

USE OF INDECENT WORDS IN A PUBLIC PLACE AS A MISDEMEANOUR

MARIA GOŁDA-SOBCZAK*

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1. INDECENT CONDUCT

In Article 141 Misdemeanour Code (hereinafter MC) the legislator stipulates the protection of public decency and penalises the placement of indecent announcements, inscriptions or drawings as well as the use of indecent words in a public place. This type of acts undoubtedly affect public decency that is protected in Chapter XVI MC as well as (what is often forgotten) in Chapter XXV Criminal Code, where offences against sexual freedom and decency are classified, although the representatives of the legal doctrine as well as the judicature (for understandable reasons) pay most attention to the former, i.e. acts that violate sexual freedom. In the light of that, still based on the Criminal Code of 1969 (henceforth CC), the Supreme Court stated that decency means fundamental moral principles of social coexistence in the field of sexual contacts and relations.¹ In the doctrine, the concept of decency is interpreted more broadly, namely as a type of conduct in a particular social group, which is acceptable in it and the violation of which results in the group's negative response.² Some doubts must immediately arise as a particular type of conduct may be accepted by one group and disapproved of by another one. It is sometimes emphasised in the doctrine that indecent conduct means such behaviour that can objectively cause indignation.³ The problem is that, as we know, assessment is never objective

* PhD hab., Associate Professor at the Institute of European Culture of Adam Mickiewicz University in Poznań; e-mail: mgolsob@amu.edu.pl; ORCID: 0000-0002-3854-7007

¹ Resolution of the Supreme Court of 13 April 1977, VII KZP 30/76, OSNKW 1977, No. 6, item 58.

² M. Zbrojewska, [in:] T. Grzegorzczak (ed.), *Kodeks wykroczeń. Komentarz*, 2nd edn, Warszawa 2013, p. 648.

³ D. Egierska-Miłoszewska, *Nieobyczajny wybryk (art. 140 k.w. w teorii i praktyce)*, Zagadnienia Wykroczeń No. 4-5, 1979, p. 70; M. Bojarski, W. Radecki, *Kodeks wykroczeń. Komentarz*, Warszawa 2006, p. 723; A. Gubiński, *Prawo wykroczeń*, 4th edn, Warszawa 1980, pp. 336-337.

but subjective in nature. One can try to rationalise it, recognise that the majority of society or a certain social group shares the same opinion, but naturally there is clear relativity. Refraining from analysing the issue of public decency, which is subject to protection in Chapter XVI MC, more thoroughly, we should agree with the opinion of Leszek Falandyś who stated that Chapter XVI MC “is unearthing theological indignation of the little ones and noble outrage of the middle class, teaching virtue under threat of punishment”.⁴

It is emphasised in the doctrine that an indecent act should be identified with an immoral act. It is indicated that an indecent act is one that is in conflict with the feeling of public morality and embarrassment.⁵ However, it should be noticed that the term “morality” has many meanings and “moral norms” are general, directive in nature and are not precisely determined or codified. Thus, one must agree with the statement that, although the spheres of legal norms and moral norms application to a large extent correspond, there are some fields that are regulated by law in a general way but thoroughly by moral norms.⁶ However, it is indicated that decency protected in Chapter XVI MC does not concern moral assessment of conduct in terms of good and evil, but the principles of coexistence in society.⁷ As a matter of fact, the concept of “public decency” covers norms connected with manners that change over time. In the past, provided we trust memoirs, indecent conduct included a kiss in public, smoking cigarettes by women and even a solitary woman’s walk in the park or an unaccompanied entry into a cafe, then wearing trousers by women, which has become a norm today and does not shock anybody in the same way as meagre bikini swimwear. Of course, the purists guarding morality or decency interpreted in a specific way still believe that sunbathing topless is a misdemeanour under Article 140 MC. It is stated that acts determined in Article 140 MC do not require the occurrence of outrage or disgust. But if they do, who should determine that a given act is indecent and where the criteria for decency should be looked for?⁸ Who decides that a given conduct is indecent? Although it is emphasised in

⁴ L. Falandyś, *Mała, natarczywa obyczajność*, Gazeta Sądowa i Penitencyjna No. 17, 1970, p. 10. Also see J. Kulesza, [in:] P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa 2016, p. 914.

⁵ M. Kulczycki, J. Zduńczyk, *Kodeks wykroczeń. Popularny komentarz*, Warszawa 1982, p. 170.

⁶ M. Ossowska, *Normy moralne. Próba systematyzacji*, Warszawa 1970, pp. 230–236; W. Lang, *Prawo i moralność*, Warszawa 1989, pp. 8–15; Z. Ziemiński, *Etyczne problemy prawnoznawstwa*, Wrocław 1972, pp. 12–16; R. Sarkowicz, J. Stelmach, *Teoria prawa*, Kraków 1998, 2nd edn, pp. 173–187. Also compare J. Stelmach, *Die hermeneutische Auffassung der Rechtsphilosophie*, Eblsbach 1991; J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1995.

⁷ J. Kulesza, *supra* n. 4, p. 914.

