

FREEDOM OF EXPRESSION AND HATE SPEECH REGARDING THE ACTIVITIES OF PUBLIC OFFICIALS IN POLITICAL DEBATE

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ABSTRACT

Freedom of expression has accompanied humanity for centuries. As societies have developed over the decades, it has evolved and changed. In parallel, the brutalisation of language has also progressed, leading to the emergence of hate speech. Today, hate speech is a global phenomenon, significantly impacting the speech of public figures. This is due to the fact that such statements reach a wide audience, which includes both supporters and opponents of such a person. Consequently, this leads to a wide-ranging debate where individual arguments lose relevance, overshadowed by the repetition of negative slogans and comments with hateful overtones. This article aims to delineate the boundary between freedom of expression and hate speech, highlighting the consequences associated with the use of hate speech by public figures. It seeks to prove the main thesis that hate speech in the activity of public figures is an unquestionably negative phenomenon and thus cannot benefit from the protection guaranteed under freedom of speech. Additionally, it posits that hate speech undermines the dignity of individuals and society, leads to a decline in the culture of speech, and diminishes both political and social culture. Consequently, it erodes the authority of public figures and harms the offices they hold by undermining trust in them.

Keywords: freedom of expression, hate speech, public figures

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INTRODUCTORY REMARKS

Freedom of expression, otherwise known as freedom of speech¹ in the sphere of private life, belongs to personal freedoms.² As Jacek Sobczak wrote, it is established for the whole society³ but is particularly significant in the sphere of political life. Therefore, in a narrow sense, it can be described as political freedom.⁴ It is a right granted to individuals, limiting the power of those who exercise authority over them, and constitutes a fundamental element of civil society.⁵ As J.S. Mill wrote, '(...) protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them.'⁶ For democracy, according to Mill, is not about the majority dominating but about everyone participating in the discussion, which guarantees the best decisions.⁷

Public debate is, therefore, a special arena for the exchange of views, requiring the maintenance of a culture of expression, as well as openness to accept, understand, and engage in good polemic with differing positions.⁸ This paper attempts to answer whether there is a place for hate speech in the activities of public officials. Should public officials care about the authority of the institutions they represent and thus limit their form of expression to avoid hate speech due to their functions?

¹ Florczak-Wątor, M., 'Komentarz do art. 54 Konstytucji RP', in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2019, p. 186; Sokolewicz W., *Prasa i Konstytucja*, Warszawa, 2011, pp. 66–67. Such an interpretation results from the interpretation of Article 54 of the Constitution of the Republic of Poland adopted in the doctrine, however, at the same time, the norm of this provision is the basis for the formulation of various types of allegations, including, *inter alia*, that the legislator did not use the internationally used expression – 'freedom of speech' – in the indicated provision. More on this subject, Lis, W., Husak, Z., 'Konstytucyjne podstawy wolności wypowiedzi', in: Lis, W., Husak Z. (eds), *Praktyczne aspekty wolności wypowiedzi*, Toruń, 2011, p. 114.

² Sadowski, J., 'Komentarz do art. 54 Konstytucji RP', in: Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom I*, Warszawa, 2016, pp. 1280–1281.

³ Sobczak, J., 'Czy wolność słowa i wolność prasy są rzeczywiście potrzebne społeczeństwu i państwu?', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2018, Year LXXX, Issue 1, p. 133.

⁴ Sarnecki, P., 'Komentarz do art. 54 Konstytucji RP', in: Garlicki, L., Zubik, M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2016., p. 292. It is therefore formulated in the doctrine as a mixed freedom. Thus, e.g., Sadowski, J., 'Komentarz do art. 54...', *op. cit.*, pp. 1280–1281.

⁵ Zięba-Załucka, H., 'Prawo do swobody wypowiedzi w prawie międzynarodowym i prawie polskim (na tle sporów o interes publiczny/demokratyzację polityki)', in: Skotnicki, K., Skłodowski, K., Michalak A. (eds), *Zagadnienia prawa konstytucyjnego. Polskie i zagraniczne rozwiązania ustrojowe, Księga jubileuszowa dedykowana Profesorowi Dariuszowi Góreckiemu w Siedemdziesiątą rocznicę urodzin*, Łódź, 2016, pp. 507–527.

⁶ Mill, J.P., *The Essential Works of John Stuart Mill*, Lerner, M. (ed.), New York, 1961, p. 258.

⁷ See, Zmierczak, M., 'John Stuart Mill o prawie wyborczym w demokracji – refleksje z perspektywy XXI wieku', *Gdańskie Studia Prawnicze*, 2012, Vol. XXVII, No. 1, p. 437 et. seq. Already at this point it must be emphasised that the formal qualification of a certain freedom as personal or political is irrelevant for the determination of its content or the differentiation of the protection afforded to it. Sarnecki, P., 'Komentarz do art. 54...', *op. cit.*, p. 292.

⁸ Sokolewicz, W., *Prasa...*, *op. cit.*, pp. 132–133.

This article aims to delineate the boundary between freedom of expression and hate speech, as well as the consequences associated with the occurrence of hate speech in the statements of public officials. The article seeks to prove the central thesis that hate speech in the activities of public officials is an indisputably negative phenomenon and, therefore, cannot benefit from the protection guaranteed under freedom of speech. Accordingly, among the additional theses selected as part of the deliberations, it is posited that hate speech damages the dignity not only of individuals but also of society as a whole, leading to a decline in the culture of speech, political culture, and social culture. Consequently, it violates the authority of public officials and harms the dignity of the offices they hold, undermining confidence in them.

