

The human right to communicate in the light of the development of IT technology at the turn of the XX and XXI centuries

ABSTRACT

The human right to communicate was noted by the doctrine in the 80s of the twentieth century. Legal bases of its are in the acts of international and national law. Most often, it is guaranteed by the constitutional provisions. The technical and technological progress of IT makes that the communication between the human beings is becoming easier. However, this may be a subject of many abuses in cyberspace by ordinary criminals and organized groups. Hence, the Internet law, implemented by States or the international organizations, provides the opportunity to restrict or to suspend that right for some reasons, for example due to the social security matters.

Keywords: human rights, the need to communicate, cybersecurity, the Internet law, the Internet crimes

1. Introduction

The subject of this study is the human being's right and the need to communicate with others. The social nature a person, of which Aristotle wrote in ancient times, is a base and source of this right and need. According to the philosopher from the city of Stagira, a human being has a natural ability to live in community, especially family or state. The goal or effect of the human social nature is friendship built on the virtues that

man should lead in life¹. The opposite point of view on human nature was proclaimed by J.J. Rousseau, according to which the primitive man lived in perfect state of happiness and a person was independent and free. Only with time, as a result of the need to preserve the conditions for the survival, the human being changed his nature and formed the family and then the structure of the state².

In both quite divergent views on the nature of man, a common element is the statement that society is a natural environment for human life and development, especially for the development of his personality. Hence, the escape is something unreasonable or contrary to the social nature of a person. Nowadays, the exclusion of a man from society may be due to the lack of new communication technologies. This phenomenon is referred to as social exclusion. In order to restore the individual to the society, the European Union is introducing programs to help overcome technical and technological barriers to the fullest possible integration of individuals into society³.

One aspect of the social nature of person is to satisfy his or her communication needs. This need is independent of whether people communicate verbally or non-verbally, such as using sign language, gestures, or symbols. This communication can take place directly – face to face, or indirectly through the use of various technical or teleinformatic devices such as telephone, fax. Today, the electronic means of communication are most commonly used.

¹ See: I. Andrzejuk, *Arystotelesowska koncepcja społeczności jako ludzi powiązanych przyjaźnią*, pp. 1–11. <http://katedra.uksw.edu.pl/katedra.htm> [access: 6.03.2017]. Arystoteles, *Dzieła wszystkie*, v.5, *Etyka nikomachejska*, Księga IX, 1169b, p. 272, Warsaw 1996, translation D. Gromska.

² See: M. Baranowska, Jana Jakuba Rousseau refleksja o naturze człowieka p. 69. http://www.repozytorium.uni.wroc.pl/Content/66121/04_Marta_Baranowska.pdf [access: 16.03.2017].

³ The Community Initiative EQUAL is one of the European Union program focused on combat with the social exclusion. See: D. Łażewska, *Wykluczenie społeczne a rozwój osoby ludzkiej. Aspekty filozoficzno-pedagogiczne*, Journal of Modern Science 3/18/2013, pp. 29–47. The exile – *exilium* was one of the most severe punishments in Roman law. See: G. Kelly, *History of exile in the Roman Republic*, Cambridge 2006; M. Jońca, *Parricidium w prawie rzymskim*, Lublin 2008, pp. 277 and the following. In the Catholic Church, the excommunication (can. 1364 §1) is the analogous panishment, that is the exclusion from the community of believers and members of the community. See: J. Syryjczyk, *Sankcje w Kościele*, Warszawa 2008. Apart of the Canon Law, this kind of punishment is not used today and it is even forbidden by international law.

The context of human right to communicate was doctrinally built in the late second half of the twentieth century and it is undoubtedly linked to the development of IT techniques, especially of the Internet and the social media. The interpersonal communication has become a global issue and it is perceived as a benefit, especially in Western civilization. In the doctrine, the right to communicate has been defined already in the early 1980's. D. Fisher and S.H. Leroy wrote about the right of communicate as about a new human right⁴.