⁸ Following the broadly commented case concerning some women sunbathing topless who were finally absolved from liability, there were arguments presented that the women’s conduct did not offend anybody and did not evoke any negative commentaries. However, the police officers intervening could not accept their behaviour. See R. Krajewski, *Oceny prawne topless*, *Ius Novum* No. 4, 2013, p. 112. Also compare M. Derlatka, *Czy opalanie topless to nieobyczajny wybryk?* *Jurysta* No. 10, 2008, p. 36; M. Zbrojewska, *supra* n. 2, p. 648. Bolesław Kurzępa’s opinion is that every case of public presentation of nudity matches the features of misdemeanour and demonstrates obscurantist penal populism; B. Kurzępa, *Kodeks wykroczeń. Komentarz*, Warszawa 2008, p. 475. What should be the interpretation of the term “nudity”? Does it mean showing the breasts and the back, even reaching the buttocks, by a woman wearing a long dress with

literature that a misdemeanour under Article 140 MC is a formal misdemeanour, an opinion is usually quoted that indecent excesses include coarse, rude and bawdy acts as indecent acts that are in flagrant conflict with good manners, disrespect the surrounding and cause outrage and disapproval of those who condemn them.⁹ Thus, some authors are ready to assume that an indecent act is to result in outrage.¹⁰

The concept of indecent conduct is quite broadly discussed in the doctrine, however, the difference between indecent conduct, indecent excesses referred to in Article 140 MC and indecent acts in the form of placing indecent words, announcements, inscriptions or drawings in a public place or using indecent words referred to in Article 141 MC is not noticed. It is necessary to agree with the opinion that indecent conduct means behaviour that is in conflict with good manners, immoral, obscene and unacceptable. An ill-mannered person is an immoral, obscene person for whom good habits are alien.¹¹ In colloquial language, indecent conduct means immodest, shameless and improper behaviour. Indecency means immorality, immodesty and non-conformity with binding norms and principles, and breaking binding norms concerning manners, principles and etiquette.¹² According to Monika Zbrojewska, indecent conduct is the behaviour that is in conflict with ethical and moral principles that are binding in society.¹³ According to Joanna Piórkowska-Flieger, recognition of something as indecent depends on the evaluator's sensitivity to a greater extent than in case of other unclear phenomena referred to in the Misdemeanour Code.¹⁴ It is also indicated, however, that the assessment of the features of indecency should be based on objective criteria and refer to dominating social opinions. It should depend on changeable attitudes that exist in society, first of all aesthetic and not ethical ones.¹⁵

2. PUBLIC INDECENCY

The above statements aim to present the relativity of the concept of public indecency and indecent conduct related to it, i.e. assumed to be in conflict with the principles of social coexistence, causing outrage or condemnation as well as negative assessment.

a décolletage in front and at the back? Or does it mean showing whole thighs by wearing a short skirt revealing stocking clips? Does a man wearing briefs tightly fitting over his genitals instead of boxer shorts and walking on a public beach present nudity?

⁹ W. Radecki, *Oceny publicznego pijaństwa w sprawie wykroczeń*, Zagadnienia Wykroczeń No. 2, 1984, p. 52.

¹⁰ J. Kulesza, *supra* n. 4, p. 917. Similarly, J. Piórkowska-Flieger, [in:] T. Bojarski, *Kodeks wykroczeń. Komentarz*, Warszawa 2015, p. 573.

¹¹ S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, Vol. 2, Warszawa 2003, pp. 935–936. It is worth mentioning that the former *Słownik języka polskiego* by M. Szymczak does not have an entry of "ill-mannered" (*nieobyczajny*) and does not provide its definition.

¹² M. Szymczak (ed.), *Słownik języka polskiego*, Vol. 2, Warszawa 1988, p. 354. S. Dubisz (ed.), *supra* n. 11, Vol. 2, p. 956.

¹³ M. Zbrojewska, *supra* n. 2, p. 648.

¹⁴ J. Piórkowska-Flieger, *supra* n. 10, p. 573.

¹⁵ J. Kulesza, *supra* n. 4, p. 323, approving of the former stand of W. Radecki. See W. Radecki, *Wykroczenia przeciwko obyczajności publicznej*, Służba MO No. 3, 1976, p. 321.

Further considerations concern, in accordance with the title of Article 141 MC, in particular the concept of “indecent” and “indecent words”. Certainly, the above-mentioned provision does not only deal with the use of indecent words but also the placement of indecent announcements, inscriptions or drawings. The evaluation whether a drawing or a painting is indecent, and thus causes outrage, indignation is relative. Today nobody thinks, at least for the time being, of recognising paintings such as *Szał* (presenting a naked woman on a raging horse) by Władysław Podkowiński, *The Nude Maia* by Francisco Goya, *Danae* by Jacopo Tintoretto, *Heracles and Omphale* by François Boucher, *The Nightmare* by Johann Heinrich Füssli, *Grande Odalisque* by Jean Auguste Dominique Ingres, *White Slave* by Jean Lecomte du Nouÿ, *The Luncheon on the Grass* or *Olympia* by Édouard Manet, *Woman in the Bath* by Edgar Degas, or *Salon de la rue des Moulins* by Henri de Toulouse-Lautrec and *Rolla* by Henri Gervex as indecent. However, when they were painted, they were recognised as indecent, caused indignation and some people categorically demanded that they be removed from the places where they were displayed.