The research theses outlined thus necessitated the use of research methods, among which the dogmatic-legal method, used to present the norms of regulation in the field of freedom of expression and hate speech, and the theoretical-legal method, used to approximate the positions of science regarding the studied phenomenon, are essential.

THE ORIGINS OF FREEDOM OF EXPRESSION

Freedom of expression, or speech, as one of the fundamental human rights with a solid foundation in the values and dignity of the human person, has gained protection in various declarations and acts, including normative ones, of national and international rank. That is why it is worth going back to its origins.⁹

It should be recalled that it was not until the modern era, the Age of Enlightenment, and especially after the French Revolution in 1789, that these terms gained significant prominence. It was at this time that many 'freedom' terms were born, such as individual freedom, the justification for which can be found in the French Declaration of the Rights of Man and of the Citizen (Article 4): 'Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of society the enjoyment of the same rights. These limits can only be determined by law.'¹⁰ This principle was also accepted in the 20th century, starting with the 1948 Universal Declaration of Human Rights, where Article 29(2) provides: 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic

⁹ Drożdż, M., 'Nie ma wolności słowa bez... spojrzenie etyczne na wolność mediów i wolność słowa', in: Hofman, I., Kępa-Figura, D. (eds), *Współczesne media – wolne media?*, Vol. 1, Lublin, 2011, p. 15.

¹⁰ Per: Smoktunowicz, E., 'Wolność jednostki', in: *Wielka Encyklopedia Prawa*, Białystok–Warszawa, 2000, p. 1152.

society.¹¹ The International Covenant on Civil and Political Rights (ICCPR)¹² also enshrines this principle in its Article 19, which constitutes a comprehensive norm, defining the principle of freedom of expression and further indicating the scope of its limitations. The article reads as follows:

'1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.'¹³

In contrast, Article 10 of the European Convention on Human Rights states that:

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'¹⁴

The norms of the provisions cited above indicate the scope of freedom of expression, while taking into account the circumstances that may limit it. The subjective scope of freedom of expression, as defined by these provisions, is enjoyed by everyone – whether natural persons, legal entities or organisational units without legal personality. The most elaborate in this respect is the norm of the ECHR provision, which identifies the circumstances that allow for the restriction of freedom of expression. I.C. Kaminski considers that, such a restriction fulfils two basic purposes. Firstly, it enables the signatory states to legitimise the interference

¹¹ *Universal Declaration of Human Rights*, adopted and proclaimed by the General Assembly resolution 217 A (III) of 10 December 1948, <https://www.refworld.org/legal/resolution/unga/1948/en/11563> [accessed on 3 July 2024].

¹² Comment on the pact more broadly, Taylor, P.M., *A Commentary on the International Covenant on Civil and Political Rights*. The UN Human Rights Committee's Monitoring of ICCPR Rights, Cambridge, 2020, <https://www.cambridge.org/core/books/commentary-on-the-international-covenant-on-civil-and-political-rights/CC17EC9E29D73687CBE691386113C706> [accessed 3 July 2024].

¹³ More broadly on this aspect of the freedom to hold and express opinions, Wieruszewski, R. (ed.), *Międzynarodowy pakt praw obywatelskich (osobistych) i politycznych. Komentarz*, Warszawa, 2012, p. 461.

¹⁴ More broadly on Article 10 in the context of the freedom of assessment of judges, Addo, M.K., 'Are Judges Beyond Criticism Under Article 10 of the European Convention on Human Rights?', *International and Comparative Law Quarterly*, 2008, Vol. 47, No. 2, p. 425 et seq.

they carry out and, secondly, it prevents abuse of the power to restrict freedom of expression.¹⁵

One should also not forget the regulation of freedom of expression in the EU Charter of Fundamental Rights adopted in Nice on 7 December 2000, which states in Article 11 that: '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.' The Charter confirms in Article 52(3) that if it contains rights corresponding to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are the same and there is even the possibility in the EU of more extensive protection. As A. Biłgorajski notes, 'the limit of freedom of expression and freedom of the media is human dignity recognised not only as a fundamental right but also as the actual source of all freedoms and rights enshrined in the Charter.'¹⁶

The regulation of freedom of expression included in the norms of documents of international and European rank allows for their clear and comprehensive interpretation. At the same time, the clarity of the acts prior to the Constitution of the Republic of Poland has become an assumption for drawing models for the constitutionalisation of freedom of expression today in Poland.

FREEDOM OF EXPRESSION IN THE DOMESTIC SYSTEM

Freedom of expression in the Constitution of the Republic of Poland is included in Article 54, which reads: 'The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.' The norm of this article indicates its subject and object scope.¹⁷

The former refers to every individual – a human being, irrespective of his or her nationality or independent or joint activity with other persons. The material scope, on the other hand, encompasses the whole mechanism of communication, from receiving and searching for messages to finally communicating them. Hence, freedom of expression is composed of three other freedoms, namely, the freedom to express opinions, the freedom to receive information and the freedom to disseminate information. Moreover, the indicated provision also guarantees the freedom of the media.¹⁸ Therefore, it should be assumed that freedom of expression consists in having opinions, information, ideas, or views and communicating them to other persons. It is noteworthy, however, that these expressions may take various forms, i.e., views, opinions, information, or ideas themselves. At the same time, the scope of their protection varies. Information with objective and 'verifiable' content

¹⁵ Kamiński, I.C., *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna*, Warszawa, 2010, pp. 28–29.

¹⁶ Biłgorajski, A., *Granice wolności wypowiedzi. Studium konstytucyjne*, Warszawa, 2013, p. 184.

