

STUDIES AND COMMENTS

Effect of the European Court of Human Rights case-law on judgments of Polish courts in the crime of hate speech

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Abstract

The Convention on the Protection of Human Rights and Fundamental Freedoms and judgments of the European Court of Human Rights set the basic direction of judicial practice in Poland by introducing elementary principles of human rights observance by public authorities. The aim of the study was to analyze the impact of selected judgments of the European Court of Human Rights on the judicature of courts in Poland regarding the limits of freedom of expression in the context of the hate crime. The basic standards and the level of freedom of expression in Polish law, as well as judicial practice in this respect, have been defined. The analysis of standards has been limited to the aspect of the limits of freedom of speech in the context of hate speech. The scope of protection of statements in Polish law is, in principle, consistent with the ECHR jurisprudence. It follows that it is generally acceptable to extend the scope of penalization of statements containing incitement to hatred and violence of a racist or xenophobic nature, in particular, if they take the form of public insults, slander or threats. The jurisprudence of Polish courts is increasingly in line with international standards.

Keywords: hate speech, freedom of speech, European Court of Human Rights, criminal law

JEL Classification: K14

1. Introduction

Freedom of speech is one of the most important elements of modern standard of democratic state in the area of fundamental rights and civil liberties. It is guaranteed by Polish Constitution, international legal acts ratified by Poland and by common legal acts. Freedom of speech is subjective right, which does not have, however, absolute character. It means, that in some matters it may be constrained in favour of other legal interest. We deal with that situation in case of acts of hate speech which is pointed out on spreading hatred, reluctance towards person or some special groups of population. Legal entities face the problem of drawing the line between freedom of speech and hate speech. The European Court of Human Rights in Strasbourg stands on behalf of obeying human rights and liberties. It is the entity which has great authority in Poland not only because of its legally binding

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judicial decisions but also of its rich judicature. The ECHR impacts on catalogue of standards, which should be taken into consideration in the state process of constituting and executing law. Poland, by joining to the Council of Europe and ratifying European Convention for the Protection of Human Rights and Fundamental Freedoms² and acknowledging jurisdiction of the European Court of Human Rights undertook to accept European standards concerning human rights protection, including, among the others, freedom of speech. With regard to the fact that the Convention³ is a part of Polish legal order it can be directly implemented, and it also acts as a point of reference in Constitutional Tribunal which in Poland is independent and separated from other Polish courts. The primary task of the Constitutional Court is examining compliance of the lower norms of law with resolutions of the Constitution, international legal acts and legal acts. Constitutional Tribunal is obliged to enforce within constitutional verification, principles and methods of interpretation leading to ease potential collisions between Polish standards against standards created by the ECHR⁴.

Taking in mind that the European Convention for the Protection of Human Rights and Fundamental Freedoms indicates basic direction of judicial practise in Poland by implementing basic principles of obeying human rights by public authorities, the main purpose of research was formulated, which was to analyse influence of selected judicial decision by the ECHR on legislation of Polish Courts. Primary standards and level of freedom of speech in Polish law and judicial practise were specified in that area. The analysis of that standards was constrained to the aspects of the boards of freedom of speech in the context of hate speech.

2. The issue of freedom of speech protection in Poland

Legal regulations related to freedom of speech in Poland contain international legal acts, European legal acts and national legal act⁵. One of the most important international legal acts is International Covenant on Civil and Political

² Poland ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms on 19 January 1993. The opportunity to file complaints to the European Court of Human Rights in Strasbourg against the Polish state appeared on May 1, 1993.

³ European Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4th November 1950, amended by Protocols no 3, 5 and 8 and supplemented by Protocol no 2 (Journal of Laws 1993, No. 61, item 284, as amended).

⁴ Judgment of Constitutional Tribunal from 18 October 2004 r., P 8/04; see more M. Szymura, *Stosowanie Europejskiej konwencji praw człowieka w polskim porządku prawnym – przegląd orzecznictwa*, [in:] M. Haczkowska, F. Tereszkievicz (eds.), *Europejska konwencja o ochronie praw człowieka – praktyka stosowania i funkcjonowanie w przestrzeni europejskiej*, Opole 2016, pp. 23-24; A. Demczuk, *Wolność wypowiedzi w orzecznictwie Europejskiego Trybunału Praw Człowieka a polskim prawie i praktyce sądowej*, [in:] M. Haczkowska, F. Tereszkievicz (eds.), *Europejska konwencja o ochronie praw człowieka – praktyka stosowania i funkcjonowanie w przestrzeni europejskiej*, Opole 2016, p. 147.