3. PORNOGRAPHY VERSUS INDECENCY

There is a problem with differentiating a situation that the legislator recognises as a misdemeanour under Article 141 MC from pornography criminalised under Article 202 §§ 1, 3 and 4b CC. Undoubtedly, a pornographic message can be treated as indecent. If such a message is in the form of a drawing and is placed in a public place both by its author and any other person, it should be recognised as an act matching the features stipulated under Article 141 MC. However, it also means public presentation of a pornographic content, and thus matches the features under Article 202 § 1 CC, and in a situation when such a presentation concerns minors or is connected with showing violence or the use of an animal, it matches the features under Article 202 § 3 CC.

It should be noted, however, that the legislator skilfully avoided the use of the concept of pornography in Article 141 MC by indicating only that this misdemeanour consists in placing an indecent drawing in a public place. However, the use of the word “drawing” must raise doubts. Although it seems to be a clear term, the word “drawing” is not unambiguous. In everyday use, a drawing is something someone draws with the use of a pencil, pen, coal, chalk or pastels. According to the Polish language dictionaries, the concept of “drawing” should be understood as “a contour, outline and shape of something”.¹⁶ “To draw” means “to depict contours, an image of something or somebody with the use of lines”.¹⁷ Thus, a question must be asked whether an oil or watercolour painting and graphic art, regardless of the technique, should be recognised as drawings. Every art historian would undoubtedly reject the identification of a drawing with those forms. Would a person

¹⁶ M. Szymczak (ed.), *Słownik języka polskiego*, Vol. 3, Warszawa 1989, p. 154; S. Dubisz (ed.), *supra* n. 11, Vol. 3, p. 1106.

¹⁷ M. Szymczak (ed.), *supra* n. 16, p. 154, S. Dubisz (ed.), *supra* n. 11, Vol. 3, p. 1105.

hanging copies of the above-mentioned pictures, artists' drawings presenting, e.g. women in poses recognised as indecent by prudish audience, match the features of a misdemeanour under Article 141 MC? Or perhaps such an act should be recognised as one matching the features of dissemination of pornography. Finally, is the activity of displaying and selling pictures presenting nude models, e.g. near St. Florian's Gate in Kraków, a misdemeanour under Article 141 MC? Such pictures often evoke some viewers' aggression. They express their dissatisfaction by flinging insults at them, threatening them with hell's fire and even spitting at the pictures. This conduct indicates that they recognise the pictures as indecent, breaking the canons of good manners, shameless and demoralising. Thus, they raise objections.

Therefore, law enforcement agencies and then courts must face a problem of penal assessment of such a presentation and of answering the question whether such activities mean dissemination of pornography or just a misdemeanour under Article 141 MC. Or possibly, there is a concurrence of the provisions of Article 141 MC and Article 202 §§ 1, 3 or 4b CC with respect to an act of presenting pornographic content. In case of Article 202 § 1 CC, it is enough that pornographic content is presented to people who do not wish to see it. In case of Article 202 § 3 or § 4b CC, just presenting this content matches the features of the offence. As a result, the issue to be solved is a question whether every pornographic drawing within the meaning of Article 202 CC is indecent and whether it is possible that an indecent drawing within the meaning of Article 141 MC is not pornographic.

Although obscene pictures have accompanied human civilisation since the dawn of time, pornography as an act matching the features of crime appeared in modern times. The term "pornography" refers to "writing, print, theatre plays, films, photographs, drawings and other objects with indecent content, aimed at evoking sexual excitement".¹⁸ *Uniwersalny słownik języka polskiego*, edited Stanisław Dubisz, explains the term a little differently indicating that pornography means "papers, films, photographs, etc. presenting a nude body (often with uncovered genitals) and sexual intercourse in the way that infringes social norms of conduct". In the doctrine, pornography is usually classified as "hard" and "soft". According to the above-mentioned dictionary, soft pornography is "mild pornography, without aggression and pathology". On the other hand, hard pornography is "pornography full of aggression, often presenting pathological sexual intercourse".¹⁹ Sometimes, child (paedophile) pornography is distinguished in literature. It is often indicated that "pornography" is derived from a Greek word *porno* used to describe prostitu-

¹⁸ See M. Szymczak (ed.), *supra* n. 12, Vol. 2, Warszawa 1988, p. 823.

¹⁹ See S. Dubisz (ed.), *supra* n. 11, Vol. 3, p. 387. Jerry R. Kirk defines hard pornography as one the content of which shows atrocities, tortures, urinating, incest, subjugation, rape, pseudo-child pornography and sadomasochism. He classifies vaginal sexual intercourse between a man and a woman as soft pornography; see J.R. Kirk, *Szkodliwość pornografii*, Gdańsk 1998, p. 3. Jarosław Warylewski draws attention to the fact that this approach lacks child pornography; see J. Warylewski, *Pornografia – próba definicji*, [in:] M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 23. Zbigniew Lew-Starowicz defines soft pornography as exposition of genitals, masturbation, sexual intercourse in different positions and sexual behaviour typical of a particular culture. He treats content with scenes of violence, paedophilia and zoophilia as hard pornography; Z. Lew-Starowicz, *Seksuologia sądowa*, Warszawa 2000, pp. 408–409.

