most serious disciplinary torts. According to the Act on the regime of common courts, a judge’s failure to disqualify himself if there were any doubts as to his impartiality in the case gives grounds to instigate disciplinary proceedings against him.<sup>100</sup> Also, the mechanism for requesting a change in court composition by the parties on the grounds of “a threat to impartiality” works well and even tends to be abused to obstruct the proceedings.

Still, there have been allegations of corruption and lack of impartiality reported by the media or civil society organisations, and widespread perceptions of lack of impartiality can be a worrying sign of a real problem. According to the survey carried out at the request of the Ministry of Justice this year, more than 40% of those polled suspect corruption in the justice system and more than 50% believe that judges are not impartial.<sup>101</sup>

One of the main factors seen as affecting impartiality is the existence of tight social and professional bonds within the so-called legal or business establishment, in particular in smaller cities. Since there is no requirement for judges to move to a different city after serving their office for a certain period of time (such

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98. Article 479 of the Code of Civil Procedure

99. Roszczenia z zakresu szkód związanych z ochroną środowiska. Zasady prawa cywilnego. Prawo i Środowisko 2 (2008).

100. Article 107 of the Act of 27 July 2001 on the regime of common courts *et seq.* (Official Journal No 98 item 1070).

101. Zawadka Grażyna. *Kiepskie Sądy i Prokuratury*. Rzeczpospolita 23 Mar. 2009.

requirement existed in the past) there are many opportunities for such bonds to develop allowing for trading influences and the exertion of social pressure on judges. Moreover, corporations tend to be represented by major law firms, while partners in such firms are often former judges, e.g. of Regional Courts or Appeal Courts, professors, and influential persons in legal circles.

### **(b) Prosecutors**

Similar issues arise in relation to the independence of public prosecutors. However, in their case, the problem may be aggravated by the existence of vertical hierarchy in the system. This relationship of professional dependence creates a threat of political and other pressures being exerted on prosecutors working “in the field” by appeal prosecutors or members of the National Prosecution Office. The political dependence of Polish prosecutors appointed by the Minister of Justice (pol. *Prokuratura Krajowa*) has been discussed widely, including by the International Bar Association and the Parliamentary Assembly of the Council of Europe.<sup>102</sup>

There have been allegations of businesses exerting influence on the prosecution, but it is difficult to find reliable evidence to support them. Such allegations have been made with regard to criminal proceedings against JMD. In this case the Minister of Justice (the Prosecutor General) decided to transfer the investigation<sup>103</sup> from Poznań to Gliwice because of the reported irregularities and negligence of the prosecution in Poznań.<sup>104</sup>

A more serious problem is the perceived lack of professionalism of the prosecutors and the generally poor organisational structure of the prosecutor offices in Poland.

#### **3.2.1.3 Fear of Retaliation**

While it would be an exaggeration to claim that fear of retaliation constitutes a systemic problem in Polish justice system, it must be admitted that in the case of disputes between individuals and corporations this factor does play a role. Retaliation may take various forms, from job loss, to further victimization during the proceedings, to counter lawsuits.

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102. An International Bar Association Human Rights Institute / Council of Bars & Law Societies of Europe, *Justice under Siege: a report on the rule of law in Poland*, November 2007, p. 76 *et seq.* Committee on Legal Affairs and Human Rights, *Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states* (Report for the Parliamentary Assembly of the Council of Europe) June 2009 ([assembly.coe.int/CommitteeDocs/.../20090623\\_abusesJUR\\_E.pdf](http://assembly.coe.int/CommitteeDocs/.../20090623_abusesJUR_E.pdf)) Compare also: Questionnaire prepared for the Conference of Prosecutors General of Europe (4th session) organized by the Council of Europe in 2003 ([www.coe.int/t/dghl/.../CPGE\\_2003\\_06\\_RepliesQuest\\_bil.pdf](http://www.coe.int/t/dghl/.../CPGE_2003_06_RepliesQuest_bil.pdf)).

103. This is one of the key competences of the Prosecutor General, illustrating hierarchical structure of the prosecution in Poland.

104. Rewiński, R. *Prokurator krajowy zabrał się za Biedronki*. *Gazeta Wyborcza* 5 Jan. 2006.



### **(a) Risk of Further Victimization in the Process**

Insufficient protection of witnesses may lead to further victimisation in the proceedings, in particular in the course of cross-examination. It is a common defence strategy during proceedings to reveal details of the private lives of witnesses in order to question their credibility or to discourage them from giving testimony. If the case is controversial, it is very likely that sensitive information brought by the defence will leak to the media. Being aware of this risk and the insufficiency of adequate legal protection available, victims or other witnesses may refrain from seeking justice before the court.

For example, in the *Wiktorzak v. JMD* case,<sup>105</sup> protection of the claimant against the exposure of details of the case was at issue. The case concerned very personal matters from Katarzyna Wiktorzak's private life, and thus the proceedings were held in camera. Nevertheless, some information from the proceedings was published in the newspapers allegedly on JMD S.A.'s initiative.<sup>106</sup> According to the claimant and her lawyers,<sup>107</sup> such conduct was humiliating and was probably a deliberate action aimed at discouraging her from pursuing her rights.

### **(b) Lawsuits Against the Claimant or Witness as a Form of Pressure**

A specific way of exerting pressure in the proceedings consists in bringing lawsuits against the claimant, legal representative, witnesses or social organisation acting in the case. An effective use of this instrument requires access to substantial legal and financial resources consistent with corporations' stronger economic position. This strategy is very effective and difficult to counter with limited access to resources (knowledge, legal aid, funds).

Companies can threaten the claimant by claiming very high compensation for alleged damage caused to the company (e.g. damage to its good faith, slander or breach of confidence). Even if the claim may seem completely unjustified, the threat of being sued by a powerful entity is real. This can occur when the proceedings have already started. Having vast financial resources and legal expertise, it is possible for the company to prepare and sustain a baseless lawsuit (supported with intricate legal arguments and a vast amount of evidence) that clears initial procedural hurdles.

A model example of this type of lawsuit is the one filed by Lionbridge Poland against its former employee Jakub Gawlikowski.<sup>108</sup> Gawlikowski was about to sue the company for the breach of employees' right to form a trade union, but was

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105. *Wiktorzak v. JMD* case file ref V P 31/04 (District Court proceedings, pending from February 2005).

106. See Leman, Helena. *Ofiary Biedronki. Przegląd* 10 May 2006; Kobińska, Marcin. *Sąd: pracownica straciła zdrowie w Biedronce. Gazeta Wyborcza Rzeszów* 21 Jun. 2006.

107. Lech Obara's law firm was consulted in the consultation process.

108. Case VII P 333/08 (District Court for Warsaw, ended with settlement).

fired after the management discovered his efforts. Lionbridge brought a lawsuit against Gawlikowski on the grounds that he disclosed company secrets. The case was abandoned as soon as the company and the former employee reached the settlement (conditions of the settlement were kept secret).

Another example can be found in the case *Łopacka v. JMD*,<sup>109</sup> where the company attempted to discredit the claimant by filing a notification that she had committed an offence by falsifying the records of hours worked. While the prosecution did not uphold these allegations, the media reported them, undermining Łopacka's credibility. It is important to note that her case was the first one brought against JMD and the company was aware that losing it would open the floodgates to many more. Their concerns were well-grounded: 130 proceedings have been carried out against JMD.

Suits may be filed against witnesses, social organisations and legal representatives in order to undermine their credibility in the eyes of the public or the court. Most often they take the form of civil law claims relating to the protection of personal interests of the company, which have allegedly been slandered. These types of claims have been labelled Strategic Lawsuit Against Public Participation (SLAPP),<sup>110</sup> as they aim not to win the proceedings, but to bully or discourage people from participating in the primary lawsuit against the company.

JMD reportedly adopted this strategy against the key legal advisor to the victims, Lech Obara, and the social organisation that acted on behalf of the victims. JMD sued them for the infringement of the company's personal interests (personal goods), claiming statements made in the media on irregularities reported by the victims shed bad light on the company. The court dismissed these claims.<sup>111</sup>

Another example of this strategy was the case of ING Nationale Nederlanden against the Association of Persons Wronged by ING Nationale Nederlanden.<sup>112</sup> The lawsuit brought by ING was aimed at silencing the public debate concerning the way in which the existing and former ING Nationale Nederlanden agents were treated. The corporation claimed the infringement of their legitimate interests, in particular good faith, on the grounds that the Association used the name of the company in their own registered name. The court, however, identified the real purpose of the lawsuit and rejected the claim, acknowledging that the alleged infringement of the good faith was justified by the need to protect a vital social

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109. *Łopacka v. JMD* case file ref III APA 125/04 (District Court and Court of Appeal).

110. SLAPP is defined as a type of claim or a counterclaim against a person or organisation, filed if that person or organisation attempts to act or express an opinion in a socially significant sphere.

111. *JMD v. Obara* case file ref. I C 275/06 (District Court in Olsztyn) and case file ref. ACa 284/07 (Court of Appeal in Białystok) *JMD v. Gollent and Stowarzyszenie Poszkodowanych przez Wielkie Sieci Handlowe - Biedronka* case file ref. I C 87/05 (District Court in Lublin) and case file ref. I ACa 631/08 (Court of Appeal in Lublin)

112. Case I ACa 15/06.

interest. The court deemed their demand to ban the Association's criticism of the company's conduct to be an abuse of rights and against the law.

### 3.2.1.4 Barriers to Obtaining High-Quality Legal Aid

Unequal access to legal advice and professional legal aid in disputes between individuals and corporations is probably the greatest obstacle in terms of ensuring "equality of arms" and effective access to justice. Typically, victims of abuses involving corporations cannot afford to pay for renowned, experienced advocates or legal advisors. Depending on their economic situation, they are either represented by lawyers designated to assist them, *ex officio* (see below the rules of obtaining free-of charge legal aid) or middle-range, individual advocates/legal advisors whose services they can afford to pay for. The price of legal services provided by big law firms is significantly higher and practically unaffordable for individuals (even those with high incomes). For instance, while an hourly rate of middle-range individual advocate/legal advisor varies from PLN 250-450, the rate for a renowned law firm would be up to 1500 PLN. In addition, the policy and specialisation of renowned law firms normally excludes the possibility of providing services for individuals.

In practice, the only possibility for victims to obtain the highest quality of legal assistance is to engage a renowned NGO, and through their intermediation engage a bigger law firm acting *pro bono*. This scenario applies in many of the cases discussed in this report.<sup>113</sup> However, as it will be discussed below, there is often an additional problem of conflict of interests if multi-national corporations are involved.