⁵ A. Michalska-Warias, *Przestępstwa przeciwko porządkowi publicznemu*, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom II. Komentarz, Art. 222-316*, Warsaw 2017, p. 363.

Rights⁶, which in Article 19 concludes matters concerning freedom of speech. It was highlighted that every human being has right to freedom of opinion and its expression. This right concludes freedom of having own independent opinion, searching, obtaining and dissemination of information and views with all possible resources regardless of any borders⁷.

In case of European regulations, the act which is the most significant is already mentioned in the introduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁸. Right to freedom of expressing opinions is mentioned in the Article 10. It must be pointed out that in this document was also undertaken matters concerning constrains in the area of freedom of speech⁹. This act stated that making use of freedom of speech might be subject to such formal requirements, conditions, constrains and sanctions which are foreseen by legal act and are necessary in democratic society in the interest of state security, territorial integrity and public safety in case of necessity of preventing legal order from disruptions or crimes and protection of health and morality, protection of good name and rights of other people and preventing from disclosing confidential information or guarantee of dignity and impartiality of judicial entities. In the forum of community, significant are also judicial decisions of the European Court of Human Rights in Strasburg, these decisions are very often related to freedom of speech and they should be taken into consideration within using law in Poland.

At the national level, the Constitution¹⁰ in the Article 54 ensures everyone freedom of expressing views and obtaining and spreading information. Freedom of speech does not have absolute character though¹¹. This freedom can be restricted in lower legal norms. Pursuant to the Article 31 section 2 of the Constitution restrictions in area of using constitutional liberties and rights can be established only in legal act and only then, when it is necessary for democratic state for its security or public safety or for environment protection, public health and morality or liberties and rights of other people. These restrictions cannot breach the essence of liberty and rights.

For such restriction in view of public order protection, liberties and rights of other people, crimes of hate speech specified in the Articles 256 and 257 of Criminal

⁶ International Covenant on Civil and Political Rights (Journal of Laws of 1977, No. 38, item 167).

⁷ A. Biłgorajski, *Granice wolności wypowiedzi. Studium konstytucyjne*, Warsaw 2013, p. 157.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, (Journal of Laws of 1993, No. 61, item 284).

⁹ L. Garlicki, *Prawa i wolności*, [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1-18. Tom I*, Warsaw 2010, p. 584; M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warsaw 2017, p. 743.

¹⁰ Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws of 1997, No. 78, item 483, as amended).

¹¹ P. Sarnecki, *Wolności i prawa osobiste*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz II, art. 30-86*, L. Garlicki, M. Zubik (eds.), Warsaw 2016, p. 295; A. Demenko, *Prawnokarna ochrona wolności wypowiedzi. Zarys problemu*, [in:], A. Biłgorajski (ed.), *Wolność wypowiedzi i jej granice. Analiza wybranych zagadnień*, Katowice 2014, p. 39.

Code¹² should be acknowledged¹³. Crime specified in the Article 256 paragraph 1 of Criminal Code consist in propagation of fascism or other totalitarian state system or incitation to hatred based on national, ethnic, race or religious differences. The Article 257 of Criminal Code specifies crimes based on public insults of group of people or individual because of national, ethnic, race or religious affiliation or because of irreligiousness, as well as breaching the personal inviolability due to aforementioned reasons. In context of hate speech crimes there is a principles dispute among lawyers specialized in constitutional law and criminal law. Some authors notice in criminal legal acts threat for constitutional freedom of speech¹⁴.

As there isn't one, generally accepted legal definition of hate speech¹⁵, within this research was accepted definition of hate speech from Recommendations No. R(97) 20 enacted by the Committee of Ministers of European Councils from 20th October 1997 where hate speech shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin¹⁶.

3. The border between hate speech and freedom of speech

The main problem connected with practicing by Courts Articles 256 and 257 of Criminal Code is the border between freedom of speech against penalization of hate speech acts. There is a question if penalization of hate speech is a threat for freedom of speech. The dilemma in this matter is on acknowledging if speech which is a hate speech should make use of legal protection or if this speech should not be taken under protection, and this speech itself crossing the borders of liberties which are given to speech.

Analysis in this matter requires referring to international standards including judicial decisions of international entities controlling protection of human rights, specifically the ECHR¹⁷. Judicial decision of the ECHR is in practice

¹² Act of 6 June 1997 The Criminal Code (Journal of Laws of 2018, item 1600, as amended).