¹⁷ Sokolewicz, W., *Prasa...*, op. cit., pp. 64–65.

¹⁸ Sadowski, J., 'Komentarz do art. 54...', op. cit., pp. 1282–1283; Mojski, W., *Konstytucyjna ochrona wolności wypowiedzi w Polsce*, Lublin, 2014, p. 10.

remains the most protected. It is important to note that these expressions may take on various forms, from economic and social to political or artistic. The ways and forms of such communication (written, oral, symbolic) may also vary.¹⁹

It should be noted that this is not the only constitutional regulation related to freedom of expression in its broadest sense. Other regulations contained in the Constitution of the Republic of Poland also contribute to this concept, so a full account of freedom of speech can only be given by looking at other constitutional provisions that relate to this freedom.²⁰

The key freedom in this respect is the freedom of the press, contained in Article 14 of the Constitution of the Republic of Poland,²¹ which states: 'The Republic of Poland shall ensure the freedom of the press and other means of social communication.' The Constitutional Tribunal found that the relationship between these two freedoms is of a complementary nature, which manifests itself in mutual reinforcement and confirmation.²² It is also worth noting the norm indicated in Article 49 of the Constitution, which states: '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,' while Article 53(1) indicates that: 'Freedom of conscience and religion shall be ensured to everyone.'²³

It is only when the above-mentioned norms are juxtaposed and understood together that it is possible to comprehensively grasp the scope of freedom of expression and thus understand the multifaceted nature of this concept, the implementation of which may manifest itself in many different areas of human activity.

However, the aforementioned differentiation occurring in national regulations cannot be perceived in the category of the displacement of one norm by another, as a broader analysis of the issue allows one to notice that in practice these norms complement each other, creating a comprehensive regulation.²⁴ The fundamental norm, constituting the basis for further, narrower regulations, should be perceived as the one indicated in Article 54 of the Constitution.²⁵ As Artur Biłgorajski postulates:

'Such qualification of the freedom to express one's opinions and to obtain and disseminate information should be interpreted as recognition of them as fundamental aspects of human

¹⁹ Braciak, J., 'Wolność słowa w Polsce', *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji*, 1997, No. 37, p. 49; Mrozek, J.J., 'Rozważania prawne wokół pojęcia "wolność słowa"', *Media – Kultura – Komunikacja Społeczna*, 2012, No. 8, p. 158; Kalisz, A., 'Rozwiązywanie kolizji norm i zasad w kontekście praw człowieka. Uwagi teoretycznoprawne', in: Biłgorajski, A. (ed.), *Wolność wypowiedzi versus wolność religijna. Studium z zakresu prawa konstytucyjnego, karnego i cywilnego*, Warszawa, 2015, pp. 10–11.

²⁰ The Constitutional Tribunal expressed itself more broadly in this regard in its judgment of 14 December 2011, SK 42/09, OTK-A 2011, No. 10, item 118.

²¹ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78 item 483, hereinafter 'the Constitution'.

²² Judgment of the Constitutional Tribunal of 1 May 2008, SK 43/05 OTK-A 2008, No. 4, item 57.

²³ Sarnecki, P., 'Komentarz do art. 54...!', op. cit., pp. 289–290.

²⁴ Sobczak, J., 'Wolność badań naukowych – standardy europejskie i rzeczywistość polska', *Nauka i Szkolnictwo Wyższe*, 2007, No. 2, p. 57.

²⁵ See Mrozek, K., *Mowa nienawiści w działalności osób publicznych* (master's dissertation, unpublished), Rzeszów, 2016.

existence, through which the very nature of man manifests itself, and which are most closely related to this nature. This implies a statement of a particularly close connection between the freedoms in question and human dignity, which the Constitution treats as inherent, inalienable, and inviolable.²⁶

Concluding this part of the deliberations, one should also notice the fact that the protection of freedom of speech is influenced not only by the norm of Article 54 of the Constitution of the Republic of Poland, but also by the principle of freedom contained in Article 31(1) and (2) of the Constitution. This is a specific principle, as it has the nature of a constitutional function, but also the function of a principle of the system of rights and freedoms of the individual and an autonomous subjective right, which makes it a specific background for the understanding and application of the constitutional provisions. Article 31 thus constitutes, in a way, a point of departure for further deliberations on specific constitutional freedoms, including the freedom of speech.²⁷

LIMITS OF THE CONSTITUTIONALLY GUARANTEED FREEDOM OF EXPRESSION

In view of the above, it is worth asking whether each and every utterance presenting a position taken in a discussion, regardless of the form in which it is formulated, falls within the limits of the constitutionally guaranteed freedom of speech?²⁸ The possibility of free speech, like other constitutional freedom rights, is not unlimited. To assume otherwise would oppose the principles of democracy and lead to the deprivation of due protection of democratic values such as state security, territorial integrity or public safety, order, health and morality, the good name and rights of others, the solemnity and impartiality of judicial authority and the prevention of the disclosure of confidential information.²⁹

Simplifying, it can also be assumed that this is a result of the development of society, as this has made the problem of the abuse of this freedom topical. Therefore, it is nowadays indisputable that not every communication benefits from the protection guaranteed by the freedom of expression.³⁰ Restrictions on this freedom apply to

²⁶ Biłgorajski, A., *Granice wolności wypowiedzi...*, op. cit., p. 187.

²⁷ Garlicki, L., Wojtyczek, K., 'Komentarz do art. 31 Konstytucji RP', in: Garlicki, L., Zubik, M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2016, p. 61.