#### (a) Pre-Trial Stage

Access to free-of-charge legal advice is particularly difficult at a pre-trial stage due to the lack of public institutions designed to provide this type of legal service. There is no public system of providing free-of-charge legal advice before the case is brought to the court. To some extent, there are possibilities of obtaining legal advice beyond the justice system. For example: consumers may count on aid provided by municipal or district consumer ombudsmen; employees may seek advice from Regional Labour Inspectors. Civil society organisations provide certain mechanisms, which attempt at filling this institutional void in the justice system, such as the network of civil advice bureaux and student-run law clinics (operating alongside law faculties at universities under academic supervision).

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113. In the series of cases against JMD Lech Obara's law firm acted *pro bono*, at the request of the Helsinki Foundation of Human Rights. The same organization also intervened or otherwise assisted victims in the following disputes: *Zagrajek and others v. Fritto Lay* (criminal case, the act of accusation abandoned by the prosecution). *Gawlikowski v. Lionridge Poland* case file ref VII P 333/08.

Nevertheless, these institutions operate as makeshift solutions and by no means can replace an efficient public system of pre-trial legal aid. In particular, there is hardly any access to civil society-generated institutions outside of bigger cities.<sup>114</sup> Small cities and villages are, practically, out of reach of civil networks and non-public institutions. Furthermore, the lack of basic knowledge about the law means that an average citizen is not aware of his/her rights, does not have practical understanding of his/her “right to court,” and does not know where to seek information or legal assistance.

The Ombudsman and civil society organizations have flagged the problem of insufficient access to legal information and advice at pre-trial stage on numerous occasions.<sup>115</sup> Generally, what has been found is that the existing situation has adverse effects on the victim’s ability to seek justice in many respects. Firstly, victims are generally unaware of options to settle their case outside the court (e.g. mediation, intervention of an appropriate administrative authority). Another “information obstacle” often comes at the stage of identifying the other party to sue. In particular, in the case of complex corporate structure, identifying the name and address of the entity may prove difficult. Finally, individuals deprived of professional advice find it difficult to formulate the claim and support it with evidence. It is common experience among practitioners that parties without professional legal advice are unable to clearly state the claims they are seeking, often confusing legal terminology. Wrong formulation of the claim necessitates its further modification. Notably, each withdrawal of a lawsuit is treated as a lost case and may result in the claimant being charged with court fees.

In light of this, observers assert that there is an urgent need to reform the legal aid system. There are a number of advanced legislative reform proposals although the chances of implementation are difficult to estimate.<sup>116</sup>

## **(b) Legal Aid at the Stage of Court Proceedings (Civil and Criminal)**

Formally, a party not represented by professional counsel has the right to file a request for an advocate or legal advisor.<sup>117</sup> The court will address the request if it considers the participation of an advocate or legal advisor necessary in the case. It should be pointed out that in 2008, the Constitutional Tribunal recognized that the obligation to obtain a court-granted exemption from court fees as a condition for obtaining a court-appointed counsel was inconsistent with the Constitution,

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114. Bojarski, Łukasz. *Dostępność Nieodpłatnej Pomocy Prawnej. Raport z Monitoringu*. Part of the project Promoting Access to Justice in Central and Eastern Europe” Helsinki Foundation of Human Rights, Warsaw 2003; *Trzeba stworzyć przesądową pomoc prawną dla ubogich*. *Gazeta Prawna* 25 November 2008.

115. Ombudsman’s Office, *Information about the Ombudsman’s activity for 2008*, The Ombudsman’s Office Publication Journal, 2009 Nr. 1; Bojarski, *ibid*.

116. Sobczak, Krzysztof. Jest nowy projekt ustawy o bezpłatnej pomocy prawnej, ale problemu on raczej nie rozwiąże. *LEX – Polish Law Server* 19 Feb. 2009.

117. Article 117 of the Code of Civil Procedure *et seq*.

as it violated a constitutional right to a fair trial and the principle of equality.<sup>118</sup> It has been an important development towards ensuring an access to legal aid.

There is certain consensus among legal practitioners and experts that the existing system of legal aid does not function well, resulting in limited access to free and high quality legal advice. It is not necessary to discuss this problem in detail, but the most essential factors that affect the quality of legal aid warrant mention.<sup>119</sup>

At present, there is an obligation on advocates to provide legal aid *ex officio* (aid in criminal and civil cases). The same exists in a more limited manner for legal advisors (civil matters). The fact that only advocates (i.e. not legal advisors) are required to provide legal aid in criminal matters limits their availability and imposes a significant burden on them. This specific form of limited competition has an impact on legal fees and decreases the availability of legal services on the market.

Since legal aid assignments are based on a drawing system, an advocate who receives a given case may not have adequate expertise or time to handle it in accordance with professional standards. In addition to this, the fees (determined by the law) for legal aid provided *ex officio* are often far too low to provide a fair remuneration for the effort and time required by the case. In particular, this problem is visible in criminal cases, where legal fees are fixed at low levels, even compared to some civil matters. For example, a fee for legal representation in a criminal case lasting 3 years and deemed particularly complicated is around PLN 7,000 (gross amount). Very low statutory fees are also a major access-limiting factor in employee and social insurance cases. For example, in cases for the reinstatement of an employee, the attorney's fee is PLN 60. Attorneys, therefore, are generally unwilling to take on these cases, especially since they require time-consuming factual analysis.

In light of the above, it is not surprising that advocates, especially more renowned and experienced ones, are often not willing or able to handle *ex officio* cases. Therefore, it is common practice to delegate *ex officio* cases to inexperienced trainees or arrange for substitute advocates. Often such practices result in poor quality legal service. For instance, it is not uncommon that the client will meet his assigned attorney for the first time at the proceeding or at the last minute discovers that there is a different person acting as a substitute.

This general problem of limited access to legal aid becomes considerably aggravated in the context of a dispute involving an economically disadvantaged individual on one side and a powerful corporation on the other. The "equality

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118. Constitutional Tribunal, judgment of 16 June 2008 (P 37/07)

119. Bojarski, Łukasz. *Dostępność Nieodpłatnej Pomocy Prawnej. Raport z Monitoringu*. Part of the project Promoting Access to Justice in Central and Eastern Europe" Helsinki Foundation of Human Rights, Warsaw 2003.

of arms” in the proceedings is under threat in a situation where one party – a professional entity – is represented by a top law firm, while the other – an individual – has to rely on an unpredictable and deficient system of legal aid.

There are additional, specific obstacles, which an individual might encounter when seeking legal aid in a dispute with a corporation. On the one hand, it might be possible to find attorneys willing to act *pro bono*, especially if a given case seems to be socially important and the victim receives support from a renowned civil society organisation. However, there is an increased risk of a conflict of interest if the case is brought against a corporation. Because of the relatively small size of the legal market in Poland, it is likely that most of the bigger law firms (i.e. potential suppliers of *pro bono* legal assistance) will have acted for the corporation in the past or will consider such a dispute to be a conflict of interest for the future. For instance, the dispute between JMD and employees of the “Biedronka” supermarket chain, due to its precedent-setting character, attracted the attention of the Helsinki Foundation for Human Rights. When the Foundation made attempts to find a law firm willing to act *pro bono* in this case, all law firms based in Warsaw reportedly declared a conflict of interest. In the end, a law firm willing to help was found in Olsztyn, a city in the eastern part of Poland.

### **3.2.1.5 Barriers to Legal Representation and Social Participation**

#### **(a) Victim’s Limited Capacity Under Criminal Law**

While in civil proceedings the parties manage the course of the proceedings, in criminal cases the victim has a very limited influence on what actually happens in the court since almost all powers are automatically transferred to the prosecutor. By definition, it is the state (represented by a public prosecutor or – more commonly – the Police) that takes full responsibility for carrying out the investigation and preparing the case. Although there exist certain measures enabling court supervision over the preparatory stage of the proceedings, there is no institution that would serve similar functions as an “investigating judge” known in some legal systems. Judicial supervision is not exerted *ex officio*, but it has to be instigated by other actors, most often the victim. If the victim is interested in influencing the steps taken by a given prosecutor, he/she must complain about the prosecutor’s negligence or omission to an appeal prosecutor, i.e. lodge interlocutory appeals against the decisions taken in the preparatory proceedings, which are dealt with by the court. However, in order to do so, the victim must be well informed about his/her rights and quite determined to seek judicial measures against the prosecution, which is often lacking due to limited access to legal aid. At the same time, any serious omission or negligence on the part of the prosecution can pose a significant barrier to pursuing justice. Often, a failure to gather evidence at the early stages of the investigation process cannot be rectified at a later stage. Steps taken at the preparatory stage are crucial as they determine the further course of the proceedings, including the key decision of whether to sustain or drop the accusation.

There is one legal instrument that enables the victim to gain a slightly greater influence over the course of the proceedings: joining the criminal proceedings in the capacity of a so-called *auxiliary prosecutor*.<sup>120</sup> The purpose of this instrument is to give the victim/social organisation more control over how the case is managed by the public prosecution. Although, the powers of the auxiliary prosecutor are formally the same as that of a public prosecutor (e.g. the auxiliary prosecutor can file evidentiary motions, hear witnesses, lodge complaints/appeals), in practice his ability to act is more limited. If the prosecution decides not to bring an act of accusation to the court, a victim can try bringing a so called *subsidiary act of accusation*,<sup>121</sup> i.e. an act of accusation that is drafted and supported exclusively by the victim (with no assistance from the public prosecutor). However, there are substantial difficulties in sustaining it. First, there is no possibility to employ state apparatus (e.g. the police) to help gather evidence. Secondly, there is a requirement to have professional legal representation, which obviously may create an additional barrier if a victim cannot afford to pay for an advocate. And judges are far less inclined to provide legal aid to a victim who insists on pursuing a case dropped by the prosecution.

This last barrier is a particular problem in labour cases, where there is a visible reluctance among prosecutors to support accusations for labour-law related offences (e.g. harassment or systemic violation of work safety standards). This reluctance is substantiated by statistical data collected by the State Labour Inspectorate: on average, only one in ten notifications of a criminal offence made by the Inspectorate gets to the stage of an official investigation and ends up with an act of accusation.<sup>122</sup> In particular, harassment allegations hardly ever result in the prosecution taking up an investigation *ex officio*.<sup>123</sup>

This reluctance seems to result from the interplay of many factors, such as: the lack of adequate training of public prosecutors, which would enable proper investigation of less typical cases (e.g. violations of labour or environmental law); the prevalent attitude that offences against social or economic interests are “less harmful” to the society than those against life or public order; and the incentive system for prosecutors, which is based on statistical outcomes only and encourages prosecutors to avoid more complicated or less clear-cut cases.