tion and a word *graphos* meaning “to write”. However, the term was not known in classical Greek.²⁰ In the middle of the 19th century, the term “pornography” started to be used in a bit different meaning than it is nowadays and it referred to literature and scientific works dealing with prostitution. The term was also applied in relation to theatre plays and opera performances the plot of which concerned courtesans.²¹ It is indicated in literature that the term was probably first used at the beginning of the 19th century in relation to a novel by Donatien Alphonse François, Marquis de Sade entitled *Justine, or The Misfortunes of Virtue*. It should be mentioned that Marquis de Sade wrote three versions of *Justine*. The first one was entitled *The Misfortunes of Virtue* written in 1787 and published as late as in 1930; the second version entitled *Justine, or The Misfortunes of Virtue* was published in 1791; and the third version, the broadest one, was published under the title *The New Justine* in 1797.²² According to Brian McNair, pornography in the present-day meaning started to be used in Europe in 1530 when an Italian poet, Aretino, published a series of sonnets with pornographic content, which were disseminated together with sixteen daring pictures by Giulio Romano, Raphael’s pupil.²³

It is worth noticing that a human being seeks erotic, obscene and even pornographic content. The reasons for that search are interpreted in varied ways, based on sexology, psychology as well as the history of art. Nobody denies the fact that there is a “need” for such messages.²⁴ Differentiation of art and eroticism is therefore very difficult.²⁵ One cannot deny that pornographic content in the same way as what we call “erotic” is based on nudity, a picture of a nude human body, especially a woman at the time of sexual intercourse. It is emphasised in literature that nudity alone brings a viewer closer to the disgusting centre of eroticism, although it is not always associated and does not have to be associated with indecency of sexual intercourse.²⁶

²⁰ See F.S.P. Dufour, *Historia prostytucji od czasów najdawniejszych do XX w.*, Vol. 1, *Czasy przedchrześcijańskie*, Gdynia 1997, pp. 63–131 et seq.; C. Reinsberg, *Obyczaje seksualne starożytnych Greków*, Gdynia 1998, pp. 68–107.

²¹ H.N. Parker, *Love’s Body Anatomized: the Ancient Erotic Handbooks and the Rhetoric of Sexuality*, [in:] A. Richlin (ed.), *Pornography and Representation in Greece and Rome*, New York 1992, p. 90; A. Krawulska-Ptaszyńska, *Spoleczne skutki upowszechnienia pornografii*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* issue 1, 1997, p. 145.

²² See M. Bratuń, *Posłowie*, [in:] *Justyna czyli nieszczęścia cnoty*, Łódź 1987, pp. 238–239. Also compare K. Matuszewski, *Sade. Msza okrucieństwa*, Gdańsk 2008, pp. 42–45. Also see M. Praz, *Zmysły, śmierć i diabeł w literaturze romantycznej*, Gdańsk 2010, pp. 106–111; R. Shattuck, *Zakazana wiedza. Od Prometeusza do pornografii*, Kraków 1999, p. 277 et seq.

²³ See B. McNair, *Mediated Sex. Pornography & Postmodern Culture*, London–New York–Sydney–Auckland 1996, pp. 42–43. Also see J. Warylewski, comments on Article 202 CC, [in:] A. Wąsek, R. Zawłocki (eds), *Kodeks karny. Część szczególna: Komentarz do art. 117–221*, Vol. I, 4th edn, Warszawa 2010, pp. 1100–1101; also compare J. Warylewski, *Przestępstwa przeciwko wolności seksualnej i obyczajności. Rozdział XXV Kodeksu karnego. Komentarz*, Warszawa 2001, pp. 189–191.

²⁴ See G. Bataille, *Historia erotyzmu*, Warszawa 2008, p. 227 et seq.

²⁵ See *ibid.*, *Erotyzm*, Gdańsk 1999, p. 140.

²⁶ B. McNair, *Seks, demokracja pożądania i media, czyli kultura obnażania*, Warszawa 2004, p. 41 et seq.; G. Bataille, *supra* n. 24, p. 199 et seq. It is even stated that: “From the male point of view, the motif of a woman dressing up and undressing is the most pleasant one throughout the history of mankind. Covering and uncovering a body is one of the simplest and the most exciting human activities. What is erotic is not only what you can see but first of all what we think we can see”, see G. Sieczkowski, *Caty ten seks. Kroniki podkasane*, Warszawa 2008, p. 1.

The invention of photography influenced its dissemination to a great extent by, as it is stated in literature, naive realism accompanying photographs, which referred to situations that could not be viewed everyday and were not realistically depicted in paintings and drawings.²⁷ Photographs of nude silhouettes drew attention to the necessity of determining borderlines between eroticism and pornography.²⁸ Film impacted the development of the phenomenon of pornography even more because it involved much less imagination than photography. However, the basic difference consisted in the fact that photographs were viewed in privacy and a film was shown to a bigger audience. That is why, as Lech Michał Nijakowski claims, the level of legal system liberalism in a given country and moral freedom had key importance for the development of film pornography.²⁹ With the development of film industry, a system of film censorship, also related to morality, started to develop.³⁰ It is also noticed that erotic messages, especially those pornographic ones, focus on the presentation of a woman at the moment of excitement, and pornography is not aimed at understanding the source and nature of this excitement or experiencing it, but getting acquainted with it.³¹

4. SEXUALISATION OF CULTURE

Sexualisation of culture is connected with a broad social change that, as it is raised in literature, is a derivative of crucial technological inventions and commercial pressure, and leads inter alia to availability of sex in the media, obscene interest in nudity and exhibitionism. Social media create a culture in which public nudity and voyeurism are allowed. They shock with nudity not only in papers known as pornographic but also in those believed to deal with serious and even popular-science issues.³² It is emphasised that in the 1990s, "keeping pace with postmodern-

²⁷ S. Sikora, *Fotografia. Między dokumentem a symbolem*, Izabelin 2004, *passim*; L.M. Nijakowski, *Pornografia. Historia, znaczenie, gatunki*, Warszawa 2010, pp. 161–164.