²⁸ It is worth adding that artistic expression is also protected under freedom of expression as a specific form of expression protected under the general regime of protecting freedom of expression. Górski, M., *Swoboda wypowiedzi artystycznej. Standardy międzynarodowe i krajowe*, Warszawa, 2019, p. 228.

²⁹ Sokolewicz, W., *Prasa...*, op. cit., p. 229 et seq.; Chorażewska, A., Greń, W., 'Granice wolności wypowiedzi księdza rzymskokatolickiego z perspektywy prawa kanonicznego w świetle zasad ustroju Konstytucji Rzeczypospolitej Polskiej', in: Biłgorajski, A. (ed.), *Wolność wypowiedzi versus wolność religijna. Studium z zakresu prawa konstytucyjnego, karnego i cywilnego*, Warszawa, 2015, p. 258.

³⁰ Ciepły, F., 'Penalizacja mowy nienawiści – kontekst polityczny i normatywny', in: Blicharz, G., Delijewski, M. (eds), *Wolność słowa. Współczesne wyzwania w perspektywie prawoporów-*

almost every sphere of life. 'There is no absolute principle of freedom of expression in any democratic state and restrictions in spheres such as national security, public order, health or public morals, state secrecy or respect for the rights of others are widely accepted.'³¹ This freedom is therefore subject to restrictions contained in the Basic Law as well as in ordinary laws. In the first place, it is subject to the operation of the general limiting clause contained in Article 31(3) of the Constitution, and in this context, the norm of this provision constitutes a kind of complement to the provision of Article 54(1) of the Constitution. Thus, the Constitutional Tribunal is compelled to treat both norms jointly, even in even in situations where the applicant has not raised Article 31(1) of the Constitution as the standard of control.³² Therefore, freedom of expression may be restricted, but only on the basis of a statute and only when it is 'necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. Such limitations shall not impair the essence of the freedoms and rights.'³³

At the same time, while in extreme cases it is not difficult to exclude a given speech from protection, the real challenge is to draw a line defining which speech is acceptable within the framework of freedom of speech and which speech, due to its content and form of expression, does not enjoy constitutional protection.³⁴ Thus, we may pose a question: is it even possible to draw such a line without examining the circumstances of the case and the context of the speech in each instance? The answer to the above question is negative, but this task is all the more difficult because there is no statutory definition of the concept of hate speech, which unquestionably infringes this freedom and whose status regularly stirs up heated debates in the political environment as well as in society as a whole.³⁵ However, the legal norms contained in the provisions of various branches of the law, above all criminal law, whose content makes it possible to clarify the scope of hate speech, may be helpful in determining this boundary.

THE ESSENCE OF HATE SPEECH

The claims formulated above necessitate an explanation of what hate speech is. At the outset, it is important to recognise that hate speech is a multifaceted phenomenon. Therefore, we can discuss hate speech in the context of freedom of

nawczej, Warszawa, 2019, p. 406.

³¹ Biłgorajski, A., *Granice wolności wypowiedzi...*, op. cit., p. 187.

³² Sadowski, J., 'Komentarz do art. 54...', op. cit., p. 1288. See also judgment of the Constitutional Tribunal of 30 October 2008, P 10/06, OTK-A 2006, No 9, item 128.

³³ As an aside, it should also be noted that there is a possibility of suspension of this freedom based on Article 233(1) of the Constitution of the Republic of Poland provided for by the legislator during martial law and state of emergency. More extensively in this regard, Sadowski, J., 'Komentarz do art. 54...', op. cit., p. 1289.

³⁴ Ciepły, F., 'Penalizacja...', op. cit., p. 406.

³⁵ More on this topic, Śledzińska-Simon, A., 'Decyzja ramowa w sprawie zwalczania pewnych form i przejawów rasizmu i ksenofobii jako trudny kompromis wobec mowy nienawiści w unii Europejskiej', in: Wieruszewski, R. et al. (eds), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Warszawa, 2010, pp. 94–95.

speech from a legal perspective³⁶ – then this phenomenon can be described using criminal law, constitutional law, civil law,³⁷ human rights protection, and even administrative law³⁸ or labour law. Hate speech can also be observed in cultural, political, linguistic, pedagogical, or sociological research. Interestingly, each of these discourses differs from the others in terms of research perspectives, methodological tools, and language used. However, it remains important that there is currently no statutory definition of hate speech.³⁹ The offence commonly referred to by this name is mainly reconstructed from the provisions of the Criminal Code ('CC'):

1. Article 119 § 1 CC concerning the use of criminal threats based on race, national or ethnic origin, religion or irreligion and political affiliation;
2. Article 256 § 1 CC concerning public incitement to hatred on grounds of race, national or ethnic origin, religion, or irreligion;
3. Article 256 § 2 1 CC criminalising dissemination and other unlawful use of an object containing content propagating totalitarianism or incitement to hatred;
4. Article 257 CC concerning public insult on account of the above characteristics.⁴⁰

Importantly, these are not the only norms referring to hate speech. References to it can be found in further articles concerning public incitement to a crime or praising a crime (Article 255 CC), criminal threat (Article 190 CC), persistent harassment (Article 190a CC), use of an unlawful threat to force another person to a specific action, omission, or suppression (Article 191 CC), defamation (Article 212 CC), insult (Article 216 CC), incitement to commit a crime (Article 18 § 2 CC), public incitement to initiate a war of aggression and praising the initiation or conduct of such a war (Article 117 § 3 CC), public incitement to or praise of genocide, certain crimes against humanity, or war crimes (Article 126a CC), public insult of the Nation or the Republic of Poland (Article 133 CC), public insult of the President of the Republic of Poland (Article 135 CC), public slander or insult of a constitutional organ of the Republic of Poland (Article 226 CC), public insult of a representative of another state (Article 136 §§ 3–4 CC), public insult of Polish and foreign state symbols (Article 137 CC), insult of a monument (Article 261 CC), insult of a corpse, ashes, or a grave, and insult of religious feelings (Article 196 CC).⁴¹

³⁶ Gieda, M., 'Godność człowieka w otoczeniu administracji publicznej – wybrane zagadnienia', *Przegląd Prawa i Administracji*, 2017, No. 3802, p. 53 et seq. More extensively in this regard is expressed by F. Cieply, cf. Cieply, F., 'Penalizacja...', op. cit., p. 404 et seq.