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120. Article 53 of the Code of Criminal Procedure *et seq.*

121. Article 306 of the Code of Criminal Procedure *et seq.*

122. Borys-Szopa, Bożena. Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy w 2006 roku. Warszawa 2007; Borys-Szopa, Bożena. Sprawozdanie Głównego Inspektora Pracy z działalności Państwowej Inspekcji Pracy w 2007 roku. Warszawa 2008.

123. *Raport PIP w sprawie mobbingu 2004*. <<http://nfamob.wordpress.com/2009/05/28/raport-pip-w-sprawie-mobbingu/>>

Moreover, there is a tendency to discontinue all proceedings involving trade unions and alleged offences of stifling trade union activity.<sup>124</sup> Research indicates that there has not been a single case in Poland of criminal charges for hindering trade union activity, even though there are numerous reports of such actions. A striking example of this trend was seen in the Fritto Lay case, where the prosecutor decided to abandon the case even though essential steps to gather and examine evidence had not been taken. According to a written justification of the decision to discontinue the investigation, only one witness was heard.

### **(b) Class Action – Lack of Legal Framework**

At the time of drafting this report there was no binding legislation in Poland providing for the possibility of bringing collective actions. The inability to institute joint proceedings when many individuals fall victim to similar abuse by the same entity constitutes a considerable barrier in pursuing justice. Currently, each single lawsuit brought before the court initiates a separate court proceedings with all the obligatory elements and consequences. For example, court fees have to be calculated and paid separately for each case, legal representation has to be arranged for by each claimant on his/her own, full evidence to support each case has to be gathered and be subjected to independent assessments by the court, and so on.

Even if the court decides to hear a number of related cases jointly, it will not affect these obligatory elements of the procedure. The only practical relief for the victims (and the court itself) is that the process of gathering evidence may become more time and cost efficient.

These practical obstacles make it virtually impossible to bring parallel claims involving 30 or more individual cases, even if all claims arose under the same or similar circumstances. Joining so many parallel proceedings would cause a huge time burden and logistical challenge for both the court and legal representatives concerned. This was the situation in the JMD proceedings. The law firm representing the victims made an attempt to settle the case with JMD on behalf of 100 employees and former employees (a so-called “lawsuit of 100”). For the purposes of representing the victims in this dispute, a special-purpose vehicle was created (the Association of Aggrieved Persons by “Biedronka” [the supermarket chain owned by JMD]). However, after an unsuccessful attempt to reach a settlement with JMD, the Association decided not to file suit, as the practical difficulties of instituting parallel proceedings on behalf of 100 individuals made it virtually impossible. The requirement of proving the scope of damage suffered by each employee would have proven particularly difficult.

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124. Application to ECtHR brought by Komisja Zakładowa Niezależnego i Samorządnego Związku Zawodowego Solidarność we Fritto Lay Poland sp. z o. o. w Grodzisku Mazowieckim against Fritto Lay Poland sp. z o. o.



It must be noted that an act on collective claims proceedings has already been adopted by the Parliament.<sup>125</sup> It is likely that this law will come into force within a few months (unless the President vetoes it), thus opening the possibility for bringing collective actions.

### **(c) Barriers to Social Participation**

According to existing provisions, the possibility of social participation is limited to enumerated circumstances. It can be observed that, in practice, a range of circumstances justify the need for broader social participation than what has been provided for in the law. Enumerative provisions should, therefore, be supplemented with an open “public interest” clause, subject to a judge’s interpretation in each case.

However, it is difficult to make a definite assessment of how courts apply existing provisions and what the impact is of jurisprudence on the possibilities of social participation. It seems that court practice in this respect is only now developing.

On one hand, there are cases when judges took a narrow interpretation of the provisions on the participation of social organisations in the proceedings, thus limiting the possibility. In the dispute between JMD and (ex-) employees of the “Biedronka” supermarket chain,<sup>126</sup> the association set up to represent the victims lodged a formal call for a settlement of the case before the court. The judge in the first instance rejected the call on the grounds that a social organisation has no right to act on behalf of individuals in this type of proceeding (settlement proceedings are treated as an alternative dispute resolution mechanism, as opposed to adversarial civil proceedings). The association appealed and the District Court took the opposite stance and allowed the representation.

On the other hand, there are judgments that seem to extend the possibility of social participation beyond what is specifically provided by the law. For instance, in the case of *Dracewicz v. JMD*<sup>127</sup> the court found that preventing a social organisation from taking part in the proceedings might result in the reversal of the judgment. In the justification of its decision, the judge stated that even in a case where the employees’ claim concerns the termination of employment (i.e. compensation for termination of an employment contract with a breach of labour law) a social organisation should be allowed to participate since it is impossible to determine at the very outset of the proceedings whether the claim might be related to discriminatory practices against employees, generally.

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125. Rządowy projekt ustawy o dochodzeniu roszczeń w postępowaniu grupowym (document no. 1829) <http://orka.sejm.gov.pl/proc6.nsf/opisy/1829.htm>. Please note that this draft law is a completely different initiative from other legislative proposals (i.e. on access to legal aid) mentioned in this Report, which are far less advanced and relate to different matters.

126. This call for a settlement did not succeed (no settlement has been reached before the court); therefore there is no case file to quote.

127. Regional Court in Olsztyn, case file ref. IV Pa 257/07

Finally, it seems that real possibilities of social participation in court proceedings are considerably limited by the weakness of civil society in Poland (in particular the lack of funds for this type of activity and limited access to professional legal assistance). Participation in the proceedings requires a substantial amount of time and legal expertise, both of which are rather scarce resources among social organisations.

### 3.2.1.6 Delays and Length of Proceedings

#### (a) General Trends and Scope of the Problem

The length of proceedings before Polish courts constitutes a significant barrier to obtaining justice. There are numerous signals confirming that proceedings in Poland take far too long. In addition to statements made at the Council of Europe<sup>128</sup> and the consensus among Polish legal practitioners on this issue, there have been a number of ECtHR judgments against Poland confirming that the length of proceedings violated the right to a fair trial “within a reasonable time” (Article 6).<sup>129</sup> In fact, over the last 10 years, the ECtHR has handed down as many as 36 judgments imposing a fine on the Polish government for lengthy proceedings.

In a landmark case *Kudła v. Poland*,<sup>130</sup> the ECtHR obliged the Polish government to introduce an effective legal measure to enable those who suffered from lengthy proceedings to seek redress from the state. A special claim for damages on the grounds of lengthy proceedings was introduced in 2003; however it proved to be highly ineffective, as the law did not provide for obligatory damages. This lack of legal obligation to adjudicate damages placed the burden on the claimant to prove not only that there was protraction but also that he/she suffered a material loss as a result of it.<sup>131</sup> In practice, proving the scope of loss suffered as a result of protraction was very difficult. After vast amounts of criticism from legal practitioners and civil society,<sup>132</sup> as well as subsequent cases brought to the ECtHR on the grounds that it was ineffective, the measure was reformed in May 2009. As

128. See *Long delays in court proceedings threaten the rule of law*, 15 October 2007 [http://www.coe.int/t/commissioner/Viewpoints/071015\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/071015_en.asp)

129. For example: *Pilka v. Poland* (Application No. 39619/98, Judgment of 06/08/2003); *Bak v. Poland* (Application No. 7870/04 Judgment of 16/04/2007); *Barszcz v. Poland* (Application No. 71152/01 Judgment of 30/08/2006); *Borysewicz v. Poland* (Application No. 71146/01 Judgment of 01/10/2008); *Byrzykowski v. Poland* (Application No. 11562/05 Judgment of 27/09/2006); *Ciagadlak v. Poland* (Application No. 45288/99 Judgment of 01/10/2003); *Ciagadlak v. Poland* (Application No. 45288/99, Judgment of 01/10/2003); *Gorska v. Poland* (Application No. 47986/99 Judgment of 03/09/2003); *Gossa v. Poland* (Application No. 45288/99 Judgment of 09/04/2007); *Ciagadlak v. Poland* (Application No. 45288/99 Judgment of 01/10/2003); *Halka and others v. Poland* (Application No. 71891/01 Judgment of 02/10/2002); *Zwierzynski v. Poland* (Application No. 34049/96 Judgment of 19/09/2001). Compare also: Frey, D. *Polska płaci za przewlekłe procesy*. *Rzeczpospolita* 2 May 2008.

130. *Kudła v. Poland* (Application no. 30210/96) Judgment of 26 October 2000.

131. Górecki P., Stachowiak S., Wiliński P., Skarga na przewlekłość postępowania sądowego. Komentarz, Oficyna, 2007.

132. Nowa skarga na przewlekłość nie przyspieszy postępowań. *Gazeta Prawna* 12 May 2009.

a result, adjudication of damages (if the protraction is proven) has been made obligatory. Nevertheless, it seems too early to judge the overall effectiveness of this instrument. The significant amendment to this law entered into force on 1st May, 2009. A complaint can now also be filed against a prosecutor if he/she is responsible for the protraction of the criminal preparatory proceedings. The court is obliged to award damages in cases where protraction can be demonstrated (from 2.000 up to 20.000 PLN).

It is difficult to estimate the average length of proceedings in Poland. According to the statistical data gathered by the Ministry of Justice<sup>133</sup> every year (last data available comes from 2006), it can be as quick as a couple of months for certain types of civil matters and as lengthy as a couple of years in other cases. Moreover, even disaggregated statistical data cannot give a true picture of the situation since there are substantial differences between types of matters, types of courts, different stages of proceedings and geographical locations. In particular, the average length of proceedings in Warsaw tends to be substantially greater than in other cities. For example, in 2003, criminal matters took an average 29 months in Warsaw as opposed to 6 months in other parts of the country. In civil matters the average outside of Warsaw was 5-6 months while in Warsaw there were many instances of proceedings lasting longer than 5 years.<sup>134</sup> Notably, the amount of outstanding cases has been decreasing constantly since 2002.

On the basis of case analysis and consultation carried out for the purposes of this Report, it can be concluded that a more complex civil case can take more than 2 years. The majority of analysed cases here that started between 2005 and 2007 were still pending at the time of writing this study. Criminal cases tend to take even longer.

### **(b) Reasons for Protracted Proceedings**

When analysing the reasons for protracted proceedings, it is important to differentiate between criminal and civil cases. In both cases, organisational factors, primarily those occurring in large courts, are significant. Often, the date of a first hearing is not set for several months, without any explanation forwarded. Subsequent hearings also tend to be held periodically with intervals of several months.

Where civil proceedings are concerned, the rules for presenting evidence undoubtedly contribute to delays. Civil procedure allows the parties to submit new evidence right up until the proceedings are completed.<sup>135</sup> In each instance, the

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133. Ministry of Justice, Organisational Department, Statistical Information on common courts' cases and jurisprudence in 2006, Warszawa 2007.