²⁸ M. Filar, *Pornografia a sztuka*, Nowe Prawo No. 10, 1978. Also see B. Kunicka-Michalska, *Pornografia i wykorzystywanie nieletnich w Internecie. Regulacje polskiego kodeksu karnego*, Studia Prawnicze No. 4(166), 2005, pp. 77–108.

²⁹ As early as in the German Empire, the presentation of a naked human body was totally prohibited. L.M. Nijakowski, *supra* n. 27, p. 170.

³⁰ In 1915, the US Supreme Court decided that filmmaking is a commercial activity so the provisions that safeguard the freedom of speech are not applicable to it. This allowed numerous censorship committees to enact codes aimed at protecting morality. No sooner than based on the case of *Burstyn v. Wilson* in 1952, motion picture was given protection and the idea of preventive censorship was abandoned. However, it finally took place in 1965. Since then, opponents of a film distribution must prove that it is "obscene". However, the system of film classification is used and it is similar to the one known in Poland under the Act on radio broadcasting and television. See D.B. Sova, *125 zakazanych filmów. Historia cenzury w kinie*, Warszawa 2006, p. 15.

³¹ See A. Giddens, *Przemiany intymności. Seksualność, miłość i erotyzm we współczesnych społeczeństwach*, Warszawa 2006, p. 146. Also compare A. Moye, *Pornography*, [in:] A. Metcalf, M. Humphries (eds), *The Sexuality of Men*, London 1985, p. 68 et seq.

³² The issue of the "Playboy" magazine in 1953 was a landmark in the history of pornography. J.R. Petersen, *Stulecie seksu. Historia rewolucji seksualnej 1900–1999 według „Playboya”*, Poznań 2002, *passim*; also see B. McNair, *supra* n. 26, pp. 5 and 21.

ist atmosphere of the decade, pornographic iconography presented a lot of pleasant erotic pictures as representation of fashion and not pornography".³³ It turned out at the time that photographs of half-naked models on magazine covers and "promising" titles accompanying them announcing articles saturated with eroticism efficiently increased sales. It should be added that, by some means accidentally, it was recognised that reference to nudity and sex, sometimes connected with irony and humour, was a good method of advertising various products. The development of photography, digital photography that allows far-reaching manipulation, resulted in deep social changes, especially at the moment when the internet, which is seemingly anonymous or at least it is believed to be such, facilitated mass dissemination of such photographs.³⁴ It is worth noticing that perception of nudity is not independent of cultural norms. Interpretation of an image of a naked human being depends on the point of view or framework adopted by the audience. It is indicated in literature that these may be the frameworks of art, pornography, information and advertising. What seems to be the essence is sexualisation of shame.³⁵

It is emphasised in literature that aesthetic emotions that people have when they deal with art, looking at a painting or reading a book, do not eliminate other emotions, including erotic ones. Undoubtedly, sex inspires artists, both great writers and painters or sculptors. It is easy to find not only eroticism and obscenity but, if someone feels ill will, also pornography in the verses written by Ovid or Rabelais, in *Romeo and Juliet* by Shakespeare, *Tristan and Iseult*, *Madame Bovary* by Gustav Flaubert, some epigrams by Jan Kochanowski, Ignacy Krasicki and Kacper Twardowski, in *Dzieje grzechu* and *Walka z szatanem* by Stefan Żeromski, in the paintings by Rubens, Botticelli and Titian, in *Frenzy* by Władysław Podkowiński and in *The Nude Maia* by Francesco Goya. Someone might also state that the above-mentioned paintings are indecent drawings, provided we recognise an oil painting as a drawing.

It is worth considering whether a state should really use penal measures to combat visual messages based only on the criterion that they present a nude human being, most often a woman. Is it necessary to involve law enforcement agencies and courts for the only purpose of satisfying a handful of politicians, clergymen and social activists most often motivated by religion and recognising all the evil in a nude human silhouette?

³³ B. McNair, *supra* n. 26, p. 159.

³⁴ K. Olechnicki, *Fotoblogi, pamiętniki z opcją przekazu. Fotografia i fotoblogerzy w kulturze konsumpcyjnej*, Warszawa 2009, pp. 83–102; L. Manovich, *Język nowych mediów*, Warszawa 2006, pp. 124–127; B. Kunicka-Michalska, *Przestępstwa przeciwko wolności seksualnej i obyczajności popełniane za pośrednictwem systemu informacyjnego*, Warszawa 2004, p. 89; Z. Lew-Starowicz, *Seks w sieci i nie tylko*, Kraków 2003, p. 58 et seq.