¹³ K. Pałka, M. Kučka, *Ochrona przed mową nienawiści – powództwo cywilne czy akt oskarżenia?* [in:] *Mowa nienawiści a wolność wypowiedzi. Aspekty prawne i społeczne*, R. Wieruszewski, M. Wyrzykowski, A. Bodnar, A. Gliszczyńska-Grabias (eds.), Warsaw 2010, p. 42.

¹⁴ A. Michalska-Warias, *op. cit. (Przestępstwa...)*, p. 362; W. Mojski, *Prawnokarne ograniczenia wolności wypowiedzi w polskim porządku prawnym. Analiza wybranych przepisów*, *Studia Iuridica Lublinensia* 2009, No 12, p. 193.

¹⁵ E. Rogalska, M. Urbańczyk, *Złożoność zjawiska mowy nienawiści w pozaprawnym aspekcie definicyjnym*, „Acta Universitatis Wratislaviensis” No 3780, „Studia nad Autorytaryzmem i Totalitaryzmem 39”, No 2, Wrocław 2017, DOI: 10.19195/2300-7249.39.2.8; p. 118-135.

¹⁶ N. Chetty, A. Sreejith, *Aggression and Violent Behavior Hate Speech Review in the Context of Online Social Networks.* Aggression and Violent Behavior 40, no. May (2018): 108–18. doi:10.1016/j.avb.2018.05.003, p. 110.

¹⁷ A. Gliszczyńska-Grabias, *Międzynarodowe standardy wolności słowa a mowa nienawiści*, [in:] D. Bychawska - Siniarska, D. Głowacka, *Mowa nienawiści w Internecie: jak z nią walczyć?. Materiały z konferencji*, Warsaw 2013, s. 45.

a huge hint in process of assessing boundaries between hate speech which must be eliminated from public domain and freedom of speech. The analysis of arguments located in judicial decisions of the Tribunal leads to conclusion, that basically hate speech is treated like crossing the boundaries of freedom of speech, which justifies and allows its restrictions¹⁸.

4. The European Court of Human Rights judicature in the field of hate speech

The standards of freedom of speech are built in great matter by judicial decisions of international legal entities, including the ECHR. This judicature in principle, acknowledges penalizing in state law sentences propagating hatred based on intolerance, inciting to hatred or justifying hatred, it may appear necessary in democratic state, under the condition that all measures used by state will be necessary and proportionally to the target which these measures shall serve¹⁹.

There are several important judicial decisions of the European Court of Human Rights in Strasburg specifying fundamental standards for freedom of speech protection. The Tribunal in its jurisdiction gives clear suggestions when protection of freedom of expression ends and hate speech begins. Under the Article 17 of the Convention, protection of human rights cannot be claimed if it constitutes an abuse of such a right, that is, it seeks to upend other rights and freedoms conventionally protected.

The judgement of the European Court of Human Rights in Strasburg²⁰ in the case of *Handyside v. United Kingdom*²¹, states that freedom of speech is one of the pillars of a democratic society, it is the basis for its development and condition for the individual's self-fulfilment. Freedom of speech cannot be limited only to approved information and views or perceived as harmless or indifferent, but also to views which insult, outrage and unreassuring in a state or in a group of society. These are requirements of pluralism, tolerance and openness, without which democratic society cannot exist.

The Tribunal stated also that freedom of speech in democratic society cannot be limited only to approved information and views or perceived as harmless or indifferent, but also to statements introducing anxiety and outrage, and this is particularly important to selected representatives of the community²².

¹⁸ L.K. Jaskuła, *Wolność działalności dziennikarskiej w perspektywie zjawiska mowy nienawiści (wybrane aspekty prawne)*, [in:] W. Lis (ed.), *Status prawny dziennikarza*, Warsaw 2014, p. 327.

¹⁹ Cf. ECHR judgment in the case of *Feret v. Belgium*, July 16, 2009 (application No. 15615/07).

²⁰ Cf. ECHR judgment in the case of *Lingens v. Austria*, December 7, 1976, application No. 5493/72; See D.K. Żak, *Wolność słowa i odpowiedzialność za słowo na forach internetowych*, [in:] W. Lis, Z. Husak (eds.), *Praktyczne aspekty wolności wypowiedzi*, p. 455.

²¹ *Handyside v. UK*, App. no. 5493/72, Ser. A vol.24, (1976) 1 EHRR 737.