134. Council of Europe Human Rights Commissioner Mr Alvaro Gil-Robles' Report from his visit in Poland prepared for the Committee of Ministers and the Parliamentary Assembly, Strasbourg, 25 February 2003.

135. *Argumentum a contrario* on the basis of Article 242 of the Code of Civil Procedure

submission of new evidence triggers a number of additional procedural protocols. It is not uncommon for parties to take advantage of this flexibility, as poor communication with the court and a lack of legal expertise can make it difficult for many parties to predict the course of the proceedings in advance.

Another significant factor affecting the length of the proceedings is the possibility to make a formal complaint against procedural decisions taken by a judge.<sup>136</sup> Every complaint must be reviewed by a higher court, which triggers side proceedings that can take additional weeks or months. While, in most cases, the use of this procedural review seems to be entirely justified, it creates a risk of obstruction and delay.<sup>137</sup>

In criminal cases, the rule that the accused be present at the hearing adds to the length of the proceeding. This requirement often involves bringing the accused to court, which requires the coordinated activity of several agencies. Moreover, a defendant will be given several opportunities to appear voluntarily before being forced to appear by the police.

Finally, observers remark that protracted proceedings can also result from a judge's incompetence, lack of professional skills, or inability to make procedural decisions. Sometimes the court of first instance, in order to avoid reversal by courts of the second instance<sup>138</sup> will hear a broader scope of evidence than is necessary, thus further protracting the proceedings.

### 3.2.1.7 Proceedings Delayed in Bad Faith

#### (a) Scope of the Problem and Identification of Main Strategies for Obstruction

Protraction of proceedings can also be caused by the conscious strategy of the defence.<sup>139</sup> Allegations of causing delay in bad faith were made in nearly all cases analysed for the purposes of this study.<sup>140</sup> The scope of the problem has also been acknowledged by all legal practitioners consulted (including judges) and has been broadly discussed in the public debate during recent years. Nevertheless, there seems to be no consensus on how to solve this problem without risking other values, in particular depriving the parties (or the accused in criminal proceedings) of the right to a fair trial.

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136. Article 394 of the Code of Civil Procedure *et seq.*

137. For comparison see Wytrykowski, Konrad. "Kto odpowiada za przewlekłość postępowań sądowych?" *Rzeczpospolita* 20 Oct. 2008.

138. Article 386 § 4 of the Code of Civil Procedure.

139. Wytrykowski, Konrad. "Kto odpowiada za przewlekłość postępowań sądowych?" *Rzeczpospolita* 20 Oct. 2008.

140. See for example, Zboińska, Alicja. Kolejny proces odroczoney – "Biedronka gra na zwłokę?" *Dziennik Łódzki* 29 Mar. 2007. "Podlaskie: nie rozpoczął się proces kierowników sieci Biedronka" *Polish Press Agency* 23 Feb. 2006.

The most common obstruction strategies in civil proceedings include:

- submitting numerous evidentiary motions, often just before the case is about to finish;
- appealing every possible procedural decision taken by the judge;
- submitting ungrounded requests for a change in court composition on the grounds of “a threat to impartiality” and appealing a negative decision;
- repetitive absence of witnesses (previously called by the defendant) at the hearings; and
- delay in delivering expert opinions (possible when an expert is arranged and paid for by the defendant).

With regard to **criminal proceedings**, in addition to the above strategies mentioned, a very common obstructive strategy (used both by the accused and his/her advocate) is to avoid appearing at the hearings. The presence of the accused and his legal representative is obligatory and the court cannot proceed *in absentia*.<sup>141</sup> This problem has diminished after the introduction of the requirement that every absence of the accused justified on health grounds must be supported with an opinion of a court doctor. Nevertheless, this obstructive strategy continues to be used effectively.

### **(b) Preventing Obstruction – Existing Legal Instruments and Problems with Their Practical Application**

The law provides for a number of instruments which, when used skilfully by the court, may prevent the proceedings from being protracted.

In particular, the court is not obliged to admit evidence in every instance, or to admit evidence with no probative value or clearly intended to delay the proceedings.<sup>142</sup> Moreover, a judge has other tools available to prevent unnecessary delay. He/she can order a party to reimburse costs incurred as a result of the party’s negligent or obviously improper actions, regardless of the outcome of the case (including costs incurred by submitting unjustified evidentiary motions);<sup>143</sup> punish a party for causing a hearing to be adjourned without a material reason;<sup>144</sup> and impose a fine on a witness (for failing to appear after a court summons) or on an

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141. This rule applies to half of all cases handled in Polish criminal courts. In a simplified procedure the presence of the defendant is not compulsory. However, due to the gravity of the offences relevant to the present study, disputes in question would rather be dealt in standard procedure, i.e. where the presence of the defendant remains compulsory.

142. Article 217 and 233 § 2 of the Code of Civil Procedure

143. Article 103 of the Code of Civil Procedure

144. Article 214 § 2 and 3 of the Code of Civil Procedure

expert (for delaying the preparation of an opinion). In particular situations, the court may even force participants to appear if it is otherwise impossible to conduct the proceedings in a proper manner.

In cases where professional attorneys represent the parties, a judge can demand that all evidence be submitted within a certain time limit under pain of losing the right to submit it later.<sup>145</sup> The incentive for all witnesses to be summoned with sufficient notice is another instrument that can prevent the most common obstructions, and effectively speed up the proceedings. For example, in the case *Łopacka v. JMD* its prudent use enabled all of the hearings to be held in consecutive days. However, this method of conducting proceedings still remains an exception rather than a rule.

Moreover, professional representatives (advocates, legal advisors) are subject to disciplinary liability for conducting proceedings in breach of professional duties and ethics. The effectiveness of this threat, however, is significantly limited by the solidarity that exists in these professions.

### **3.2.1.8 Barriers to Justice Related to Legal Costs and Court Fees**

#### **(a) Court Fees and Legal Costs – General Principles**

Court fees in civil proceedings include fees and legal costs.<sup>146</sup> Fees are imposed on briefs filed during the proceedings (claims, appeals, complaints). Legal costs include parties' travel costs, witnesses' lost earnings or revenue, and reimbursement of costs incurred by court experts, translators, etc.<sup>147</sup> Legal costs are, in principle, levied on the losing party at the end of the proceedings. Their final amount will depend on the circumstances of each case (length of proceedings, the number of court expertises needed, the amount of travel, etc.).

The fees may be fixed, proportional or basic. Fixed fees are imposed in cases concerning non-proprietary rights (PLN 30 to PLN 5,000). In some types of cases concerning proprietary rights the law provides for a fixed fee in order to protect a "weaker" party. For instance, in cases falling within the scope of labour law, a basic charge of PLN 30 is collected only on an appeal, complaint and cassation appeal. However, in cases where the amount in controversy exceeds PLN 50,000 a proportional fee is imposed on all chargeable briefs.<sup>148</sup> A proportional fee is levied in all cases concerning proprietary rights and equals 5% of the amount in controversy (minimum charge PLN 30 maximum PLN 100,000).

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<sup>145</sup>. Article 207 § 3 of the Code of Civil Procedure.

<sup>146</sup>. Article 20 of the Act of 28 July 2005 on court fees in civil matters (Official Journal No 167, item 1398) *et seq.*

<sup>147</sup>. Article 98 of the Code of Civil Procedure

<sup>148</sup>. Article 45 of the Act of 28 July 2005 on court fees in civil matters (Official Journal No 167, item 1398).

In civil proceedings the court will not entertain arguments from a brief that has not been duly paid for; although the court should summon a claimant to pay a due fee before rejecting the claim. The above rule is not applicable, however, if a party is represented by a professional attorney (advocate, legal advisor). In such cases, where no payment is made, the brief will be returned without any summons. In order to prevent a rejection of the claim, the attorney must pay the outstanding charge within a week.

The most problematic aspect of this process is not the time limitation but rather the fact that the attorney must calculate the exact amount of the fee due. The calculation is not straightforward and in many cases attorneys encounter problems; judges are not obliged to advise a party represented by a professional in this respect. Finally, in the case of an appeal or complaint measure lodged by a professional attorney, the court will reject a brief that was not duly paid for without any summons and without giving additional time for payment of the outstanding charge. This strict procedure might pose an obstacle to pursuing justice, in particular if a claimant has to rely on legal aid granted *ex officio* and has limited ability to control actions taken by his/her attorney.

With regards to criminal proceedings, a convicted person has a statutory obligation to pay fees ranging from PLN 60 to PLN 600. Moreover, in cases where a so-called auxiliary prosecutor<sup>149</sup> (usually a victim who decided to join the proceedings in this capacity) is the only prosecutor, the court will order him/her to pay a fee ranging from PLN 60 to PLN 240.

### **(b) Exemption from Court Fees and Legal Costs: Principles and Practice**

An exemption from court fees can be obtained if an individual proves that he/she cannot pay the fees without causing detriment to his/her material well-being or that of their family. A request for exemption must be supported with a statement on the family's situation, assets, incomes and sources of income, and relevant documents to prove this statement. It is important to note, that an exemption from court fees does not release a party from the obligation to reimburse the other party for the costs of the proceeding. A party losing a case may only be released from the obligation to reimburse the other party for the costs incurred in exceptional circumstances. An evaluation of whether such circumstances arise is made by a judge and, generally, does not depend on the same grounds as exemption from court fees (as it is based on the principle of equity).

In criminal proceedings the court may release an accused person or an auxiliary prosecutor from payment of all or part of the court fees if there are grounds to believe that they would be too financially burdensome or if such exemption is justified in equity.

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149. This legal instrument has been explained above in the Section "Limited victim's capacity under criminal law".

According to legal practitioners, courts are generally cautious in waiving the costs of proceedings. In employee disputes, courts undoubtedly waive costs more often than in, for example, general compensation claims. Although it is not possible to determine this without an in-depth analysis of court files, it seems that in cases for damages and compensation related to accidents at work, courts generally waive court fees as well as legal costs due in the case of a loss. This practice poses a question: why should courts favour one category of claimants while applying a more stringent approach to others, e.g. victims of environmental damage or dangerous products?

