PRACTICA

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Legal prohibition of hate speech in jurisprudential practice – between judicial discretion and arbitrariness

Abstract

Based on a comparative study of jurisprudence in hate speech cases, especially criminal cases, a consideration of judicial discretion and arbitrariness is made. The author argues that discretion – in the sense of a certain amount of latitude within the limits of the law on the part of the court in making findings and decisions – is inevitable and necessary. However, not infrequently the courts, in the administration of justice, resort to arbitrary actions, which in hate speech cases takes forms such as, in particular: selective and biased application of the law according to the ideological key; self-proclaimed expansion of the statutory catalog of groups of people protected from hate speech; failure to take into account or depreciate the argument formulated by the accused from freedom of speech or freedom of religion in their deliberations; a priori assumption that the expression of hateful content is the same as stirring up or incitement to hatred; ignoring the question of the relationship of the accused's incriminated behavior with the violation of or threat to the protected legal good, in particular public order. Judicial arbitrariness is a blatant distor-

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tion of the standards of the adjudicatory process and the role of the judiciary in the rule of law.

Key words

Judicial discretion, judicial arbitrariness, hate speech, jurisprudence.

1. Introduction

The characterization of judges as "mouths of the law" in its literal sense is neither normatively nor – even less – descriptively valid today[2]. This in no way implies acquiescence in the arbitrariness of representatives of the judiciary in judicial activity. Sometimes, however, judges overstep the limits of their discretionary power, entering the field of arbitrariness. One of the thematically or objectively distinguished categories of cases in which the judiciary's power is sometimes abused are those involving legally prohibited hate speech. The article, based on a study of cases from the judicature of more than a dozen legal orders, presents the perceived regularities, trends, interpretative directions in the judicial application of the law against hate speech, mainly criminal law. The intention was to delimit, synthesize and critically-valuably analyze the various forms or manifestations of judicial discretion and judicial arbitrariness accompanying the practice of jurisprudence with regard to incriminated hate speech.

2. The concepts of judicial discretion and arbitrariness

Judicial discretion is the judicial latitude, which is within the limits of the law, to resolve the case under review in a manner that takes into account and is appropriate to its specifics, and at the same time in accordance with the applicable legal regulations. Although not infrequent objections are raised to it in the legal doctrine – rather not so much to discretion as such, but more to its practice[3] – to some extent it is both

[2] J. Zajadło, Banał formuły dura lex sed lex, Palestra 2019, No. 5, p. 10. See: P. Tuleja, Dlaczego sędzia nie może być ustami ustawy? Prawa człowieka a ustrojowa pozycja sądu, (in:) J. Ciapała, R. Piszko, A. Pyrzyńska (eds), Dylematy wokół prawa do sądu, Warszawa 2023, p. 81–93.

[3] "The irregularities related to the abuse of discretionary power result not so much from the fact that a judge is equipped with this type of powers, but from their im-

inevitable[4], and necessary[5]. A certain freedom, flexibility or latitude[6] on the part of the court accompanying the adjudicatory process derives from the nature of the law, especially the characteristics of the legal language (such as, for example, the use by the legislator of vague and evaluative terms, often marked axiologically – for example, the term "hatred", the occurrence of general reference clauses, the presence of estimative phrases), as well as from the institution of judicial discretion (for example, in the context of the judicial assessment of punishment) or proportional balancing of conflicting rights, goods, values, legal interests (such as balancing in cases of unlawful hate speech the need to protect human dignity and public order with the need to respect freedom of speech and freedom of religion)[7]. In contrast, the concept of judicial arbitrariness[8] – which appears much less frequently in legal scholarship and is often used interchangeably with the phrase "arbitrality"[9] – supposes unrestrained action and consequent misappropriation or violation of the applicable law[10]. It usually does not involve overt insubordination, ostentatious judicial disobedi-

proper use to achieve extra-legal goals". S. Dąbrowski, A. Łazarska, Nadużycie władzy sędziowskiej, Polski Proces Cywilny 2012, No. 1, p. 43.