The subject of the study is to present the content of human rights to communicate through the prism of analysis of normative acts, case law and doctrine. The research hypothesis is to assume that this law is not intrinsic and absolute, and therefore it may have some limitations. Hence, this research will show the limits in exercising this right and the unlawful practices used by uniformed and secret services, or the unlawful practices by some states such as North Korea or China.

In order to interpret national and European law and in order to analyze the case law and doctrine, the dogmatic-legal method will be used in this work.

2. Scope of the right to communicate

In doctrine, among others. C. Hamelink, it is assumed that the right to communicate is not an intrinsic right. It is a component of other human rights. It should therefore be considered in the conjunction and relation with other rights, especially with the right to personal freedom. The duty of the state to guarantee to every citizen the right to freedom also includes the obligation to respect the right to communicate with others⁵.

As C. Hamelink noted, the right to communicate is not just a process by which an individual has the ability to share information with others or with authorities. This right includes, in particular, the possibility of active (right to publish) and passive access (the right to know the content published in

⁴ D. Fisher, S.H. Leroy (ed.), *The right to communicate: A new human right*. Boole Press 1983.

⁵ See: C. Hamelink, *Statement on the Right to Communicate by Article 19 Global Campaign for Free Expression*, London February 2003, p. 2 Website: <https://www.article19.org/data/files/pdfs/publications/right-to-communicate.pdf> [access: 1.03.2017].

national and international publications) of individual to media, the right to create and publish cultural works (material and non-material), the right to use of any language, the right to participate in public decision-making processes (participation in a referendum), the right of access to information – including the public information, the right to privacy, including the right to anonymously publicize their views or opinions⁶.

The right to communicate is an essential element of the content of the right to privacy. It is enough if one of the parties of communication wants to conceal the content of this communication. As such, it is subject to criminal law protection. According to the article 267, § 3 of the Criminal Code, the protection of speeches is provided to participants in conversations, if at least implicitly, a confidential nature was given, without regard to the intentions of such statements. The violation of this right may occur by disclosing the content of the conversation by any of the participants of the conversation, by a third party by those who has overheard the conversation or illegally recorded the content by means of a wiretap. In the Supreme Court's Decision of 27th April 2016, signature III KK 265/15, is stated that the object of protection of art. 267 § 3 of the CC is *the secret of communication and the related right to privacy, guaranteed by the article 49 of the Constitution of the Republic of Poland, the article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the article 17 of the International Covenant on Civil and Political Rights* (Legalis).

3. The right to communicate and the new technologies

Currently, the human right to communicate is very closely linked to technical means and new technologies of social life organization. The direct communication, *face to face*, which for millennia has been the primary form of human communication, is being replaced today by new techniques and technologies of social life organization on a global scale. Undoubtedly, the Internet together with social communicators

⁶ Ibidem.

like Facebook, Skype, Gadu-Gadu, Tlen (O₂), Pidgin and many others are mainly the new techniques or instruments for communicating with people. It is also important to mention forums, blogs, information portals, which are also instruments to communicate. The advantage of this communication is the practical ability to communicate without barriers and without obligations and most often without fees. Hence, this communication is not only done for private use but also for professional purposes, often between public offices. The communication can be in the form of text, voice or video, depending on the will of the communicators.

New technologies also change the shape of social relationships and their pace. They are becoming less and less personal contacts, which are replaced by contacts by means of the Internet. At the same time, the traditional family ties are weakened, especially marital and parental ones, for which the current basis, also statutory, was the physical proximity of another person. On the other hand, with the increasing migration of people, such means of communication are an opportunity to maintain these contacts. Perhaps with time, there will be the change in the content of the article 113, § 2 of the Act of 25th February 1964 – the Family and Guardianship Code⁷, which now states: *Contacts with a child include, in particular, staying with the child (visits, meetings, taking a child out of his or her permanent residence) and direct communication, maintaining correspondence, using other means of distance communication, including electronic means of communication*⁸. The statutory obligation of physical contact between the parent and the child can be further weakened and parental responsibility can be exercised through, for example, social communicators.