The most problematic issue regarding court practice is the lack of transparent and consistently used standards with regard to how courts decide on waiving the fees. Legal practitioners and victims often claim that these criteria are based on inadequate assumptions. For example, a party applying for a waiver has to state whether he/she owns real estate, which is then interpreted as evidence of the capacity to bear the costs. Until recently, courts did not take into account the illiquid nature of real estate. However, this approach is gradually changing and it now becomes possible to be given a fee waiver when the claimant owns real estate. It seems unacceptable that a party seeking justice be compelled to liquidate the only valuable asset to cover the costs of proceedings. Nevertheless, according to legal practitioners and victims, courts tend to examine the financial situation of a party applying for a waiver in abstract terms (i.e. looking at whether in theory that property enables the party to cover the costs and fees), rather than examining whether the costs can be borne without prejudice to the party's ability to support him/herself and his/her family. It is also alleged that courts often decide not to waive the fees on the grounds that, and taking into account the average earnings, it is theoretically possible for the claimant to save the money needed to cover the cost of proceedings. This reasoning appears unjustified in cases where it was not possible for the claimant to foresee the proceedings (which is precisely the case if an abuse or violation occurs).

The very short time provided by the law for making a payment can also be problematic. If a waiver of court fees has been refused, a claimant is obliged to make a payment within 7 days on pain of his claim being rejected. Taking into account the economic situation of the average Polish family, it is likely that the claimant will have to take a loan or resort to some other form of emergency financing in order to gather this amount, having not enough time to set it aside from regular income.

### **(c) Practical Impact on Access to Justice – Fear of Incurring High Cost**

The fear of incurring costs can turn out to be a significant factor determining whether (or to what extent) a victim decides to pursue justice. In particular, victims deprived of professional legal advice are often not aware of the possibility to apply for an exemption from court fees and unable to estimate their chance of failure and the risk of having to cover the costs incurred by the other party. The decision on whether to bring the case to the court is, by definition, taken before a victim



has a chance to apply for legal aid. Since there is no pre-trial legal aid system, this critical decision is very likely to be affected by existing information asymmetry and various misconceptions on how the justice system works. If, in addition to this, the other party turns out to be a corporation represented by a top law firm, the chilling effect is substantially increased. However, without adequate statistical data it is rather difficult to assess the real impact of court fees and legal costs on access to justice.

On one hand, it is possible to quote the number of complaints made by victims where the court fees were found to be a substantial burden on their budget. This problem arises especially in certain types of cases where the value of the dispute is detached from the claim actually being sought. For example, in cases concerning unjust termination of an employment contract concluded for an indefinite period of time (i.e. when a claimant seeks to be re-employed), the assumed value of the dispute will be a year's remuneration. This amount may turn out to be quite substantial, which affects the amount of the court fee charged from the claimant (see general rules on calculation of court fees above).

On the other hand, present rules on court fees are more lenient than they used to be before 2005. This reform of civil procedure has caused a substantial decrease in proportional fees (from 8% to 5% of the amount claimed) and has also introduced flat fees, which tend to be lower than the proportional fees, in many types of cases (e.g. for employment-related claims).<sup>150</sup> Moreover, according to experienced legal practitioners, once an application for a waiver of court costs has been refused, it is rare for a claimant to withdraw the initial claim. If a claimant is certain that he/she can win the case, he/she is inclined to bear the full amount of the court costs, counting on the court to order the defendant to reimburse him/her for them.

In general, the fear of incurring legal costs of both sides poses a more significant deterrent than court fees. Court fees in appeals present a further problem. In practice, it has been observed that the fear of incurring further costs (after having made a substantial financial effort to cover the initial costs) may prevent victims from bringing their case before a court of second instance. On the same grounds, victims often decide to waive part of their claims at the stage of bringing an appeal in order to reduce the amount of court fees. For example, in the case *Wiktorzak v. JMD*,<sup>151</sup> the claimants considerably reduced the compensation they sought in the appeal proceedings (to PLN 50,000).

Overall, it must be admitted that, in practice, the present rules for adjudicating court fees may force an individual to abandon their case or to seek emergency financing.

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150. The Act of 28 July 2005 on court fees in civil matters (Official Journal No. 167, item 1398).

151. *Wiktorzak v. JMD* case file ref V P 31/04.

### **3.2.2 Key Challenges in Gathering Evidence and Proving the Scope of Damage**

#### **3.2.2.1 Practical Barriers in Suing Company Officers (Criminal Law)**

The main issue in the area of criminal liability is the practical difficulty of bringing a case against company managers, directors, or officers for aiding or encouraging their employees to commit criminal acts. This study was not able to identify any past instances where high-ranking officers faced criminal liability for such offences.<sup>152</sup> The main obstacle in suing company officers holding managerial positions tends to be to a lack of adequate evidence to support such accusation.

In order to establish criminal liability the prosecution has to prove, at least, that the accused was aware of the criminal action taking place and had the duty to prevent it. It is a standard arrangement that management board members delegate formal responsibility for compliance with environmental, sanitary or work security standards to lower-rank officers (i.e. respective directors), even though the key decisions as to the company's policy in this respect might be taken by the board. Therefore, it is difficult to establish their direct responsibility under the existing criminal law framework. Such practice is more likely to support an accusation for aiding or abetting a criminal act.

The JMD case offers a good example of these challenges. The prosecution has been conducting proceedings to determine the liability of managerial officers of JMD in Poland since 2004. The basic aim of the investigation is to determine whether JMD created, for the purpose of generating profit, a system of general exploitation of persons employed by a chain of discount stores. It must be determined whether the introduction and maintenance of this profit-generating system was at the outset based on the abuse of employee rights. Finally, the prosecution will have to establish whether a decision to create this system of abuse was taken at the top management level of the company or whether its regional directors or shop managers took the decision independently.

Until now, no formal allegations of this kind have been made against JMD management board members. The prosecution has charged only store managers and their deputies. This may be indicative of difficulties in proving that the management board members actually knew about the system enforced by regional managers around the supermarket chain.

As discussed in Chapter 1 above, criminal liability under Polish law can be attributed only on the basis of guilt/fault. The behaviour need not always be intentional; negligence can also be grounds for liability, e.g. for environmental or labour law

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152. Nevertheless, without further research it is not possible to make a definite statement that there have been no such cases in Poland. Two criminal cases discussed in this study (JMD and Indesit) were pending at the time of writing.

offences.<sup>153</sup> However, since there are no provisions establishing the presumption of managers' knowledge about what is happening "down the chain" in the company's structure, their intention or recklessness and negligence must be proven with sufficient evidence. It is always for the court to make an independent assessment of the evidence provided<sup>154</sup> and, in theory, the court could establish the liability of managers on the basis of indirect evidence. Nevertheless, at present, there is no known jurisprudence to support this.

Developments in the case of allegations of gross health injuries and premature deaths caused by VIOXX, a medicine produced and marketed in Poland by Merck Dohme Poland, show that the prosecution might not even try to investigate the case before the end of civil proceedings. Until now, no formal investigation against company officers in this case has been initiated in Poland.

By contrast, the Indesit case<sup>155</sup> seems to be an important development in the field of criminal liability. Of all the cases analysed, only in Indesit did the prosecution manage to charge the head director of the company (i.e. the Polish branch of an international corporation). The facts of the case, as reported by the media, indicate that the management of the company encouraged or at least allowed for systemic abuses of health and safety standards in the factory. In order to speed up the production process, shift managers were removing necessary safety gear from the heavy machinery used by the workers.<sup>156</sup> As a result, workers suffered from various injuries, which occurred on a regular basis and which were not reported to the State Labour Inspectorate. This policy also caused the tragic death of one worker (as a result of safety gear taken away). The director and a few lower-rank company officers have been accused of gross abuse of health and safety standards, which caused the death of a person.<sup>157</sup> This case proves that it is possible to bring criminal law charges against high-rank officers on the grounds of the duty of care attributable to them as managers of the whole enterprise. Nevertheless, court proceedings have been pending since 2007, which shows the difficulty of sustaining an accusation. The outcome is still difficult to predict.

### 3.2.2.2 Pressure on Witnesses

Information available to the ICJ shows that of witnesses refuse to testify or withdrawing their testimony because of pressure from the defendant (corporation). In some cases where witnesses were employed by the defendant company, they

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153. See Article 181 *et seq* and 218 *et seq* of the Criminal Code.

154. Principle of independent assessment of evidence has been discussed in the text further below.

155. Criminal investigation in this case is still pending and the act of accusation has not been brought to the court yet. It is run by the public prosecutor's office in Łódź-Widzew.

156. Kozarewska, Małgorzata. "Wojna z białymi kotłodziurkami" *Gazeta Wyborcza Duży Format* 16 Oct. 2006.

157. Kozarewska, Małgorzata. "Wojna z białymi kotłodziurkami" *Gazeta Wyborcza Duży Format* 16 Oct. 2006.

have presented circumstances of the case in a way that was advantageous to their employer.

In the series of cases against JMD, witnesses reported that they were subject to various threats (anonymous phone calls, broken windows, etc.).<sup>158</sup> It has been reported that a number of employee witnesses who gave testimony against JMD subsequently decided to change it substantially, which might have been the result of pressures exerted by JMD.<sup>159</sup> In *Łopacka v. JMD*, witnesses who had initially testified in favour of the claimant changed their testimony reportedly after a retreat sponsored by the employer and after talking to their superiors.

Alleged pressures on witnesses go beyond the employer-employee relationship. For example, in the Indesit case<sup>160</sup> it was puzzling for observers that an independent public officer, who was involved in the preparation of the post-accident report, could not recall any details from the site of the tragedy during the hearing in court.<sup>161</sup>

While most of the above are as yet unconfirmed allegations, they should not be dismissed. Civil proceedings suffer from the fact that there is no way of protecting the identity of the witness. The protocols in criminal proceedings that allow for anonymous testimonies given through video conferencing seem not to be used except in exceptional circumstances.

### 3.2.2.3 Role of Judges and Prosecutors in Evidence Gathering: Practical Challenges

#### (a) Prosecutors – Preparatory Proceedings

Preparatory proceedings play a substantial role in criminal cases. Civil society organisations and legal practitioners often report negligence and omissions on the part of prosecutors while gathering evidence. One striking example of this problem is the Fritto Lay case.<sup>162</sup> Another one occurred in criminal proceedings against JMD, where the Prosecutor General eventually moved the investigation to a different prosecutor's office after numerous allegations that hardly any steps had been taken in order to examine the circumstances of alleged crimes.

158. "Elbląg: kasjerce z Biedronki grożono śmiercią?" *Polish Press Agency* 19 Mar. 2009.

159. Szaro, Grzegorz. "Czy Biedronka szkoliła świadków?" *Gazeta Wyborcza* 8 Mar. 2005; Kopinski, Michał and Szaro, Grzegorz. "Proces Biedronki: pracownicy zmieniły zeznania" *Gazeta Wyborcza* 29 Sept. 2005.

160. Criminal investigation in this case is still pending and the act of accusation has not been brought to the court yet. The investigation against the company's director and other officers is being conducted on the grounds of a breach of work safety standards.