[4] The Regional Court in Częstochowa recognizes judicial discretion as the "principle of judicial sentencing". Judgment of the Regional Court in Częstochowa of 9 July 2019, VII Ka 536/19, LEX no. 2699773.

[5] Hoping "for a complete elimination (of judicial discretion) is simply indulging in illusions". Ł. Machaj, Wypowiedzi symboliczne w orzecznictwie Sądu Najwyższego USA, Wrocław 2011, p. 30.

[6] See: judgment of the Court of Appeal in Łódź of 25 February 2014 (I ACa 1116/13, LEX no. 1439202), in which judicial discretion was expressed in terms of "decisional latitude".

[7] See more: B. Wojciechowski, Dyskrecjonalność sędziowska. Studium teoretycznoprawne, Toruń 2004; R. Mańko, W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja, Łódź 2018, p. 95–146; V. Nor, M, Dzyndra, The Concept of Judicial Discretion in Criminal Proceedings, Wrocławsko-Lwowskie Zeszyty Prawnicze 2015, No. 6, p. 259–265.

[8] See the dictionary meaning of the term “arbitrariness”: https://wsjp.pl/haslo/podglad/59428/arbitralizm and https://wsjp.pl/haslo/do_druku/69340/arbitralnosc.

[9] Lawyers often assume implied meaning of judicial „arbitrariness/arbitrality”, therefore use it without explaining the given concept. See, e.g., T. Zych, W poszukiwaniu pewności prawa. Precedens a przewidywalność orzeczeń sądowych w tradycji prawa anglosaskiego, Toruń 2017, *passim*.

[10] M. Safjan, Niezależność Trybunału Konstytucyjnego i suwerenność konstytucyjna RP, Państwo i Prawo 2006, No. 6, p. 7–8 (The author combines "judicial arbitrariness" with "interpretive freedom").

ence[11] through outwardly communicated *contra legem* conduct. It is more about ignoring the basic principles of the judicial process (such as impartiality and objectivity), interpretive methods and directives or, more broadly, certain canons of conduct that make up the methodology of the judge's work. It is not uncommon for judicial arbitrariness to go hand in hand with judicial law-making and an activist attitude[12]. It also contradicts the principle of legal certainty and security[13].

In legal doctrine, including criminal law, it is not uncommon for the terms discretion and arbitrariness to be used interchangeably. As one author argues, "hate crimes are more vulnerable to the arbitrariness of criminal procedural authorities than other crimes; and the threat of discretion is all the greater because the pressure of groups interested in stigmatizing certain behavior as hate crimes can be an important factor in determining specific procedural decisions"[14]. Similarly, another author points out that, in turn, the use of analogies in criminal law "increased the scope of the judge's discretionary power, allowing him to decide arbitrarily whether to criminalize a particular act"[15].

However, there is also no shortage of examples of a legitimate distinction between the two conceptual categories. Aleksandra and Piotr Kardas contrast the "discretionary power of the court" precisely with "arbitrariness", understanding by the first concept "necessary for the realization of the function of judicial administration of justice freedom...in making findings of fact and for the application of norms to established facts, as well as the dimension of punishment" serving "the realization of the principle of individualization of criminal responsibil-

[11] See: J. Zajadło, Sędziowskie nieposłuszeństwo, Państwo i Prawo 2016, No. 1, p. 18–39.

[12] A manifestation of "judicial arbitrariness" is considered to be "the subjectivization of case law by effectively giving the power to create judicial law in the strict sense to the panel of judges adjudicating in a given case". P. Mysłowski, Prawo sędziowskie a pewność sytuacji prawnej jednostki – spojrzenie krytyczne, (in:) A. Błaś (ed.), Pewność sytuacji prawnej jednostki w prawie administracyjnym, Warszawa 2012, LEX No. 369251458.

[13] A. Rychlewska, Zasada *nullum crimen sine lege* w systemie państwa prawa. Analiza porównawcza na tle europejskiego systemu ochrony praw człowieka, Kraków 2018 (PhD dissertation), pp. 154, 158, 240–241, 258, 280 and 295.