New IT technologies used to communicate between people also influence the shape of interpersonal friendship. Increasingly, they do not occur any longer during family or friendly gatherings, but just in the network. The people are less and less united by a common history or experience. In the network, people choose friends according to completely different criteria like in the past, such as: profession, common interests, political views, hobbies. The nature of assemblies or social integration is also changed. The political demonstrations of 1956, 1968, 1970, 1976 or 1980, as well

⁷ Consolidated text: Dz.U. z 2015 r. poz. 2082 (Journal of Law, 2015, pos. 2082).

⁸ Comment to art. 113 see: K. Gromek, *Kodeks rodzinny i opiekuńczy. Komentarz*. edition. 5, Warsaw 2016. Legalis.

as meetings with Pope John Paul II or great charity questions remain in Poles' memory. Thanks to the Internet, everything is changed. It is enough to mention the 2008 Barack Obama presidential election, which has won thanks to the consolidation of its supporters through a marketing campaign skillfully conducted on the Internet. In this way, money was also collected to finance the election campaign⁹. Another example is the collection of money on the car – fiat seicento of the perpetrator of Prime Minister B. Szydło's accident, in Oswiecim. In just two days using the Internet, more than 80 thousand zlotys was collected¹⁰. In this way, many charitable donations are being carried out today. We can also imagine the situation that in the near future the political decision will be made with the use of Internet.

One of the problems with the right to communicate is when there are people who are not able to speak and who face real obstacles. The legislator, in the article 4, paragraph 1 of the Act of 19th August 2011 on sign language and other means of communication (hereinafter referred to as: jmskU – Journal of Laws No. 209, item 1243), decided that *the entitled person* (own note: the deaf person) *has the right to freely use the form of communication of his or her choice*. If the person does not have full legal capacity, he or she has the right to co-decide with the parents or legal guardians about the form of communication (paragraph 2). The people with dysfunction in hearing and speaking also have the right to support from public administrations to facilitate their communication. Therefore, the article 9, paragraph 1 of jmskU states that the public administration bodies are obliged to provide communication support services to such people (paragraphs 1 and 2). In addition, the public body should publish the information about these services so that all interested parties can benefit from it (paragraph 3). This information may be published in the Internet, in the Public Information Bulletin or on the local or central authority's website (paragraphs 3 and 4). In the article 10 of jmskU, the legislator also provided to those people the use of sign language interpreter or the translator the guide on public expense. Finally, in the article 18 of jmskU, the legislators

⁹ See: T. Frontczak, *Barack Obama już wygrał w internecie! Strategia marketingu internetowego Obamy*, <https://sprawnymarketing.pl/barack-obama-juz-wygral-w-internecie-strategia-marketingu-internetowego-obamy/> [access: 5.03.2017].

¹⁰ See: *Maluch dla Hanksa*, <https://silesion.pl/zbiorka-na-seicento-zebrali-70-tysiecy-w-dwa-dni-15-02-2017> [access: 5.04.2017].

provided financial support to people with these dysfunctions. Often, those people have very limited financial resources, and without public support those people will find it hard to take advantage of their right to communicate with others and with the environment.

4. The legal framework for human rights to communicate

The oldest legal basis for human rights to communicate is the article 19 of the Universal Declaration of Human Rights of 1948, in which we can read: *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.* There is no “right to communicate” in the above-mentioned text, but it is possible to point to the elements that directly relate to that right. The content creators of article 19 considered that the constitutive element of this law is the freedom of every human being to express his or her opinion, manifested by the ability to not only have the opinion or to collect the information but, above all, by proclaiming it using all means, also technical means, irrespective of political or economic boundaries. Hence, in the content of article 19, the right of every person to global communication. can also be seen.