³⁵ L.M. Nijakowski, *supra* n. 27, p. 328; B.A. Eck, *Nudity and Framing: Classifying Art, Pornography, Information and Ambiguity*, Sociological Forum Vol. 16, No. 4, 2001, p. 604.

5. PROFANITY

Profanity, as it is indicated in the doctrine, means using offensive, vulgar words.³⁶ A dispute can be noted in the doctrine over grounds for assessing a word as offensive. According to Radosław Krajewski, the recognition of a word as offensive depends on the assessor's stand. He indicates that younger people often do not treat words used by the youth as offensive, however, older people may recognise them as such. The author also notices that words used in a certain circle do not cause indignation, they are not perceived as offensive, but in other circles of people they are vulgar. He emphasises that all assessments of profanity should be done *in concreto*, and not *in abstracto*.³⁷ In such a situation, it would be necessary to analyse who the perpetrator is, how old they are and what social circle they come from as well as to whom they address their message that can be recognised as indecent in the meaning of Article 141 MC. Jan Kulesza is of a different opinion and indicates that the assessment by younger people does not matter when words recognised by the majority as profanity are said in a public place. In his opinion, the fact that such words are used in public places is decisive and individual evaluation and habits, and linguistic norms are not important because of a potential conflict with the freedom from other people's indecent messages. Next, he states that the content of Article 141 MC aims to protect public decency "targeted at protecting values important for society as a whole as well as its individual members". At the same time, he sees the need to adopt an objective criterion, although he admits that it may be difficult to achieve.³⁸ On the other hand, Mariusz Czyżak's opinion seems to be doubtful as he tries to prove that the assessment of vulgar or insulting words as profanity is unambiguous because they offend other people's feelings.³⁹ This stand seems controversial because not all words used in public space offend other people's feelings.

It is worth noticing that the issue of protecting the Polish language was finally regulated by statute, namely the Act on the Polish language of 7 October 1999.⁴⁰ Article 3 para. 1 of the Act stipulates that the protection of the Polish language consists, inter alia, in caring for its proper use, improving language skills, creating conditions for its proper development as a tool of interpersonal communication and, what is important from the point of view of the topic discussed, preventing its vulgarisation. "Preventing" should be understood as opposing something, in

³⁶ M. Zbrojewska, *supra* n. 2, p. 649.

³⁷ R. Krajewski, *Karnoprawna ochrona języka polskiego*, *Ius Novum* No. 4, 2013, p. 14.

³⁸ J. Kulesza, *supra* n. 4, p. 925.

³⁹ M. Czyżak, *Kilka uwag o odpowiedzialności wykroczeniowej za nieobyczajne zachowanie się w eterze*, *Przeгляд Sądowy* No. 7–8, 2011, p. 101.

⁴⁰ Consolidated text, Dz.U. 2011, No. 43, item 224, as amended. It is pointed out in literature that the legislator recognised a native language as worth protecting by law and taking special care of in public life. Determining the Polish language as a basic element of the national identity and the good of national culture, the legislator referred to historical experience and globalisation processes, and emphasised the significance of this language protection for the maintenance and development of cultural diversity of Europe. The legislator also decided that the protection of the language is the obligation of all public authorities, thus also courts.

this case vulgarisation, preventing some activities.⁴¹ Vulgarisation means making something vulgar, coarse, rude, ordinary, deprived of gentleness, good taste and decency.⁴² Vulgarities mean words or collocations recognised by language users as indecent, rude, ordinary and morally and aesthetically offensive. Vulgarities are perceived as a lack of culture and respect for an addressee.⁴³

The enactment of the statute resulted in an amendment to the Act of 26 January 1984: Press Law,⁴⁴ which imposed an obligation on editors-in-chief of newspapers and magazines to care for the linguistic correctness of press materials and to prevent vulgarisation, which is laid down in Article 25 para. 4, and on journalists to care for linguistic correctness and to avoid vulgarities, which is laid down in Article 12 para. 1(3) Press Law.⁴⁵

It is noticed in the doctrine that the contemporary Polish language seems to accept phrases that used to be recognised as trivial and vulgar not very long ago. However, a reverse process should also be noted. Words quite often recognised as vulgar nowadays did not use to have this meaning. *Fraszki* by Jan Kochanowski can be an example but not only because in the past many outstanding poets and writers did not refrain from using words that are vulgar today.⁴⁶

Using vulgar and indecent words seems to reflect a type of fashion. The conclusion that it is a type of fashion seems to be true, although it is not based on any research. In youth circles, there is a desire to show oneself as easy-going, free from social conventions and not looking down on others. A cursory glance over a student community and youth in public transport proves that the above-discussed words are treated as the “interval” between or an element linking successive sentences or nominal sentences used by men as well as, unfortunately, women. What is interesting is the fact that also older people and older generations use them to gain social approval and be perceived as communicative and friendly. This does not justify the use of such words at all. However, it should be emphasised that perpetrators of misdemeanours under Article 141 MC cannot be selectively prosecuted. It seems that the practice of ignoring vulgarities, indecent and rude words used by young people who pay no attention to others, mothers with children, passers-by, the elderly, police

⁴¹ S. Dubisz (ed.), *supra* n. 11, Vol. 3, p. 632.