[14] M. Woiński, Prawnokarne aspekty zwalczania mowy nienawiści, Warszawa 2014, LEX No. 369312599.

[15] T. Kaczmarek, Chapter I. Kara kryminalna i jej racjonalizacja, (in:) *idem* (ed.), Nauka o karze. Sądowy wymiar kary. System Prawa Karnego, vol. 5, Warszawa 2017, p. 26.

ity"[16]. At the same time, these authors add that the "discretionary power of the court" is "the decision–making freedom vested in the court, within the limits set by the legal norms"[17]. Similarly, Stanisław Dąbrowski and Aneta Łazarska emphasize that judicial discretion does not mean "arbitrary latitude" and "cannot serve to justify judicial willfulness," since its limits are "set by law." Not only that "the judge in his activity is limited by the law," but "in addition, his action is to be characterized by the diligence of adjudication, expressed in taking into account all the circumstances of the case, respecting universal standards of action, such as, for example, rationality, justice and fairness"[18].

Analogous views are also given expression in the case law itself. In the justifications of the judgments it is indicated that the scope of the court's discretion "is determined by the provisions of the law"[19] or it is "allowed by the legislator"[20]. Even if the scope is wide, it still "does not mean arbitrariness"[21]. The arbitrariness of action is not a feature of judicial discretion, but synonymous with the capriciousness of the court[22], understood, among other things, as "ruling in a mechanical and thus unjust manner"[23]. However, as in legal doctrine, so also in jurisprudence, it is sometimes mistaken to equate judicial discretion with arbitrariness[24].

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[16] P. Kardas, A. Kardas, Zasada równości w prawie karnym (zarys problematyki), Czasopismo Prawa Karnego i Nauk Penalnych 2019, iss. 1, pp. 23 and 29.

[17] *Ibidem*, p. 37.

[18] S. Dąbrowski, A. Łazarska, Nadużycie…, p. 30.

[19] Decision of the Supreme Administrative Court of 23 September 2010, II FZ 474/10, LEX No. 742526.

[20] Judgment of the District Court for the Capital City of Warsaw of 11 January 2022, I C 1703/21, LEX No. 3416542.

[21] Decision of the Supreme Court of 10 January 2020, II CSK 436/19, LEX No. 3220723; judgment of the Supreme Court of 13 July 2022, II CSKP 769/22, LEX No. 3399826; judgment of the Supreme Court of 28 April 2021, I CSKP 87/21, LEX No. 3175568.

[22] Judgment of the Supreme Administrative Court of 26 January 2012, II OSK 2146/10, LEX No. 1138088.

[23] Judgment of the Court of Appeal in Warsaw of 6 March 2015, VI ACa 666/14, LEX No. 1740721.

[24] As the Court of Appeal in Katowice puts it, "free assessment of evidence cannot be associated with judicial discretion. The judge cannot freely evaluate individual means of evidence because he is obliged to explain how he assessed them and why he drew certain conclusions regarding factual findings from them". It thus suggests that judicial discretion consists in the full freedom of actions and the lack of the need to rationalize them. Judgment of the Court of Appeal in Katowice of 29 November 2018, II AKa 413/18, LEX No. 2671571.

The jurisprudence recognizes various sources of judicial discretion, not restricting it to the institution of judicial margin of appreciation or free evaluation of evidence, but including interpretive discretion. As one court states, "within the scope of the discretionary power of the courts is the manner of interpreting the law"[25].