161. "Śmierć w Indesicie. Inspektor BHP nie pamięta ważnych faktów" *Gazeta Wyborcza Łódź* 1 Nov. 2007.

162. Application to ECtHR brought by Komisja Komisja Zakładowa Niezależnego i Samorządnego Związku Zawodowego Solidarność we Fritto Lay Poland sp. z o. o. w Grodzisku Mazowieckim against Fritto Lay Poland sp. z o. o.

## (b) Judges

In principle, the court can base its decision only on the facts and evidence provided by the parties or that which is generally known.<sup>163</sup> Every factual statement made by the parties has to be followed by the provision of relevant material to the court in order to prove it. If the parties fail, *prima facie*, to do so the judge can draw the inference he deems suitable. Usually, the result will be that the judge will put more weight on the statement that has been supported with adequate evidence, instead of taking actions *ex officio* to check the credibility of the opposite statement.<sup>164</sup>

While the court is **not required** to act *ex officio* and help a “weaker” party in gathering the evidence, there are provisions that allow for such intervention. In practice, courts tend to allow evidence *ex officio*, in particular, they often request documents from the parties and opinions from court experts in order to avoid being overturned for not having explained all circumstances of the case.<sup>165</sup>

While there is no explicit obligation imposed by law on the parties to exhibit evidence and to allow the opposite party to access relevant documents, the court has the power to request all documents when deemed necessary. It is, however, common practice that after obtaining a relevant piece of evidence (e.g. full company documentation on the working time of its employees) the claimant will have to analyse its content and find concrete arguments to support the claim, without the assistance of the court. Most often the only way to handle such a complex piece of evidence is to engage a court expert, which means an additional cost for the party unless the court decides to do so *ex officio*.

### 3.2.2.4 Proving Damage Caused by the Abuse of Work Safety Regulations

Work-related accidents and work-related illnesses are probably the most common grounds on which individuals have to confront powerful corporate entities. Abuses of work safety regulations continue to constitute a significant problem in the Polish labour market and may sometimes amount to systemic abuse of human rights, e.g. the right to health (*Wiktorzak v. JMD*<sup>166</sup>), the right to a healthy working environment (a series of other cases against JMD), or the right to life (e.g. *Indesit case*<sup>167</sup> and *Glińska v. JMD*<sup>168</sup>).

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163. Article 228 of the Code of civil procedure

164. Article 233 of the Code of civil procedure

165. Article 386 of the Code of civil procedure

166. *Wiktorzak v. JMD* case file ref V P 31/04.

167. The criminal investigation in this case is still pending and the act of accusation has not been brought to the court yet (therefore there is no case file reference number). It is run by the public prosecutor's office in Łódź-Widzew.

168. *Glińska v. JMD* case file ref C 110/08.

All cases analysed in this study show that the biggest challenge for the claimant is to prove that health damage or death actually occurred as a result of reckless action or conscious abuse of work safety regulations by the company. This is because of the complexity of the circumstances involved, such as individual health predispositions or the impact of a so-called “human factor” – i.e. fault attributed to a negligent individual claimant.

The first condition of establishing liability of the company for health damage or death of an employee is to prove that work safety standards were violated. The second step is to prove causation – a direct link between this abuse and any harm suffered. Both steps can be very difficult in the course of proceedings. Standard defence strategies used by companies are likely to include instigating a “battle” of contradictory expert opinions or traumatising cross-examinations of witnesses and the victim. In most cases the only way to avoid these obstacles is through the use of legal presumptions or documentary evidence produced by public authorities, such as the State Labour Inspectorate.

As regards legal presumptions, existing regulations<sup>169</sup> provide a list of illnesses and injuries (specified for various professions) presumed to be “work-related”. If such illness or injury occurs, a specialised social insurance agency will examine the patient and issue a formal decision confirming the work-related nature of health damage or disability. This decision constitutes a very important piece of evidence in the court, since it makes it unnecessary for the claimant to prove the abuse of safety standards at work or the causal link between such abuse and individual damage. The problem lies in the way this official list of work-related illnesses has been formulated. At present, there is a closed catalogue of possible illnesses and injuries specified for professions that are deemed risky or dangerous for health. In practice, the range of possible work-related injuries and illnesses is much broader. For instance, a miscarriage as a result of extremely heavy physical work (*Wiktorzak v. JMD*<sup>170</sup>) or serious backbone disorders developed as a result of long working hours at the supermarket till (e.g. *Łopacka v. JMD*<sup>171</sup> and numerous other claims) are not deemed “work-related” injuries. This situation has been criticised by the Ombudsman<sup>172</sup> and reviewed by the Constitutional Tribunal<sup>173</sup> (on grounds of possible discrimination); nevertheless the law remains essentially the same. Although it does not affect the possibility of establishing the company’s liability for work-related injuries (i.e. it does **not** constitute a limitation of liability as such), this situation poses a serious obstacle to gathering evidence.

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169. Regulation of the Council of Ministers of 30 July 2002 on the register of work-related illnesses and the procedures of their notification and handling (Official Journal No. 132, item 1115)

170. *Wiktorzak v. JMD* case file ref V P 31/04.

171. *Łopacka v. JMD* case file ref III APA 125/04.

172. Ombudsman’s Office – “Information about the Ombudsman’s activity for 2008”, *The Ombudsman’s Office Publication Journal*, 2009 No. 1

173. Judgment of 19 June 2008 (P 23/07).

Another potential obstacle in gathering evidence stems from the way in which post-accident procedure operates. Existing regulations leave a considerable role for the employer himself, despite the obvious conflict of interest. The claimants in the Indesit case were burdened with this very problem.<sup>174</sup> Controversies surrounding the accuracy of post-accident reports and typical problems with obtaining reliable witness testimony afterwards could be avoided if there was an obligation to involve a neutral agency (e.g. the police or the State Labour Inspectorate) in a direct investigation after the event.

### 3.2.2.5 Particular Obstacles to Whistleblowing

In addition to general obstacles that may affect witnesses confronted with an influential corporate entity, whistleblowers are subjected to additional pressures and strain. First, there are significant mental barriers that might prevent a person from revealing irregularities within the company. Loyalty to one's narrow social or business group continues to be perceived as a value, while the act of whistleblowing brings associations with a breach of confidence.

In legal terms, the basic problem is the lack of adequate statutory regulations providing official protection for whistleblowers. Current legislation, rather than providing protection against social persecution (e.g. procedural solutions that would enable keeping their identity protected), exposes whistleblowers. Existing data protection regulations<sup>175</sup> *de facto* oblige public authorities (e.g. the prosecutor) to reveal the identity of the whistleblower to the company concerned. If applied in accordance with the letter of law, the Personal Data Protection Act<sup>176</sup> requires a data administrator (e.g. the prosecutor) who processes personal data of another person (e.g. company's manager) obtained from a whistleblower to inform this person that his/her personal data is being processed and reveal the source of such data (i.e. the identity of the whistleblower).<sup>177</sup>

However improbable it might seem, there has been no jurisprudence so far departing from this literal reading of the law for the purposes of protecting whistleblowers and, indirectly, the public interest. It seems, therefore, that the law must be changed first, before the jurisprudence and social attitudes evolve.

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174. Criminal investigation in this case is still pending and the act of accusation has not been brought to the court yet.

175. The Act of 29 August 1997 on personal data protection (Official Journal No 133 item 883)

176. Article 25 of the Act on personal data protection

177. Wojciechowska-Nowak A., Sytuacja prawna polskich whistleblowerów w postępowaniu przed sądem pracy z perspektywy doświadczeń organizacji pozarządowej, publication of the Stefan Batory Foundation's Anti-Corruption Program).

### 3.2.2.6 Burden of Proof: Challenges with Proving Exact Scope of Damage

In accordance with the general principle, the burden of proof lies with the person who attributes legal consequences to a fact.<sup>178</sup> Once the claiming party has managed to prove that there are reasonable grounds<sup>179</sup> for his/her claim, the burden of proof is automatically transferred to the other party, who must present evidence to rebut the allegations. It is within the scope of the judge's discretionary powers to assess whether the evidence provided was sufficient. The Code of Civil Procedure does not provide for any specific rules with regard to what standard of proof the court should adopt. On the contrary: there is an important provision stating that "the court will assess the value and reliability of evidence provided according to its own judgment, based on a multi-faceted consideration of all evidence gathered in the proceedings."<sup>180</sup> In criminal law, the burden of proof lies with the prosecutor (including a private prosecutor). There are no exceptions to this rule.

In labour law the burden of proof is divided on similar terms as in civil law. However, there are certain exceptions meant to protect an employee against a "stronger" opponent. For example, it is the employer's burden to prove that the refusal to enter into a relationship, the termination of an employment relationship, disadvantageous remuneration, disadvantageous employment conditions, or non-promotion of an employee are objectively justified.<sup>181</sup> Also, in general discrimination cases courts have started to shift the burden of proof after the claimant shows that the discrimination is probable.

The burden of proof will always be transferred to the other side if the law creates a presumption, i.e. an assumption that the occurrence of one event (grounds of presumption) means that another event also occurred (conclusion based on presumption). The legal presumptions most commonly used in disputes between individuals and corporate entities were discussed above.

Even though the rules on transferring the burden of proof might seem very fair and sometimes even favourable to a "weaker" party in the proceedings, the biggest evidentiary challenge often arises after the grounds for the claim have been proven. It stems from the general principles recognised in the civil law doctrine<sup>182</sup> that damages adjudicated by the court have to correspond to the scope

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178. Article 232 of the Code of Civil Procedure

179. This standard of proof is not made express in the provisions of the Code of Civil Procedure but is established in the legal doctrine and jurisprudence. See e.g. *The Code of Civil Procedure – the commentary*, edited by Prof. T. Ereciński, Lexis Nexis 2007, p. 356 *et seq.*

180. Article 233 of the Code of Civil Procedure

181. Article 183b § 1 of the Labour Code.

182. While there is no explicit provision stating this principle in the Civil Code, the principle of "adequate compensation for the damage suffered" is recognized as one of the fundamentals in the civil law doctrine. See e.g. *Prawo cywilne - część ogólna. System Prawa Prywatnego*, edited by prof. dr hab. Marek Safjan, C.H.Beck, Warszawa 2007, p. 55 *et seq.*



of the damage evidenced in the proceedings. As a matter of principle, it is for the claimant to prove the exact scope of damage in order to sustain the claim. Therefore, even if the burden of proof was successfully transferred on the company and the company failed in its defence, in the end the obligation to prove the scope of damage suffered burdens the claimant, which can be very difficult in complex cases. For instance, *Łopacka v. JMD*<sup>183</sup> and other cases concerning unpaid (and unregistered) overtime, claimants encountered substantial difficulties in proving the exact amount of remuneration due to them (including sums owed going back over 3 years before the case started) on the basis of documents provided by the company at the court's demand (the main evidence consisted of thousands of till receipts).