However, the most important in the content of article 19 of the Declaration is the limitation or even exclusion of the possibility of limiting this right by the state, whether through legal regulations or practical actions, for example: by creating a single, state-controlled communication center.¹¹

The analogous regulation is found in the article 10, paragraph 1 of the European Convention on Human Rights of 1950 and in the article 19, paragraph 2 of the International Covenant on Civil and Political Rights 1966¹². Also in the regional conventions there is no direct reference to this law, for example – the article 13, paragraphs 1 and 2 of the American Convention on Human Rights of 1969¹³.

¹¹ See: C. Hamelink, *Statement on the Right to Communicate by Article 19 Global Campaign for Free Expression*, London February 2003, p. 3. web site: <https://www.article19.org/data/files/pdfs/publications/right-to-communicate.pdf> [access: 1.03.2017].

¹² Journal of Law, 1997, no. 38, pos. 167 (Dz. U. z 1977 r. nr 38, poz. 167).

¹³ Text of Convention see: <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> [access: 28.02.2017].

The development of technology that facilitated interpersonal communication after the Second World War and the exercise of important human rights components for communication had undoubtedly affected the Conciliar Fathers in the early 1960s. In the decree of the Second Vatican Council of December 4, 1963 on the social media of social communication (*Decretum de instrumentis communicationis socialis – Inter mirifica*), in number 5, there is a clear reference to this right. Namely, it was stated that Everyone has the right to collect and proclaim news. According to the Council Fathers, the information has become extremely useful because it gives the ability of each person to read information at their own discretion, regardless of the source of that information¹⁴.

Since then, the technical and technological progress has gone much further, hence there is a need for further discussion on this right, especially its content, its application and respect by the state authorities.

For the first time the phrase “right to communicate” was used *expressis verbis* in the article 7 of the Charter of Fundamental Rights of 2000 (hereafter: CFR): *Everyone has the right to respect for his or her private and family life, home and communications*. Prima facie of the formulation of such a legal provision follows a clear change in the previously established content of the right to communicate. In this optics, it is more closely related to the right to privacy not only personal privacy, but also family and home privacy rather than to the right to personal freedom. It seems, however, that such a restrictive interpretation of the article 7 of the CFR is wrong because the right to privacy includes primarily the right to personal freedom. Within this freedom lies the right of the individual to decide on the will to communicate, the choice of means of communication and the interlocutors, and to disclose information about himself only to those he or she deems appropriate. According to J. Sobczak, this right prohibits the interference of public factors into the private life of individuals. An individual has the right to participate also in mass communications. The communication cannot be restricted to

¹⁴ Text of the Decree see: *Sobór Watykański Drugi. Konstytucje, dekry, deklaracje*. Paris 1967, pp. 63–75. (Polish version) or http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19631204_inter-mirifica_en.html – English version [access: 28.02.2017]

correspondence only¹⁵. The author further points out that the right to communicate includes a guarantee of confidentiality. This means that no public authority or private person can interfere with the content of the communication. Its integrity both *de iure* as well as *de facto* must be preserved. It is therefore not permissible to censor, to eavesdrop, to take over, to hold, to record, or to publicize the communication process, except the situation and cases describe in legal regulations. This understanding of the right to communicate also arises from the article 17 of the International Covenant on Civil and Political Rights of 1966¹⁶.

In the Constitution of the Republic of Poland of 1997, the right to communicate is expressly stated in the article 49, in which the legislator decides that *The freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute.* This provision is quite rich in content and it is rather different interpretation of the right to communicate than it does with respect to international law. B. Banaszak points out that the author of article 49 of the Polish Constitution has indicated that communication is a manifestation of freedom in a singular dimension. As such, it is protected. No one can be forced to participate in the process of communication – one can only be invited. Involuntary invitations to communications are treated as violations of constitutionally protected freedoms and rights¹⁷. According to M. Wild, the right to communicate is a constitutional value distinct from the freedom to express one's views or to acquire and disseminate information as referred to in the article 54 of the Constitution of the Republic of Poland¹⁸.