³⁷ On the civil law aspects of protection against hate speech, see in more detail, Pałka, K., Kućka, M., 'Ochrona przed mową nienawiści – powództwo cywilne czy akt oskarżenia?', in: Wieruszewski, R. et al. (eds), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Warszawa, 2010, pp. 42–54.

³⁸ On the administrative-legal instruments for combating hate speech, see in more detail, Krotoszyński, M., 'Trzecia droga: środki administracyjne w zwalczaniu mowy nienawiści', in: Wieruszewski, R. et al. (eds), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Warszawa, 2010, pp. 114–127.

³⁹ Rogalska, E., Urbańczyk, M., 'Złożoność zjawiska mowy nienawiści w pozaprawnym aspekcie definicyjnym', *Studia nad Autorytaryzmem i Totalitaryzmem*, 2017, No. 2, p. 117 et seq.

⁴⁰ Cf. Cieply, F., 'Penalizacja...', op. cit., p. 428; Starzewski, Ł., 'Jak walczyć z mową nienawiści. 20 rekomendacji RPO dla premiera', *Biuletyn Informacji Publicznej RPO*, 21 February 2019, <https://bip.brpo.gov.pl/pl/content/jak-walczyz-z-mowa-nienawisci-20-rekomendacji-rpo-dla-premiera> [accessed on 20 March 2023].

⁴¹ Cieply, F., 'Penalizacja...', op. cit., p. 430.

It should be noted, however, that the offences of insult set out in Article 216 CC and defamation contained in Article 212 CC differ from the offences cited above, as they are of a private-argument nature.⁴² Also provisions of the Civil Code concerning protection of personal rights, i.e., Article 24 in conjunction with Article 23 of the Civil Code,⁴³ will have a private prosecutorial character in the fight against hate speech, together with Article 448 of the Civil Code.⁴⁴ It is also worth noting the fact that hate speech in the broader sense includes other types of acts such as the dissemination of untrue electoral materials (Article 111 § 1(3), Article 111 § 4–5a), contained in the Election Code.⁴⁵

The legislator's undertaking to combat hate speech through provisions of many branches of law has resulted in the gap caused by the lack of a statutory definition being filled by academia.⁴⁶ Krzysztof Gorazdowski states that hate speech 'consists in the use of speech to promote, justify, or even glorify racial hatred, xenophobia, anti-Semitism, and the spread of other forms of intolerance that undermine democracy, security, or pluralism.'⁴⁷ J. Sobczak points out that hate speech 'may take the form of oral, written, visual communication, also of a symbolic nature'.⁴⁸ In the opinion of Sergiusz Kowalski and Magdalena Tulli, it includes statements aimed at mocking or humiliating an individual or a group for reasons 'at least partly beyond their control'.⁴⁹ At the same time, it is important to note that the target of hate speech is always a collective, even when the addressee appears to be an individual.⁵⁰

Even a cursory glance at the problem of hate speech reveals how controversial and wide-ranging a phenomenon it is.⁵¹ This controversial character necessitates not only discussion but also the work of state bodies, including the legislator, in this area. Therefore, the first issue on which the legislator should reflect is the formulation of a definition of hate speech. It is worth considering, following Adam Bodnar, whether the definition proposed in Recommendation No. R 97 (20) of 30 October 1997 of the Committee of Ministers of the Council of Europe should serve as inspiration. As this

⁴² Kujawa, D., 'Złożoność i niejednoznaczność mowy nienawiści', *Refleksje*, 2018, No. 17, p. 65 et seq.

⁴³ The doctrine distinguishes two aspects of human honour: the internal aspect denoting personal dignity, i.e., a person's idea of his or her own worth and expectation of respect from other people, and the external aspect. This, in turn, determines the good reputation, the good opinion of other people, the respect that the environment bestows on a person – in relation to the various spheres of human life: personal, professional and social, Pazdan, M., 'Dobra osobiste', in: Pietrzykowski, K. (ed.), *Kodeks cywilny. T. I. Komentarz do art. 1–44910*, Legalis 2015, Article 23, p. 1121.

⁴⁴ Act of 23 April 1964 – Civil Code, Journal of Laws of 1964, No. 16, item 94, as amended.

⁴⁵ Act of 5 January 2011 – Election Code, Journal of Laws of 2011, item 1277. Banaszak, B. (updated by Michalska, J.), *Kodeks wyborczy. Komentarz*, Warszawa, 2018, p. 228.

⁴⁶ See more, Rogalska, E., Urbańczyk, M., 'Złożoność zjawiska mowy nienawiści...', op. cit., p. 117 et seq.

⁴⁷ Gorazdowski, K., 'Próba oceny karnoprawnych regulacji zwalczania mowy nienawiści w Polsce', *Studia Administracji i Bezpieczeństwa*, 2019, No. 6, p. 95.