There is, however, one legal instrument that allows a judge to deal with this evidentiary challenge. According to Article 322 of the Code of Civil Procedure, if the court decides that it is impossible or extremely difficult to evidence the amount of a claim precisely, after considering all the circumstances of the case, it may award an amount it considers appropriate. According to the Supreme Court ruling, this possibility can also be applied in labour law cases relating to remuneration, including remuneration for work during overtime.<sup>184</sup>

This legal instrument is in practice used by judges but without an in-depth analysis of case files it is difficult to say how often and effectively it is used.

### 3.2.3 Sanctions and Reparations

#### 3.2.3.1 Obstacles in Obtaining Fair Compensation

With regards to pain and suffering – moral damage (e.g. resulting from harassment, discrimination, humiliating treatment, loss of health, disability, death of a close person, etc.) the main challenges to ensuring fair compensation are the various assumptions accepted by the courts in their calculations of damages. Both the law and jurisprudence leave the judge significant leeway for determining compensation in any given case. The law provides, in very general terms, for the adjudication of “an adequate amount”<sup>185</sup> for moral damage and suffering. The Supreme Court's jurisprudence formulates general guidelines only, stating that the amount of compensation awarded should be based on the consideration of both the actual living conditions of an aggravated party as well as the average standard of living and general level of economic development of the country.<sup>186</sup> However, at the same time, the Supreme Court acknowledges that due to the inherent nature and function of this instrument (i.e. providing redress for individual loss

183. *Łopacka v. JMD* case file ref III APA 125/04.

184. Supreme Court Judgment of 23 November 2001 (I PKN 678)

185. Article 455 of the Civil Code

186. See for example Supreme Court Judgment of 29 May 2008 (II CSK 78/2008); Supreme Court Judgment of 12 July 2002 (V CKN 1114/2000)

and suffering) judges must have significant discretion in calculating proper damages.<sup>187</sup>

According to legal practitioners, the amount of compensation awarded by the courts is steadily increasing (compensation exceeding PLN 100,000 is not uncommon, especially in cases of permanent and extensive bodily injury or long-term disturbance of health). Nevertheless, there are continuing allegations that Polish courts, on average, award low compensation, incommensurate to the harm actually suffered by the victim.

The main obstacle in obtaining fair compensation in civil cases involving corporations (e.g. health damage related to environmental pollution, dangerous products or unsafe working conditions) is the set of evidentiary hurdles claimants must surpass in order to substantiate their claim (as discussed above). According to the law, the amount of damages awarded cannot exceed the amount of actual material loss evidenced before the court. While this rule is justified according to the fundamental principles of civil law and the principle of fair compensation,<sup>188</sup> it has the potential to lead to unfair outcomes in cases where evidencing claims is particularly difficult (for example in claims for unpaid work, as discussed above).

The VIOXX case illustrates this problem well. Merck-Dohme Poland (“Merck”), a subsidiary of Merck in the USA, introduced and distributed in the Polish market a medicine for rheumatic diseases known under a trading name “VIOXX”. After a couple of years of its approved commercialisation, it was publicly disclosed that regular use of VIOXX causes very serious health damage, in many cases leading to premature death.<sup>189</sup> Out of tens of reported victims all around Poland, only 8 individuals decided to bring civil claims against Merck, demanding compensation in the amount of 5 million PLN, which was commonly perceived as a “precedent-setting claim.”<sup>190</sup> The media and experts repeated the argument that victims would be better off making their claims in US courts, since their chance of being awarded fair compensation would be much higher, even taking into account the substantial increase in legal costs and the costs of being included in class action (which means obtaining only a fraction of total compensation awarded by the US court).<sup>191</sup>

In a series of cases against JMD, compensation amounts awarded to the victims or claimed (many of the cases are still pending) for harassment, humiliation and systematic abuse of employee rights ranged from PLN 5000 to PLN 50,000. In the

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187. Supreme Court Judgment of 4 February 2008 (III KK 349/2007).

188. Article 77 of the Constitution

189. The “VIOXX affair” spread throughout a number of countries, including the USA; therefore we assume that its facts are commonly known and do not need extensive description. See e.g. Pruchniewicz, Przemysław. “Śmierć w pastylkach” *Przegląd* 27 Oct. 2005; “VIOXX mógł zabić. Pacjenci dostaną odszkodowania” *Dziennik* 12 Nov. 2007.

190. Rewiński, Robert. “Polacy chcą mega odszkodowań za szkodliwy lek” *Gazeta Wyborcza* 8 Oct. 2005.

191. Pozwy polskich ofiar leku Vioxx, *Życie Warszawy* 06 May 2005.

*Wiktorzak v. JMD*<sup>192</sup> case, the compensation claimed for a miscarriage due to work overload was only 130,000 PLN.

It would be difficult to make any general claim as to the adequacy of compensation awards adjudicated by Polish courts and support it with concrete evidence. This is due to the lack of relevant statistical data as well as to the inherent problems of assessing the appropriateness of particular judgments. However, there is reason to be concerned with regard to how compensation is determined. In the first place, it seems that courts (in particular in employment-related cases) too often concentrate only on the amount of the remuneration earned taking it as the basis for determining the amount of compensation (e.g. twice the amount of monthly remuneration). Often the reasoning behind adopting this particular “measure” is to avoid “unjustified enrichment” of the employee. However, a similar line of reasoning is also applied in general civil compensation cases, including in claims relating to injuries caused by a dangerous product or environmental damage.<sup>193</sup>

Secondly, there is no established jurisprudence or doctrine allowing for different ways or standards to determine compensation awards depending on whether the enterprise is big or small. Therefore, courts tend to adopt the same standard regardless of the size and economic power of the company resulting sometimes in multinational corporations being ordered to pay only symbolic amounts for gross abuses.

### **3.2.3.2 Limited Effectiveness of Criminal Law Sanctions Versus Corporate Entities and their Officers**

If the functions of criminal law include deterring future offences and ensuring moral redress for the victim and society as a whole, it can only be effective if the penalty imposed is commensurate with the gravity of the offence/crime committed and directed at the person who bears responsibility. But in cases of criminal acts committed by employees or officers acting on behalf of corporate entities, the law seems to fall short.

In many of the cases reported in the media and analysed in the study,<sup>194</sup> it seems that the companies’ general policies are the main issue, in particular, business policies that encouraged or even required lower-ranking managers to take large safety-risks (e.g. cutting costs by removing safety gear or providing insufficient equipment to handle heavy physical tasks) or apply oppressive methods in personnel management (e.g. forced overtime, putting mental pressure on employees, denying the right to work-breaks). This type of behaviour may constitute an offence or crime (e.g. harassment, offences against work-safety) for which,

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192. *Wiktorzak v. JMD* case file ref. V P 31/04.

193. These observations are based on consultations with judges and other legal practitioners.

194. See Indesit and JMD affairs described in previous Sections.

according to criminal law principles, its direct perpetrator should be held liable. However, it has proved very difficult to establish the liability of high-rank managers for “aiding” or “abetting” such offences/crimes as discussed above.

In the cases discussed above, company policy may have caused managers to adopt high-risk production processes and abuse their workers. In these cases, the direct perpetrators of criminal acts are, at the same time, victims of abuses caused by higher-rank officers or employees of the company who define and enforce the company’s policies. That the managers acted under direction and pressure from higher-ups may be taken into account in criminal proceedings and should lessen the applied penalty. This reasoning was applied in *Łopacka v. JMD*.<sup>195</sup>

Moreover, fines imposed on company officers under criminal law, while adequate punishment for individuals, are unlikely to deter the company from committing further abuses. According to consulted practitioners, it is common practice for companies to reimburse their employees and officers for any fines imposed on them in connection with their professional activity. Taking into account the size of an average budget of a corporation, such reimbursement does not constitute a substantial burden and can be easily provided for while planning the annual expenses of the company. In this context, the fines imposed on individuals do not seem to serve their punitive or deterrence functions.

In the light of the above, it must be concluded that only criminal sanctions imposed directly on a corporate entity and constituting a substantial financial burden could effectively serve the function of punishing corporations and preventing further abuses of human rights.

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195. *Łopacka v. JMD* case file ref III APA 125/04.

## Conclusions and Recommendations

Disputes involving individuals and/or groups on one side and corporations on the other side reproduce common barriers to access to justice in a major scale and with particular characteristics. Significantly, the realisation of the procedural principle of “equality of arms” seems to be one major issue. Common problems tend to be aggravated when the victim lacks high-quality legal advice and has limited resources (in terms of time and money), and faces a powerful corporate entity.

Polish law generally does provide remedies for victims of human rights abuses caused by corporate entities. Overall, criminal prosecution as well as civil remedies are important legal tools that can be used to redress human rights violations committed by companies. At the same time, there are numerous legal and practical obstacles, which can render the process of pursuing justice difficult, ineffective or even impossible.

### Piercing the Corporate Veil and Holding Managers Accountable

As in other countries the legal doctrine that protects the separation of legal entities and the limited instruments for piercing the “corporate veil” in cases of serious offences to reach the parent company or the shareholders to hold them accountable play as real obstacles to potential redress for the victims of abuse. Holding the parent company accountable for acts committed by its subsidiary or (economically dependent) supplier presents extraordinary complexities. With regard to personal liability of company managers (which could have a considerable deterring effect if pursued effectively), practical possibilities of making that effective remain limited. The most important hurdles in this regard are of evidentiary nature.

Standards for cases in which it would be possible to pierce the corporate veil need further development through jurisprudence, in particular by the Supreme Court. Concepts such as “negligence” (applicable to individuals/managers) or “own operations” (as applicable to companies) in the specific context of complex corporate structures seem suitable for jurisprudential clarification and development.

### Lack of Efficient Legal Framework for Criminal Liability of Legal Entities

The existing (quasi-) criminal liability of collective entities (including companies) is based on premises that render it largely ineffective. The limitations derive from the fact that a company’s liability is always secondary and requires the individual responsibility of the person who acted on behalf of or in the name of the company to be established first to serve as grounds for the company’s own liability. The company may not be held liable for the conduct of persons serving

in key managerial positions. Finally, the company's liability is limited to certain categories of criminal offences, which do not include offences under labour law provisions.

There is a need to change the law (the Act of 28 October 2002 on the liability of collective entities for acts prohibited on pain of penalty) and address all these issues through legislative intervention. As confirmed by a recent Supreme Court ruling, the way existing provisions are drafted does not allow for broader judicial interpretation.