⁴² S. Dubisz (ed.), *supra* n. 11, Vol. 4, p. 547; M. Szymczak (ed.), *supra* n. 16, p. 779. Also see P. Czarnecki, *Komentarz do art. 3 ustawy o języku polskim*, Warszawa 2014.

⁴³ J. Sobczak, *Prawo prasowe. Komentarz*, Warszawa 2008, p. 489.

⁴⁴ Dz.U. 1984, No. 5, item 24, as amended.

⁴⁵ For this issue, see J. Sobczak, *supra* n. 43, pp. 485–489.

⁴⁶ J. Kochanowski, *O łaziebnikach; Na matematyka; J.A. Morsztyn, Matżeństwo*, [in:] *Fraszki to wszystko. Mała antologia dawnej fraszki polskiej*, selected and provided with the preface by A. Pomorski, Warszawa 2004, pp. 11, 21 and 57. Aleksander Fredro did not refrain from using vulgarities, either, in a longer text found in the Jagiellonian Library in 2016. Even the title contains a vulgar word the citation of which met with this article reviewers' rejection, although the existence of the vulgar word is recognised in *Słownik polszczyzny XVI wieku*. For this issue, see M. Grochowski, *Słownik polskich przekleństw i wulgaryzmów*, Warszawa 2017; J. Lewinson, *Słownik seksualizmów polskich*, Warszawa 2017. The case of the book entitled *Memoria de mis putas tristes [Memories of My Melancholy Whores]* by Gabriel García Márquez shows the hypocrisy and sanctimoniousness of some guardians of the Polish language purity. The Polish title of the book is *Rzecz o mych smutnych dziwkach*, which ignores the Spanish wording and uses a softer word than the Polish literal equivalent of “whores” just in order to avoid its use.

officers on patrol or railroad guards is inadmissible. Such selective application of law seems to prove certain helplessness of law enforcement bodies and a wish to apply the provisions of Misdemeanour Code in relation to groups unaccepted by another social or political group.

Undoubtedly, the use of vulgar and offensive words as insults addressed to a particular person should be recognised as inadmissible. In such a situation, there is no doubt that a perpetrator matches the features of the offence under Article 216 § 1 Criminal Code. However, the use of such words as a typical linguistic linking tool is completely different. They are also treated as interludes making it possible to focus on the successive part of the message.

Prosecution of the use of vulgar words, in fact, does not make sense. Law enforcement institutions will never be able to prosecute all the users of indecent words in public places. Selective charging some of them, e.g. those who hold senior position in the social hierarchy, will be recognised as unjust. The sole fact of using indecent words meets with very limited public disapproval.

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USE OF INDECENT WORDS IN A PUBLIC PLACE AS A MISDEMEANOUR

Summary

An offence involving in the use of indecent words in a public place is one of the acts classified in Chapter XVI Misdemeanour Code that violates public decency. Its subject matter consists in placing an obscene announcement, inscription or drawing or using obscene words in a public place. Both the notion of public morality and the sign of indecency are indeterminate in nature. Similarly, the concept of an "obscene word" is not very precise. Both public morality and obscenity are highly relative, perceived differently by different social groups and considered more or less acceptable depending on the age of the audience. The pursuit of offences involving the use of indecent words cannot, however, be selective. One should distinguish between the use of vulgar words as an insult and a specific "interlude".

Keywords: misdemeanour, public decency, indecent words, pornography, profanity

UŻYWANIE SŁÓW NIEPRZYWOITYCH W MIEJSCU PUBLICZNYM
JAKO WYKROCZENIE

Streszczenie

Wykroczenie polegające na używaniu w miejscu publicznym słów nieprzyzwoitych jest jednym z czynów stypizowanych w rozdziale XVI Kodeksu wykroczeń godzących w obyczajność publiczną. Jego stroną przedmiotową polega na umieszczeniu nieprzyzwoitego ogłoszenia, napisu lub rysunku, albo używaniu słów nieprzyzwoitych. Zarówno pojęcie obyczajności publicznej, jak i znamię nieprzyzwoitości mają charakter niedookreślony. Podobnie mało precyzyjne jest pojęcie „słowa nieprzyzwoitego”. Zarówno obyczajność publiczna, jak i nieprzyzwoitość są wysoce relatywne, postrzegane są różnie przez różne grupy społeczne i uznawane za mniej lub bardziej dopuszczalne w zależności od wieku odbiorcy. Ściganie wykroczeń polegających na używaniu słów nieprzyzwoitych nie może być jednak selektywne. Odróżnić należy postępowanie się słowem wulgarnym jako wyzwiskiem od traktowania go jako swoisty „przerywnik”.

Słowa kluczowe: wykroczenie, obyczajność publiczna, słowa nieprzyzwoite, pornografia, wulgaryzmy

USO DE PALABRAS INDECENTES EN LUGAR PÚBLICO COMO FALTA

Resumen

La falta que consiste en el uso de palabras indecentes en lugar público es uno de los hechos tipificado en el capítulo XVI y viola la decencia pública. Consiste en colocar un anuncio, inscripción o dibujo obsceno o en el uso de palabras indecentes. Tanto el concepto de la decencia pública como el elemento de indecencia no son precisos. También acontece esto con el concepto de "la palabra indecente". Tanto la decencia pública como la indecencia son muy relativos, pueden entenderse de diferente manera por diferentes grupos sociales y considerarse más o menos aceptables dependiendo de la edad del interlocutor. La persecución de

faltas consistentes en el uso de palabras indecentes no puede ser sin embargo selectiva. Hay que diferenciar entre usar una palabrota como invectiva y entre usarla como de cierto modo "la palabra pausa".