²² *Castells v. Spain*, App. no.11798/85, Ser. A vol.236, (1992) 14 EHRR 445. Yaman Akdeniz, 'To Block or Not to Block: European Approaches to Content Regulation, and Implications for Freedom of Expression', *Computer Law & Security Review*, 26.3 (2010), 260–72 <<https://doi.org/10.1016/>

The abovementioned judgements concern protection of freedom of speech. However, the Tribunal referred also to hate speech. In the decision on 27 June 2017, the complaint no 34367/14, *Belkacem v. Belgium*, the Tribunal stated clearly, that the Article 17 of the Convention (concerning decline of protection) can be used only exceptionally and in extreme situations. The purpose thereof is to prevent exercising conventional law, which appellant wishes to assert in the Tribunal. In cases concerning the Article 10 of the Convention, this Article should be used only when it is obvious, that subjective statements were intended to depart from its actual purpose by using the right of freedom of expression in a manner unambiguously inconsistent with the values of the Convention. A decisive matter in the light of the Article 17 is that, whether the purpose of the appellant's statement was to incitement to hatred or violence, or whether by these statements the appellant sought to invoke the Convention in a way allowing him to conduct activity or to commit acts in order to upend rights and freedoms protected by the Convention.

It results that there is no legitimate criticism, also political criticism, and no freedom of expression is protected by such a statement, which seeks to deny other rights and values protected by the Convention: the right to life, the right to freedom of religion, the prohibition of discrimination (including the prohibition of discrimination on grounds of sexual orientation, which the Polish legislator still refuses to recognize), the right to freedom and security, democratic values of the rule of law and the like.

5. Analysis of the relationship between judgments of Polish courts and standards of the ECHR

The case-law of Polish Constitutional Tribunal underlines, that specified in the Article 54 paragraph 1 of the Constitution of the Republic of Poland freedom of expression should be understood as broadly as possible and include not only personal statements regarding facts and phenomena in all aspects of life, but also presentation of opinions, assumption and forecasts, including information about facts, both real and alleged. In the opinion of the Tribunal freedom of expression is one of the pillars of a democratic society and condition for its development and individual's self-fulfilment, however in cannot be limited to information and views which are received favourably or perceived as harmless or indifferent²³.

Compatibility of constitutional system with international standards of human rights protection requires making "pro-European" interpretation of the Constitution. This justifies the thesis that the scope of protection of statements in national law is, in principle, consistent with the ECHR judicature²⁴. It follows that it is generally acceptable to include in the scope of penalisation statements

j.clsr.2010.03.004>. A. Redelbach, *Wolność słowa w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Ruch Prawniczy Ekonomiczny i Społeczny 2000, No 3, p. 14.

²³ See. Judgment of the Constitutional Tribunal of 23 March 2006, K 4/06, OTK ZU 2006, No. 3A, item 32.

²⁴ M. Woźniński, *Prawokarne aspekty zwalczania mowy nienawiści*, Warsaw 2014, p. 117.

containing incitement to hatred and racist or xenophobic violence, in particular if they take the form of public insults, slander or threat.

The freedom of speech protects not only statements, which are received favourably or perceived as harmless or indifferent, but also statements expressing disapproval, dislike or antipathies. At the same time, freedom of speech is not absolute²⁵. In the case „Gąsior V. Poland” in judgement on 21 February 2012²⁶ the ECHR reminded, that freedom of speech is one of the pillars of a democratic society and one of the fundamental conditions for its development and individual's self-fulfilment. Subject to the second paragraph (Article 10 of the Convention), freedom of expression applies not only to "information" and "views" that are well received or perceived as harmless or indifferent, but also to statements that are offensive, shocking or obstructing. These are requirements of pluralism, tolerance and openness, without which there is no “democratic society”. This confirms the issue of the un-absolute character of freedom of speech.

In daily life, the limits of every freedom, including freedom of speech, are the rights and freedoms of others (specified in the Article 31 paragraph 2 of the Constitution). The essence of freedom of speech is the possibility of its collision with other values, especially with the right to privacy and family life. To reconcile these values, the legislator may (based on the Article 31 paragraph 3 of the Constitution) establish a limitation in the use of constitutional freedom of speech when this limitation will serve safety or public order, or protection of the environment, health, public morality or the rights and freedoms of others. An additional limit for the restriction introduced into the national legal system is the prohibition against infringing the "essence" of freedoms and rights (the Article 31 paragraph 3 of the Constitution). Each statutory limitation of a given freedom shall be therefore proportional to required legal protection.