⁴⁸ Sobczak, J., 'Język nienawiści w kampaniach wyborczych', *Przegląd Wyborczy. Biuletyn informacyjny*, 2017, No. 4–6, p. 48.

⁴⁹ Kowalski, S., Tulli, M., *Mowa nienawiści. Raport 2001*, akapit pierwszy, <http://or.icm.edu.pl/monitoring3.htm> [accessed on 20 March 2023].

⁵⁰ Pałka, K., Kućka, M., 'Ochrona przed mową nienawiści...', op. cit., p. 42.

⁵¹ Rogalska, E., Urbańczyk, M., 'Złożoność zjawiska mowy nienawiści...', op. cit., p. 119 et seq.

author aptly notes, hate speech ‘should be considered any form of expression that disseminates, incites, promotes, or justifies racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including intolerance expressed in the form of aggressive nationalism or ethnocentrism, discrimination or hostility towards minorities or persons from immigrant communities.’⁵²

HATE SPEECH AND DIGNITY

Reflections on freedom of expression and hate speech in the activities of public officials force the question of dignity to be asked: is there still a place for it? In answering such a question, it should be pointed out that the applicable constitutional and statutory provisions use the concept of dignity in various contexts.⁵³ Firstly, with reference to human beings, Article 30 of the Constitution states: ‘The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.’⁵⁴

Secondly, the legislator also considers it a special attribute, a desirable value characterising various subjects: the nation, the chambers of parliament, the individual, as well as persons occupying certain high public functions or associated with public institutions, who should enjoy public confidence. These heightened requirements are intended to form the basis of a person’s authority, which serves to increase the respect of institutions and individuals in public activities.⁵⁵ The Constitution itself repeatedly refers to the dignity of the office and institution, e.g., in Articles 205(3), 209(3), 214(2) of the Constitution. The provisions prohibit judges of the Constitutional Tribunal (Article 195(3)), the President of the Supreme Audit Office, the Ombudsman, and members of the National Broadcasting Council from conducting activities that are incompatible with the dignity of the offices they hold. Among other provisions that use the concept of dignity, it is also worth quoting the provisions of parliamentary regulations. The current Regulations of the Sejm impose on the Speaker of the Sejm the duty to ‘uphold the rights, dignity and solemnity

⁵² Starzewski, Ł., ‘Jak walczyć z mową nienawiści...’, op. cit.

⁵³ More on the essence of dignity, Wieruszewski, R., ‘Rola i znaczenie Karty Praw Podstawowych Unii Europejskiej dla ochrony praw człowieka’, *Przegląd Sejmowy*, 2008, No. 2, p. 41 et seq.; Wawrzyniak J., *Etyka eutanazji. Studium filozoficzno-aksjologiczne*, Poznań, 2015; Wawrzyniak, J., *Teoretyczne podstawy neonaturalistycznej bioetyki środowiskowej*. Poznań, 2000; Michalska-Sieniawska, D., ‘Godność człowieka w obliczu medykacji życia’, in: Bieńkowska, D., Kozłowski, R. (eds), *Prawa człowieka i zrównoważony rozwój. Konwergencja czy dywergencja idei i polityki*, Warszawa, 2020, pp. 68–69.

⁵⁴ In doing so, it is important to bear in mind the fact that, as R. Wieruszewski highlighted in his works, ‘Human rights and freedoms are only affirmed in the Constitution, not bestowed.’ Cf. Wieruszewski, R., ‘O pojmowaniu wolności i praw człowieka. Ani utopia, ani fikcja prawna’, *Rzeczpospolita*, 6 November 2002. More on the relationship between dignity and privacy, Fleszer, D., ‘Godność i prywatność osoby w świetle Konstytucji Rzeczypospolitej Polskiej’, *Roczniki Administracji i Prawa*, 2015, No. XV(1), pp. 19–30.

⁵⁵ Laskowski, M., *Uchybienie godności urzędu sędziego, jako podstawa odpowiedzialności dyscyplinarnej*, Warszawa, 2019, p. 57 et seq., p. 170 et seq.

of the Sejm' (Article 10(1)(1) of the Regulations of the Sejm). An analogous duty is imposed on the Speaker of the Senate. The regulations prohibit the holders of these offices from behaving in an undignified manner in public activities, which means, in the case of hate speech, that there is no full legal protection. It can be noted that the legislator considers dignity to be a specific attribute, a value that is associated with public officials who should enjoy public trust. Elevated requirements are to constitute the basis of a person's authority and, thus, the activity of public authority.⁵⁶

The activity of public officials should, therefore, be characterised by far-reaching restraint, relating to both the forms of their public involvement and the content thereof. This includes any manifestation of public activities that could undermine confidence in their impartiality.⁵⁷ Thus, every public official in a political debate should be guided, in the first instance, by not violating the dignity of another person, including, above all, a political opponent, setting an example, as it were, to the public. It is not possible to maintain the dignity of an office without disgracing it when, being a public functionary, one violates the dignity of others (not only politicians). For example, an MP in his or her public service should be guided by generally accepted ethical principles and respect the dignity of others, in which the Sejm's Committee on Parliamentary Ethics should assist. Indeed, this is the body in parliament that plays a leading role in countering hate speech.⁵⁸