In practice, the fullest possible realization of the right to communicate depends on two factors. The first is the legal arrangements for the organization and functioning of uniformed and non-uniform services. These are the basis on how much citizens can move in cyberspace or how to use conventional means of communication. The second factor affecting

¹⁵ See: J. Sobczak: A. Wróbel (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz.* Warsaw 2013, Legalis. See also: Goban-Klas, *Komunikowanie masowe. Zarys problematyki socjologicznej,* Kraków 1978, p. 19.

¹⁶ Ibidem.

¹⁷ See: B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Warsaw 2012, pp. 304–305.

¹⁸ See: M. Wild: M. Safjan, L. Bosek (ed.), *Konstytucja RP. Tom I. Komentarz do art. 1–86,* Warsaw 2016. Legalis.

the quality and level of human communication is the economic resources of the state, which will allow them to build the appropriate technical infrastructure that is the basis for communication. However, it should be remembered that there is no target or optimal communication model. All ideas in this regard are derived from the experience and legal and economic capabilities of the state and the individual, and above all from the level of technical and technological development.

5. Restrictions on the right to communicate

New ways of communicating can be and are used by organized crime groups, terrorist organizations, hackers, or individual users of cyberspace against another person. In practice, it is enough to point out the use of the Internet for criminal purposes, among others: by pedophiles, dishonest contractors, organized crime, or by terrorists such as Al-ka'ida or the self-proclaimed Islamic state – ISIS to recruit new followers or willing to carry out terrorist attacks.

The increasingly widespread possibility of global communication is becoming increasingly difficult to control by state authorities or international organizations, such as the European Union. In some countries, efforts are being made to limit or inhibit the development of this communication. North Korea, which has built its own Internet or we should actually say the Intranet, with only 28 domains across the country can be a good example of such activities¹⁹. In turn, China censors the content posted on the Internet²⁰.

However, it still remains an open issue the answer to question on how much State control over the complex process of communicating with people and institutions in global cyberspace is permissible. From a human-rights perspective, the human right to communicate is not an absolute right or fundamental law, so is the right to life. Hence, based on legal regulation (Act), this right can be restricted in some way and even suspended.

According to J. Sobczak, the content of article 7 and the article 8, paragraph 1 of the European Convention on Human Rights allows the possibility of

¹⁹ See: K. Kopańko, *Tak wygląda Internet w Korei Północnej. Mają tylko 28 domen*: <http://www.spidersweb.pl/2016/09/korea-polnocna-internet.html> [access: 15.03.2017].

²⁰ See: P. Borkowski, *Koncepcja cyberbezpieczeństwa w ujęciu Chińskiej Republiki Ludowej – wybrane aspekty*, *Przegląd Bezpieczeństwa Wewnętrznego* 13.7 (2015), pp. 49–59.

controlling correspondence in certain situations. However, the goals of legislators must be legitimate. In fact, the jurisprudence of the European Court of Human Rights states that democratic societies are very often threatened with sophisticated forms of espionage and terrorism and often of international character. This forces the states to undergo a secret investigation of suspected of such activity²¹. And further, J. Sobczak writes that *the public authorities enjoy some freedom in determining the nature and use of certain means, but that freedom is not unlimited* (judgment of 06.09.1978, Klass and others vs. Germany, A28, the report of European Commission on Human Rights of 09.03.1977, Complaint No. 5029/71; M.A. Nowicki, Europejski Trybunał Praw Człowieka. Orzecznictwo, vol. II, pp. 812–818)²².

It is important to look for an answer to the question on the ability to control communication in the Internet, due to the fact of potential abuse. It is favored by the rather poorly developed legal science in this regard, and thus poorly developed the legal regulations. As it was noted by P. Wojtunik, in some countries such regulations do not exist at all²³. The Internet law, especially the rules governing the movement in the cyberspace and the responsibility for all the activities carried out there, are just evolving, so they are *in statu nascendi*. Undoubtedly the United States has currently the most well-developed laws in this area.