There is no doubt that the decisive role in the shape of internal legislation is played by the ECHR judgments, and for that reason they should be regarded as the main point of reference. There is a growing influence of the European Convention on Polish law and legal practice. This applies to issues related to freedom of expression. Strasbourg's requirements are perceived and taken seriously. An example of the consistent with the Tribunal approach to combating hate crimes was undoubtedly issuing of the General Prosecutor's Guidelines in 2014 to conduct hate crimes proceedings²⁷. The recognition of any pre-trial investigation in hate crimes as a case of special gravity, appointment of specific prosecutors' offices to conduct such cases, or the order to constantly monitor ongoing proceedings was particularly important. Undoubtedly, however, all the rules of conducting cases in cases motivated by hatred, such as impartiality, objectivity or special diligence in revealing the

²⁵ Judgment of the Constitutional Tribunal of 25 February 2014, SK 65/12, see A. Łukaszewicz, *Trybunał: wolność słowa ma granice*, Rzeczpospolita 2014, 2.26.

²⁶ Gąsior v. Poland application no. 34472/07.

²⁷ Guidance of the Prosecutor General G VII G 021/54/13 of 26 February 2014 available on the website <https://pk.gov.pl/wp-content/uploads/2014/03/4e331e3a170f1719e3f846b06a2c5f7d.pdf> (accessed 28 January 2019).

motivation of the perpetrator, indicated by the European Court of Human Rights, are within the task of following the rule of law by the prosecutor's office.

There are two institutions in Poland authorized to counteract hate speech: The Commissioner for Human Rights (RPO) and the Government Plenipotentiary for equal treatment (Plenipotentiary)²⁸. The Government Plenipotentiary for Equal Treatment is appointed by the Government and acts within the structures of the Prime Minister's Office. The Commissioner for Citizens' Rights performs the function of the body responsible for performing tasks related to the implementation of the principle of equal treatment. It is an independent body subject to the supervision of the Parliament only.

The attention to increasingly frequent proposals for amendment of criminal laws that typify hate speech offences should also be drawn. They are primarily related to attitudes changes in the world in relation to certain properties of certain social groups and people belonging to them. Over the years, attempts have been made to amend the provisions of the criminal code by extending the catalogue of features covered by protection against hate speech²⁹. In recent years' non-governmental organizations working for human rights have been continuously advocating such amendment of the Criminal Code, justifying their conclusions by existing similar recommendations formulated by international bodies dealing with human rights.

6. Conclusion

Performed analysis has confirmed that the case-law of the ECHR has a significant role in the shape of the internal legislation of Poland and is treated as an essential reference point. We can notify growing influence of the Convention for the Protection of Human Rights and Fundamental Freedoms on Polish law and judicial practice. Requirements and standards established by the ECHR are noticed and taken into consideration by Polish judges. The provisions of the Convention and the ECHR judgements have designated to the present time the primary direction of judicial practice in Poland by implementing fundamental principles of obeying human rights by the public authorities. Polish courts judicature have been increasingly consistent with international standards. The introduction of appropriate legal regulations aimed at eliminating sources of violations will not take desired effect without the relevant activities of the Executive and the

²⁸ Art. 18 of the Act of 3 December 2010 on the implementation of certain European Union provisions in the field of equal treatment (Journal of Laws of 2016, item 1219).

²⁹ See a parliamentary draft act amending the Act - Penal Code, the 6th term, printing the Sejm No. 425, the document is available online at: [http://orka.sejm.gov.pl/Druki6ka.nsf/0/426E6F5F4F91E685C125789D00302F25/\\$file/4253.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/426E6F5F4F91E685C125789D00302F25/$file/4253.pdf) (accessed 3 March 2019); draft act amending the act - Penal code, VII term of office printing of the Sejm No. 340, the document is available online at: <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=340> (accessed 3 March 2019); a parliamentary draft act amending the Act - Penal Code, the 7th term, printing the Sejm. No. 2357, the document is available online at: <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2357> (accessed 10 March 2019).

Judiciary. Implementation of legal solutions in practice of public authorities is impossible without their participation.

The problem of boundary designation between hate speech and freedom of speech requires consideration of its fluidity, which in practice can be very difficult. Legal boundaries must be drawn cautiously. We should keep in mind that each case of crossing the border of freedom of speech is an exception. The rule is freedom. It should be emphasized that in Poland the principle *in dubio pro libertate* (in latin: in case of doubt, it should be settled for freedom) is in force, which also refers to freedom of speech. The need to respect in the internal law standards resulting from the judgments of the ECHR means the duty of taking them into consideration in the operation of State authorities and the Constitutional Tribunal should apply the principles and methods of interpretation leading to minimizing possible conflicts between standards resulting from Polish law and standards formed by the ECHR.

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4. *Handyside V. UK*, App. no. 5493/72, Ser A vol.24, (1976) 1 EHRR 737.
5. *Castells V. Spain*, App. no.11798/85, Ser. A vol.236, (1992) 14 EHRR 445.
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