The line between discretion and arbitrariness can be debatable *in concreto*, especially in cases of misused discretion. The classification of a court's action into one or the other posture is determined not so much by the content of the decision made or the particular determination made preceding that decision, but by the chosen method of reasoning and argumentation leading to one conclusion or another. The erroneousness of the conclusion reached by the court is not *per se* a sign of arbitrary conduct. However, if the conclusion was reached *a priori*, everything that contradicts it was ignored *ex ante*, the universally recognized standards of legal interpretation were not observed, a biased view of the facts was made, an extremely selective and one-sided reference was made to the body of case law, the requirements of the principle of proportionality were disregarded in cases involving a collision of competing rights, the point of reference for its considerations was made not the law in force, but personally expected law, then it is impossible to define the practice of the court other than arbitrary, i.e. not grounded in the constitutional and procedural norms governing the proceedings of the judiciary or manifestly inconsistent with the substantive law applied.

3. Interpretation of the legally relevant term "hatred"

As mentioned above, the interpretation of the statutory term "hatred"[26] in the context of such unlawful acts as, in particular, criminal stirring up or incitement to hatred, inevitably carries a certain amount of discretion. Courts in the clarification of this concept usually do not exceed the limits of their interpretative discretion. However objectionable some of the results of operative interpretation are, even their erroneousness is not of that degree or that obviousness which would allow us to speak definitively of arbitrariness, a certain capriciousness

[25] Decision of the Supreme Administrative Court of 15 June 2011, II FZ 218/11, LEX No. 852080.

[26] As a rule, in individual legal orders, the term of legal language (language of legal acts) is the word "hatred", while the phrase "hate speech" remains a term of lawyers' language, i.e. the language of legal scholarship and the practice of applying law.

in decoding the meaning of the legal text. In the case of constitutional courts, or those competent in judicial review, courts sometimes contest the legislature's official interpretation. Aptly, in one of its judgments, the Canadian Supreme Court held that the legislature's classification as unlawful hate speech of speech that ridicules or belittles a protected group of people constitutes a disproportionate interference with freedom of expression. He also opted for classifying defamatory speech as hate speech simply because of its slanderous nature. He also opposed classifying calumny statements as hate speech just because of false misrepresentations alone. Instead, he linked hate with detestation and vilification[27]. Cases of questioning an overly broad understanding of hate speech are also shared by jurisprudence in civil law states. For example, the Hungarian Constitutional Court correctly assumed that hate speech is not merely "offensive" speech[28].

Polish jurisprudence lacks a common definition of hate speech, or more precisely, the statutory formulation of "incitement to hatred." In its decision of February 5, 2007, the Supreme Court reduced incitement to hatred "to this type of speech, which arouses feelings of strong dislike, anger, disapproval, even hostility to individual persons or entire social or religious groups, or because of the form of speech sustains and intensifies such negative attitudes and thus emphasizes the privilege, superiority of a particular nation, ethnic group, race or religion"[29]. Over time, the Supreme Court has legitimately moved, it seems, away from defining hate speech in terms of "no approval", "disapproval", "antipathy", "prejudice", "dislike", "negative attitudes", "anger", "privileging", "superiority", in favor of "hostility", "contempt", "vilification", "humiliation", "scorn" or "aggression", which better and more accurately reflect the essence of hatred[30].

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[27] Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 [2013]. Similarly, the Greek Supreme Court explained incitement to hatred in terms of arousing hostility, repulsion and disgust in the recipients. Judgment of the Greek Supreme Court of 29 June 2020, no. 858/2020, http://www.areiospagos.gr/nomologia/apofaseis_DISPLAY. asp?cd=MM8X2SENB1Z5BP10XPW156841DB4JS&apof=858_2020&info=%D0%CF%C9%CD%C9%CA%C5%D3%20–%20%20%D3%D4.

[28] Judgment of the Hungarian Constitutional Court, 30/1992 (pt V.3), https://hunconcourt.hu/uploads/sites/3/1992/06/30_1992–ab_eng.pdf.

[29] Decision of the Supreme Court of 5 February 2007, IV KK 406/06, LEX No. 245307.

[30] Decision of the Supreme Court of 1 September 2011, V KK 98/11, LEX No. 950444; judgment of the Supreme Court of 8 February 2019, IV KK 38/18, LEX No. 2621830; judgment of the Supreme Court of 16 February 2022, IV KK 168/21, LEX No. 3402189.