It is also worth noting that the lack of decisive action against hate speech has resulted and will continue to result in a further deepening of this phenomenon. In one of his recommendations in 2019, the former Ombudsman Adam Bodnar acknowledged another threat related to hate speech, namely the brutalisation of language.⁵⁹ This manifests itself in a dangerous tendency to abandon dialogue in favour of extreme radical opinions based on negative emotions. Hence, their selection is not accidental, as they are intended to evoke in the average viewer a feeling of hostility or hatred towards persons or views described as different or alien. Such a state of affairs means that, for a large section of society, the dignity of another human being no longer constitutes a specific limit to freedom of expression. Hence, the only appropriate response to hate speech and the associated threats to a democratic and pluralistic society is to build a comprehensive strategy to counter hate speech in public spaces. In this aspect, a comprehensive, external analysis of the activities of the Committee on Parliamentary Ethics regarding the response to hate speech in, for example, the Sejm or the Senate, could be helpful.⁶⁰

⁵⁶ Gorlewska, E., 'Profile pojęcia "godność" w Konstytucji Rzeczypospolitej Polskiej', in: Sokółska, U. (ed.), *Socjolekt, idiolekt, idiosyl*, Białystok, 2017; https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/8062/1/E_Gorlewska_Profile_pojecia_godnosc.pdf [accessed on 17 May 2024].

⁵⁷ A negative example in this respect can be seen in the bipartisan statements of the Supreme Court judges quoted in the article: Adamski, M., 'Zmiany w SN: "Szlag mnie trafia". Małgorzata Manowska oburzona komentarzem', *Rzeczpospolita*, 28 July 2022, <https://www.rp.pl/sady-i-trybunaly/art36772921-zmiany-w-sn-szlag-mnie-trafia-malgorzata-manowska-oburzona-komentarzem> [accessed on 8 August 2022].

⁵⁸ Starzewski, Ł., 'Jak walczyć z mową nienawiści...', op. cit.

⁵⁹ For more on the brutalisation of language, see also, Bralczyk, J., *Brutalizacja języka publicznego*, <https://docplayer.pl/27357918-Brutalizacja-jezyka-publicznego.html> [accessed on 8 August 2022].

⁶⁰ Starzewski, Ł., 'Jak walczyć z mową nienawiści...', op. cit.

HATE SPEECH AND FREEDOM OF EXPRESSION IN PRACTICE

In view of these considerations it seems that, due to the existence of restrictions on the exercise of freedom of expression, hate speech will not be subject to legal protection to any extent. This is because, if speech embodies any of the prerequisites allowing the restriction of freedom of expression, it loses legal protection. This interpretation, which could be considered right and reasonable, is, however, hindered by the findings of Recommendation R (97) 20 of 30 October 1997 of the Committee of Ministers of the Council of Europe on hate speech, according to which a restrictive approach to interference with freedom of expression, including in the context of hate speech, is recommended to the Member States of the Council of Europe. An analysis of the content of principle four of this recommendation shows that only 'specific instances' of hate speech do not benefit from protection, within the framework of freedom of expression. In other words, not every case of hate speech will be deprived of protection under freedom of expression, but only those instances which are of a 'specific' nature should be deprived of protection.⁶¹ It is, however, difficult to develop uniform rules indicating which instances of hate speech will be considered of a specific nature and which should be denied such a designation.

A later document of the Council of Europe, Resolution 1510 of 2006, presented a different position on this issue, effectively removing the protection granted to hate speech. This document addressed the issue of freedom of expression and respect for religious beliefs. On the one hand, it pointed out that freedom of expression should no longer be restricted to meet increasing sensitivities of certain religious groups (paragraph 12). However, at the same time, this paragraph emphasises that hate speech against any religious group is not compatible with the fundamental rights guaranteed by the ECHR. Thus, the resolution places this form of expression in the context of Article 17 ECHR.⁶²

Public debate is, therefore, a place where two opposing values clash – on the one hand, there is political culture – the need to maintain appropriate, high standards in political debate, expressing one's own position while respecting the opinion of others and human dignity itself. On the other hand, there is the freedom of expression – the bluntness of the expressions used to convey a divergent, disapproving, or even scandalous position in the most appropriate and powerful way. Drawing the borderline between these phenomena is extremely difficult, as it is impossible to indicate unequivocally – in isolation from a given case – how far one can go in expressing one's own viewpoint while maintaining an appropriate standard of political culture. It should be noted that public expression is a value which is appreciated and recognised both by national jurisprudence and by the case-law of the European Court of Human Rights, since it constitutes the basis for the exchange of information in a democratic society, and the very fact of granting the status of public expression to messages of various content and form implements

⁶¹ Jaskuła, L.K., 'Wolność działalności dziennikarskiej w perspektywie zjawiska mowy nienawiści (wybrane aspekty prawne)', in: Lis, W. (ed.), *Status prawny dziennikarza*, Warszawa, 2014, pp. 325–326.

⁶² Kamiński, I.C., *Ograniczenia swobody wypowiedzi...*, op. cit., p. 414.

the principle of the right to information as a right of society as a whole.⁶³ However, when compared to the case law of the ECtHR, the position of national courts is much more restrictive with regard to the construction of public utterances, as it pays considerable attention to the acceptable shape, form, as well as the manner of expression of the utterance, pointing out the essence of social interest, including the protection of the audience from possible hate speech.