## **Remedies**

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### **Fair Compensation**

Although it is not possible to make a general claim that the amounts of compensation awarded on average by Polish courts are not sufficient, more coherence and transparency in the criteria used to determine the amount of compensation is needed (e.g. to what extent the level of income of the aggrieved individual should have an impact on the amount of compensation awarded for personal damage, if at all). Also, neither jurisprudence nor doctrine differentiates between small and big enterprises to determine compensation awards.

Clearer guidelines from the Supreme Court or doctrine would help judges to address these interpretative challenges.

### **Ineffectiveness of Criminal Law Measures**

Damages under civil remedies are in principle limited to compensate the loss actually suffered. Effective criminal measures against corporations (as legal entities) and/or their managers (as individuals) would play a greater role in deterring further violations and encouraging compliance with the rules. Polish law is weak in this respect.

With regard to the personal liability of managers, existing criminal law mechanisms holds direct perpetrators accountable, but leaves company managers and higher-rank officers largely unaccountable. However, in practice direct perpetrators of crimes committed in connection with the company's operations generally act under the supervision of higher-rank officers and are subjected to various forms of pressure. This results in the creation of a certain culture of impunity among head managers and causes frustration in society. With regard to the criminal liability of corporations as legal entities, the existing mechanisms seem ineffective.

A possible solution to this systemic problem would be the introduction of company criminal liability that does not rest on the prior finding of fault of individuals acting on behalf of the company or does so in a different or mitigated way. In this context, there is an urgent need to open up the debate about possible

reforms of the law on quasi-criminal liability of legal entities taking into account practice from other countries.

## **Criminal Investigation Stage**

Effectiveness of criminal sanctions depends, to a great extent, on the quality of investigation performed by public prosecutors. This investigatory stage is also affected by a number of problems. A discernible trend in the prosecution's policy to avoid or protract more complicated cases, such as systemic violations of labour law or environmental matters, and discontinue cases involving obstruction of trade union activity can be identified.

There is no obvious solution to this problem since the introduction of judicial supervision over the investigation stage would require a deep reform of the whole justice system. However, reform of the prosecution could already have a positive effect. Changes in this context necessarily include additional safeguards against politicisation of the prosecution -which has already started with a recent change in the law separating the role of Minister of Justice and General Prosecutor,<sup>196</sup> – and a change of encouragement policies, currently predominantly based on statistical results. This would require parallel deep institutional changes and a different approach with regard to the education of prosecutors. Specific training of prosecutors to enable them to deal with investigations involving complex corporate structures is necessary.

## **Enforcement**

There does not appear to be any particular obstacles to the enforcement of judgments in cases involving corporations. Evidence shows that once a judgment is delivered, multinational companies tend to abide with them without delays, perhaps to avoid further reputational risks. Moreover, there are objective factors that facilitate enforcement, such as easily identifiable and sizeable company assets.

## **Procedural Issues / Equality of Arms**

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Key procedural factors that tend to discourage victims from pursuing justice before courts, even if they have a good case, include: (i) lack of access to adequate legal advice at the pre-trial stage; (ii) difficulty in accessing legal aid, often of unsatisfactory quality; (iii) a protracted and complicated procedure before the court; (iv) practical difficulties in gathering evidence, combined with lack of knowledge of what is required to sustain the claim; (v) fear of retaliation by the company (which applies to victims/claimants and other witnesses); and (vi) fear of incurring high legal costs, in particular in the case of loss.

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196. The change will take effect on 1st April 2010

## **Legal Aid / Protection of the Weaker Party / Protraction of the Proceedings**

Major issues for the practical respect of the principle of equality of arms during the proceedings include: limited access to high-quality legal aid (in particular at the pre-trial stage); insufficient support for the weaker party (generally an individual facing a powerful corporation) throughout the proceedings; and protraction of the proceedings. These factors combined often cause scepticism among the victims about the real chances to obtain redress within a reasonable time. This perception influences their decision whether to seek justice or to give up the case to avoid further losses.

To tackle the problem steps should be taken to carry out a comprehensive reform of the legal aid system, including the creation of a publicly funded network of lawyers to provide pre-trial legal advice. In particular, consideration should be given to the idea that provision of publicly funded legal aid be a separate system or be integrated into the social care system and managed by municipalities rather than the judiciary. Legal aid may be provided by lawyers who freely choose to do so and receive fair remuneration for their work. Legal aid reform currently being prepared by the Ministry of Justice (in consultation with civil society groups) seems to go in this direction.

Urgent changes are needed in relation to the role of the judge in the proceedings. These changes rather than legal are mainly in training and culture. Proceedings are frequently obstructed because the judges do not use all the instruments offered by the law. The judge is generally empowered to advise a weaker party on procedural steps, admit evidence *ex officio* or discipline parties (e.g. requiring the production of evidentiary motions without delay). Proper and prudent use of these possibilities could have a significant impact on the realisation of the equality of arms principle.

Current reluctance to use these instruments may be explained by the general aversion to risk and lack of confidence observed among district court judges. Want for judicial education and training and their relatively vulnerable position within the justice system contribute to this situation. Finally, the jurisprudence, in particular of the Supreme Court, does not provide clear guidelines on how to strike the right balance between impartiality and necessary intervention in proceedings in the interests of justice.

Reforms in this area would include cultural education of judges with a focus on independent decision-making and self-confidence. The position of the judge within the whole justice system also needs to be strengthened so that judicial office becomes to be considered as the culmination of a successful legal career.



## Legal Costs and Fees

It is difficult to make a definite conclusion of the actual impact of legal costs and court fees on access to justice on the basis of the limited case-law analysed. An in-depth analysis of cases is beyond the scope of this study. In the majority of the cases, the fear of incurring high legal costs was mentioned as an important factor, but most legal practitioners observed that cases in which this issue limits access to justice were rare. Costs of legal representation are definitely more important for the claimants than court fees.

Lack of transparent and consistent criteria providing guidelines on deciding whether or not to waive court fees and/or discharge the losing party from the obligation to cover other party's legal costs is a problem. Courts from different cities use different approaches and standards. Adequate guidance from the Supreme Court in this respect could have a positive impact.

An immediate measure could be the introduction of the possibility to appeal decisions of the second level court refusing to waive court fees. This would allow the Supreme Court to clarify the criteria lower courts should apply when deciding on waivers of court costs. Legislative interventions in the judicial discretionary power to decide on waivers do not seem justified. In particular, any attempt by the legislature to set detailed criteria for the court to follow would contradict the principle of a thorough, complex and objective assessment of each particular case.

## Burden of Proof / Gathering Evidence

Obstacles in gathering evidence result from the inherent inequality existing where individual victims try to sue multinational companies with complex corporate structures and significant economic influence. This problem is compounded by possible retaliation and pressure against witnesses especially in employment-related cases where witnesses are employees of the corporation. Victims usually agree to settle in unfavourable conditions to avoid a lengthy and costly process.

A common strategy reportedly used by powerful companies in order to obstruct the evidence gathering process, is to commission an expert opinion **before** proceedings commence from an expert in the court roster, which many times prevent the courts from calling on the same experts to issue expert opinion during the proceedings. Measures should be taken to prohibit certified court experts from issuing opinions in their private practice capacity if the opinion concerns a matter under legal dispute or where it is likely to become one. In the meantime experts should exercise caution and due diligence when agreeing to give commissioned expert opinion).

With regard to the protection of witnesses and whistle-blowers, an effective measure would be the introduction of provisions in the Code of Civil Procedure (or a separate legal act) offering them identity protection during the proceedings.

In the case of whistle-blowers, changes should be made in the data protection rules that currently oblige prosecutors and/or solicitors to reveal the identity of the whistleblower to the accused/defendant. Shifting the burden of proof to the employer in cases of unfair dismissal of a whistleblower should also be considered.

Consideration should also be given to the introduction of certain legal presumptions in favour of individuals in dispute with corporations so that the burden of rebutting those presumptions is shifted to the corporation. One is the presumption that the management board are aware of policies implemented by lower-rank managers if these are consistent throughout the company. However, before introducing any legislative change, careful consideration should be given to all pros and cons.

Judges also have a crucial role in overcoming the existing obstacles in the evidence gathering process through jurisprudence clarifying the circumstances in which indirect evidence of fault can be accepted and also through a more strategic and assertive use of judges' powers during proceedings.

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## Annex I. Cases and Allegations Against JMD

Jeronimo Martins Distribution JMD – Poland is the owner of the supermarket chain “Biedronka”. JMD is an entity incorporated under Polish law, owned by a Portuguese consortium Jeronimo Martins. Since 2003 when the first legal proceedings started, this case has been one of the most prominent cases of systemic violation of human rights involving a corporation in Poland. Irregularities disclosed in the supermarket chain and, in particular, the frequency with which they occurred, may lead to the conclusion that the management system led to violations to occur by making the generation of profit at the lowest possible cost for the company the overriding management concern.

Allegations and claims against JMD or its managers include: forcing workers to enter into types of contracts other than a standard employment contract (e.g. temporary work contracts, commission contracts) in order to deprive them of legal protection applicable to the employment relationship; forcing workers to work overtime on a regular basis (“planned overtime”), forging working time documentation and depriving workers of remuneration for overtime work (e.g. *Tulska, Bażyński v. JMD*); forcing female workers to carry out heavy tasks (e.g. lifting heavy packages) that were not included in their job specification, causing spine injuries (*Łopacka v. JMD*), miscarriages (*Wiktorzak v. JMD*) and death as a result of cerebral aneurysm, aggravated by working conditions (*Glińska v. JMD*).

Allegations also include mobbing and degrading and humiliating treatment (including preventing cashiers from taking necessary toilet breaks).

There is a series of civil cases brought against JMD as the owner of the supermarket chain (some of them still pending), and criminal investigations (carried out ex officio) against JMD’s employees and low-rank officers formally responsible for criminal deeds (pending). There are, in total, around 120 different proceedings (pending or completed) carried out in this case. Lawyers acting (pro bono) on behalf of victims gave a few hundred pieces of legal advice. Some of the civil proceedings involved as many as 20 hearings and lasted as long as 2-4 years. Many of the completed proceedings ended through settlement between an (ex-) employee and JMD.

Company’s officers who created the system of abuse have not been held accountable so far. The persons punished most often are those who implemented the system at the lowest level of management, i.e. store managers, who were often victims of rights violations themselves. The evidence has not been sufficient for holding liable persons with higher positions in the hierarchy, for instance regional managers. Actions taken by the State Labour Inspectorate brought similar results: as a result of inspections carried out in 2004, labour inspectors fined 112 persons, among whom there were only six district managers and two regional managers.