The courts in Poland often define hate speech too broadly, and thus "exaggeratedly," including in it statements "of a homophobic nature"[31], spreading "negative views and prejudices"[32], or being "the opposite of the language of love"[33]. It is also an erroneous *interpretatio extensiva* to treat collectively in terms of hate speech utterances with discriminatory overtones, which ascribe inferiority to certain groups of people or deny them some rights[34].

It is disappointing to see a universal determinant of hate speech in giving expression to criticism of the granting of certain rights to certain people or communicating a belief in the superiority of one group of people over others. It is impossible to completely abstract this issue from the context and specifics of particular acts of expression, to determine what "rights" and how understood "superiority" are at stake. For example, it is not a manifestation of hate speech for adherents of a particular religion to proclaim a belief in their "spiritual" superiority, based on the conviction that only they believe in the true god(s), and everyone else worships imaginary idols, and therefore will experience eternal damnation as unbelievers if they do not convert. Similarly, it does not constitute hate speech to criticize the permissibility of marriage for same–sex couples, even if one were to consider that this criticism fits into the judicial definition of hate speech, in which hate speech is understood as "denying the right to equal treatment" or "calling for restrictions on the exercise of certain rights and freedoms by representatives of negatively valued groups"[35].

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[31] Judgment of the Regional Court in Warsaw of 21 March 2016, XX GC 1186/14, LEX No. 2095550.

[32] Judgment of the Regional Court in Warsaw of 27 March 2012, I C 426/09, LEX No. 1306049.

[33] Judgment of the Court of Appeal in Katowice of 5 March 2010, I ACa 790/09, LEX No. 1236397.

[34] For example, judgment of the Court of Appeal in Warsaw of 20 April 2015, II AKa 26/15, LEX No. 1711578; judgment of the Regional Court in Wrocław of 12 September 2017, III K 199/17, LEX No. 2374894; judgment of the Regional Court in Częstochowa of 11 December 2018, II K 104/18, LEX No. 2718194; judgment of the Regional Court in Piotrków Trybunalski of 8 February 2022, IV Ka 879/21, LEX No. 3341031; judgment of the Regional Court in Białystok of 30 June 2021, III K 131/20, LEX No. 3477420; judgment of the Court of Appeal in Szczecin of 4 February 2010, I ACa 691/09, LEX No. 1089005.

[35] Judgment of the Regional Court in Białystok of 30 June 2021, III K 131/20, LEX No. 3477420; judgment of the Regional Court in Białystok of 9 November 2015, VIII Ka 409/15, LEX No. 1933524.

4. Hate expression vs. incitement to hate

The rule in the criminal legislation of individual states is to include the crime of hate speech as an intentional crime[36]. This confronts the courts with the need to make findings on the subjective side of the incriminated act. It is a manifestation of arbitrariness to anticipate that the mere externalization of one's own hatred against a protected group of people proves the intention to arouse hatred in others. The use of inference of this type in its symplistic nature is impermissible. Assessing the subjective side of criminal act requires contextual considerations by the court, such as, for example, considering the fact that the accused communicated sincerely held religious teachings[37]. While without taking this context into account the accused would be attributed with the intention to stir up or incite hatred, when it is taken into account it may turn out that his sole purpose was to preach the word of God, bear witness to the professed faith and convert sinners[38]. In the jurisprudence of the courts of various countries there are cases of too hasty, somewhat automatic imputation of the intention to incite hatred[39].

An exemplification of the judicial discrepancies in assessing the subjective side of the crime of hate speech is the divided stance of the Polish Supreme Court in a case involving a social media posting with xenophobic and nationalistic overtones. Dismissing the cassation of the conviction, the Supreme Court assumed that the defendant's use of an imperative sentence with an exclamation point shows that his statement is "in the form of a call, a strong appeal," "a strong exhortation, with reference to an unspecified audience, for taking action (unspecified as to form)," and not "in the form of a discussion or commentary"[40]. However, the Su-

[36] For example, in the Polish legal order it is assumed that an act under Art. 256 § 1 of the Penal Code it can only be committed with direct intent (*dolus directus coloratus*). In turn, in Hungarian jurisprudence, in the context of the crime of inciting hatred, there is a position on the possibility of committing this act also with eventual intent. See judgments of the Hungarian Supreme Court: BH 1997/165, BH 1998/521, BH 2005/46, BH 2011/242.