Indeed, the Supreme Court has taken the position that the right to criticism must not degenerate into the formulation of invectives and slander.⁶⁴ This principle had already been highlighted in a Supreme Court judgment in which it was stated:

'A person holding a public function is exposed – which is a natural phenomenon in any democratic state – to the exposure of his actions to public scrutiny and must expect criticism of his conduct, which is socially useful and desirable if it is undertaken in the public interest and has the characteristics of fairness and factuality – and at the same time does not exceed the limits necessary to achieve the social purpose of the criticism. These limits cannot be drawn generally, as they are determined by the unique circumstances of the particular case'.⁶⁵

This thesis points to the need for a balance, an appropriate balance between the criticism – which should have the characteristics of constructiveness, and factuality, without insulting the addressee, and with the contribution of value to the discussion – and the form of this communication, within the limits of the moral norms in force. Thus, J. Taczkowska correctly observes that in domestic case-law, public expression is a narrower concept than in the position adopted by the ECtHR. It may not be characterised by arbitrariness of form and content; on the contrary, it should have informative value. Hence, public utterance is included in the framework of 'information about public matters.' The dispute between the position of the ECtHR and the position expressed in national case law is, in a way, a dispute about quality.⁶⁶ At this point, it is worth noting the standards relating to the protection of the honour of persons who are participants in public debate. The subjective differentiation of the scope of protection of honour, especially of the good name, is advocated both in doctrine and in case law and is particularly relevant to persons engaged in public activities. The scope of the protection of honour vested in public officials is, as a rule, narrower than the analogous scope of the protection of honour vested in private persons.⁶⁷ Such a solution also indicates the relative character of the protection of personal rights, even though the protection itself is based on the construction of an absolute subjective right.⁶⁸ The source of the narrowing of

⁶³ Taczkowska, J., *Kategorie wypowiedzi i ich ochrona*, Warszawa–Poznań, 2008, p. 120.

⁶⁴ Order of the Supreme Court of 10 December 2003, V KK 195/03, OSNKW 2004, Vol. 3, item 25.

⁶⁵ Judgment of the Supreme Court of 28 September 2000, V KKN 171/98, OSNKW 2001, Vol. 3–4, item 31.

⁶⁶ Taczkowska, J., *Kategorie wypowiedzi...*, op. cit., p. 121.

⁶⁷ Sadowski, J., 'Ochrona czci uczestników debaty publicznej', in: Balcarczyk, J. (ed.), *Dobra osobiste XXI wieku. Nowe wartości, zasady, technologie*, Warszawa, 2012, p. 182.

⁶⁸ Cisek, A., 'Ochrona dóbr osobistych osób sprawujących funkcje publiczne', in: Machnikowski, P. (ed.), *Prace z prawa cywilnego dla uczczenia pamięci profesora Jana Kosika*, Wrocław, 2009, p. 33.

the protection of the honour of public officials is to be found in the legitimate public interest in this matter. According to the view expressed by the Supreme Court, the activities of public officials have an impact on the shaping of public life, and this justifies the interest of the public in the activities they carry out. Therefore, the level of permissible criticism in relation to such persons is broader, and the protection granted is less, than in the case of private persons.⁶⁹ Furthermore, in other rulings, the Supreme Court has emphasised the fact that public officials, due to the specific activities they carry out, must expect harsher criticism of their conduct and are exposed to stronger interference in the sphere of private life.⁷⁰ An analogous view on this issue has been expressed by the Constitutional Court. Indeed, it would be paradoxical if persons taking part in a public debate and resorting to hate speech simultaneously invoked the protection of their honour and good name.⁷¹

CONCLUSION

To summarise the above considerations, it should be stated that hate speech is extremely often used to pursue and carry out harsh, critical discussion and is motivated primarily by striking at a person's dignity. However, this 'striking at the dignity of a person' is apparent because hate speech is directed against society as a whole, public order, and the value system of a democratic society based on the rule of law. Hence, the conflict of public officials cannot be perceived and viewed solely in the category of a two-person dispute between the individuals concerned, as there is an important public law aspect to it.⁷²

It cannot be denied that statements characterised by hatred do not have a positive impact on the shape of public debate and political culture in Poland. Therefore, they should be eliminated, or reduced to a minimum. Although the above assumption is commonly accepted, it is also common knowledge that it is impossible to completely exclude them from public life because, in practice, they have a significant influence on the shape of political life. Consequently, it should also come as no surprise that public officials use it as a kind of 'weapon' against their political opponents. However, the most dangerous practice is the demonisation of those with whom we disagree, because then politics, instead of being cooperation for the common good, becomes a fight against political opponents who deserve only contempt. Hate speech is therefore the source of a certain paradox, as a result of which society, instead of trusting its elected representatives as much as possible, disregards their statements. This is facilitated by the instruments of modern communication

⁶⁹ Resolution by a panel of 7 Supreme Court judges of 18 February 2005, III CZP 53/04, OSNC 2005, No. 7–8, item 114.

⁷⁰ The Supreme Court judgment of 24 January 2008, I CSK 338/07; the Supreme Court judgment of 8 February 2008, I CSK 347/07.

⁷¹ Judgment of the Constitutional Court of 5 March 2003, K 7/01, OTK-A 2003, No. 3, item 19.

⁷² Orban, E., 'Regulacja prawna mowy nienawiści i przyczyny przestępstw z nienawiści', in: Blicharz, G., Delijewski, M. (eds), *Wolność słowa. Współczesne wyzwania w perspektywie prawnoporównawczej*, Warszawa, 2019, p. 289.

(e.g., portals), in which various unflattering statements by politicians are often disseminated despite the passage of years.⁷³

There are many reasons for this situation. Among them are allegations of inadequate education of public officials, lack of skills in political and public debate, low level of personal culture of public officials, or more general ones, such as the brutalisation of language. However, it remains to be hoped that hate speech, because of the sanity of public officers, will be marginalised.

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⁷³ Sadowski, J., 'Ochrona czci uczestników...', op. cit., p. 101.

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