Palabras claves: falta, decencia pública, palabra indecente, pornografía, palabrotas

ИСПОЛЬЗОВАНИЕ НЕПРИСТОЙНЫХ СЛОВ В ОБЩЕСТВЕННОМ МЕСТЕ КАК ПРАВОНАРУШЕНИЕ

Резюме

Правонарушение, состоящее в использовании непристойных слов в общественном месте, является одним из деяний против общественной нравственности, предусмотренных в главе XVI. Его предметная сторона заключается в размещении непристойного объявления, надписи или рисунка, а также в использовании непристойных выражений в устной речи. При этом понятия общественной нравственности и непристойности имеют недостаточно определенный характер. Расплывчатым является и понятие «непристойное слово». Как общественная нравственность, так и непристойность являются весьма относительными понятиями, которые по-разному воспринимаются различными социальными и возрастными группами. Однако, преследование правонарушений, состоящих в использовании непристойных выражений, не может быть избирательным. Следует также различать использование ненормативной лексики в качестве оскорбления от её использования в качестве своеобразной «связки».

Ключевые слова: правонарушение, общественная нравственность, непристойные слова, порнография, ненормативная лексика

VERWENDUNG VON OBSZÖNITÄTEN IN DER ÖFFENTLICHKEIT ALS ORDNUNGSWIDRIGKEIT

Zusammenfassung

Die Ordnungswidrigkeit von massiv gegen geltende Normen verstoßenden sprachlichen Äußerungen in der Öffentlichkeit ist eine der in Kapitel XVI typisierten strafbaren Handlungen gegen die öffentliche Sittlichkeit. Der sachliche Geltungsbereich schließt anstößige Veröffentlichungen, Schriftzüge oder bildliche Darstellungen sowie obszöne sprachliche Äußerungen ein. Sowohl der Begriff der öffentlichen Sittlichkeit, als auch das Merkmal der Anstößigkeit sind dabei nicht näher bestimmt. Ebenso ist der Begriff „Obszönität“ eher unscharf. Sowohl die öffentliche Sittlichkeit, als auch die Anstößigkeit sind in hohem Maße relativ und werden von verschiedenen sozialen Gruppen unterschiedlich wahrgenommen und je nach Alter des Empfängers als mehr oder weniger akzeptabel betrachtet. Die Verfolgung von Delikten in Form der Verwendung von Obszönitäten darf jedoch nicht selektiv erfolgen. Es sollte zwischen der Verwendung vulgärer Ausdrücke als Beleidigung und Obszönitäten unterschieden werden, die als eine Art „Füllwort“ behandelt werden

Schlüsselwörter: Vergehen, Ordnungswidrigkeit, öffentliche Sittlichkeit, Obszönitäten, Pornographie, Vulgärsprache

UTILISER DES MOTS INDÉCENTS DANS UN LIEU PUBLIC COMME UNE INFRACTION

Résumé

Une infraction impliquant l'utilisation de mots indécents dans un lieu public est l'un des actes envisagés au chapitre XVI et constitue une violation de la moralité publique. Son objet consiste à placer une annonce, une inscription ou un dessin indécent, ou à utiliser des mots indécents. Le concept de morale publique et la marque d'indécence sont indéterminés. De même, la notion de «mot indécent» n'est pas très précise. La moralité publique et l'indécence sont très relatives, perçues différemment par différents groupes sociaux et considérées plus ou moins acceptables en fonction de l'âge du destinataire. La poursuite d'infractions impliquant l'utilisation de mots indécents ne peut toutefois être sélective. Une distinction doit être faite entre utiliser un mot vulgaire comme une insulte et le traiter comme une sorte «d'un intermède»

Mots-clés: infraction, moralité publique, mots indécentes, pornographie, vulgarités

UTILIZZO DI PAROLE INDECENTI IN UN LUOGO PUBBLICO COME CONTRAVVENZIONE

Sintesi

La contravvenzione consistente nell'utilizzo di parole indecenti in un luogo pubblico è una delle azioni tipizzate nel capitolo XVI lesive del buon costume. Il suo elemento sostanziale consiste nella pubblicazione di un annuncio, di una scritta o di un disegno indecente o nell'utilizzo di parole indecenti. Sia il concetto di buon costume che quello di indecenza hanno un carattere non completamente definito. Analogamente è poco preciso il concetto di "parola indecente". Sia il buon costume che l'indecenza sono qualcosa di estremamente relativo e vengono percepiti diversamente da diversi gruppi sociali e considerati più o meno ammissibili a seconda dell'età del destinatario. La repressione delle contravvenzioni consistenti nell'utilizzo di parole indecenti non può tuttavia essere selettiva. Bisogna distinguere l'utilizzo di una parola volgare come insulto dal trattarla come uno specifico "intercalare".

Parole chiave: contravvenzione, buon costume, parole indecenti, pornografia, volgarità

Cytuj jako:

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