The broadly-defined human right to communicate can therefore conflict with certain values and consequently, with human rights, including such rights as the right to individual and collective security or the right to good name. The organic right to communicate can be one of the tools to restore a balance between these values or rights.

Restricting the right to communicate may result from legal provisions, generally from the act. Such a situation is usually unique. One such case is the issue of people with mental disorders that endanger the lives, health or sexual freedoms of others. In the article 23, paragraph 2 of the Act of 22nd November 2013 on the treatment of persons with mental disorders posing a threat to the life, health or sexual freedom of others (Journal of Laws of 2014, item 24, as amended – hereinafter referred to as PostZabPsychU),

²¹ J. Sobczak, op. cit.

²² J. Sobczak, op. cit.

²³ See: P. Wojtunik, *Strategie i cele wykorzystywania mediów przez organizacje terrorystyczne*, <https://www.bbn.gov.pl/download/1/1967/zeszyt9wojtunik.pdf> [access: 5.03.2017].

legislator decided that in the case of a person with a mental disorder that threatens the life, health or sexual freedom of another person, the preventive supervision may be replaced with the operational control. The manner of setting this control raises doubts of the Ombudsman, who asked the Constitutional Tribunal to check the constitutionality of the above-mentioned legislation. He stated that this measure was disproportionately applied and unduly restricted the right to protection of private life and the freedom of communication and the right to the protection of the confidentiality of such communications (Legalis).

In its judgment of 23rd November 2016, the Constitutional Tribunal decided that there is no doubt that the challenged provision of the Act of 2013 significantly interferes with the human sphere of freedom, and in particular through the non-custodial measures (preventive supervision) and the isolation means (placement at the Center) – may constitute a legal basis for the limitation or deprivation of personal liberty, as well as the sphere of its privacy or the freedom of communication and the right to the protection of the secret of communication. The Constitutional Tribunal has ruled that this law does not violate the right to privacy or freedom of communication (Legalis).

Another area where there may be a need to control or restrict communication is the hate in the Internet. With the use of short commentaries being the part of hate speech, on various portals, the public figures belonging to politics, arts or science life are often defamed. Also, very often the wave of hate has the micro-local scale. The goal is to discredit a particular person in a very narrow environment. The same effect is achieved by creating an offensive web page. The hate as a negative social phenomenon is recognized as the acts of cyberbullying or psychological harassment²⁴. This is such type of hate speech, where the attacked person is usually helpless. The way of defense is very long and costly. It requires the protection of personal rights in the court based on the article 23 of the Civil Code or the article 212 of the Criminal Code, and this road may last for years.

²⁴ Zob. I. Jakubowska-Branicka, *Hate Narratives. Language as a Tool of Intolerance*, Frankfurt am Main 2016, pp. 25 and following.

6. Conclusions

In the conclusion of the work, it should be stated that the technical and technological development in the IT field is a great gift for humanity. People have received new tools that allow them to communicate remotely (long distance communication). As a result, the human right to communicate has grown, the right that is derived from human's social nature. Thanks to this progress, the numerous barriers of interpersonal communication have been overcome, also in the case of the deaf or the blind people.

One cannot fail to notice the changes and the dangers that are made by such a wide range of communication possibilities. The relationship between people, also in the family, is changing. The most important thing, however, is that the increased capacity for communication has created an opportunity simultaneously for all kinds of crime. For this reason, it is necessary to introduce some legal regulations limiting or suspending the use of new technologies and thus the limits in communication. Hence, the legal instruments for the functioning of cyberspace have been developed for a long time. However, it is useful to repeat after the Court of Appeal in Warsaw: the electronic network serving billions of users worldwide is not and will never be regulated and controlled in the same way (Judgment of the Appeal Court in Warsaw, I Civil Department, 1st October, 2015, I ACa 142/15).

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