[37] E. Brincat, Court clears priest of hate speech charges, https://timesofmalta.com/articles/view/court–clears–priest–hate–speech–charges.983888

[38] P. Edge, Oppositional Religious Speech: Understanding Hate Preaching, Ecclesiastical Law Journal 2018, Vol. 20, pp. 278–289.

[39] G. Maroń, Krytyka homoseksualizmu (homoseksualistów) w świetle orzecznictwa sądów kanadyjskich, Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza 2015, No. 17, pp. 57–60.

[40] Decision of the Supreme Court of 13 July 2022, IV KK 32/22, LEX No. 3480944.

preme Court came to a different conclusion when considering the extraordinary appeal against the same verdict. He pointed out that criminal law does not permit basing a conclusion about the defendant's intent "on presumptions or assumptions that have no basis in the evidence of the case." He aptly argued that an ethically negative assessment of a given statement does not prejudge the criminal nature of its public formulation, but "it is additionally necessary to demonstrate that, by posting the statement, the perpetrator had a real intention to provoke negative feelings and hatred in the audience." In the opinion of the Supreme Court, the court of first instance failed to demonstrate such an intention on the part of the convict, essentially failing to address this issue at all in the reasons for its ruling. Paradoxically, even the court of merit considered the convict's explanations, in which the convict explicitly denied having the intention to arouse hatred in others, as "deserving of belief, because they are consistent and logical"[41].

The court should be expected to provide arguments in favor of the conclusion that the defendant intended to stir up hatred. Stopping in this regard at an analysis of the content of the incriminated speech itself is unreliable. An example of the correct approach is the consideration of a Canadian court in one of the criminal cases involving hate speech against homosexuals. The court, in contrast to the prosecutor, noted that the defendant, by distributing leaflets during the Pride Parade, did not so much want to stir up hatred against homosexuals, but his goal was to criticize the parade itself and what it symbolizes, and to get active homosexuals to convert. He added that the intention to make one's act of expression controversial, ostentatious and shocking is not tantamount to an intention to provoke hatred. He also commonsensically argued that if the defendant had intended to stir up hatred against homosexuals, he probably would not have distributed leaflets precisely to them, the allegedly targeted group of people[42].

5. Verification of the violation or threat of violation of a legally protected good

In cases of punishable hate speech, the courts should determine whether the defendant, by his behavior, violated the legal good protected

[41] Judgment of the Supreme Court of 19 April 2023, II NSNk 12/23, LEX No. 3570699.
[42] R. v. Whatcott, 2021 ONSC 8077 (pts 72–93).

by the legal provision prohibiting hate speech or created a threat to this good. This fits into the systemic and functional interpretation of the law. In the various legal orders, the crime of hate speech is usually captured as harming public order or the dignity or honor of those attacked[43].

For example, Hungarian courts in hate speech cases consistently verify the reality of the threat to the protected legal good in the context of a given factual situation. According to the case law there, the commission of a crime can be said to be conditional on the existence of a "clear and real danger" of acts of violence or violation of individual rights. An implied or assumed danger in this regard is not enough. The assessment of the reality of the threat to the legal good is made according to objective criteria, and not the subjective conviction of the person acting as a victim[44].

An exemplification of just such a contextual assessment is the position taken by the Greek Supreme Court in the case of Orthodox Bishop Amvrosios, convicted of publicly inciting discrimination, hatred and violence against homosexuals by publishing an online post titled "The scum of society have raised their heads. Let's spit on them." The court aptly pointed out that the occurrence of the danger of violent acts following hate speech was increased by the fact that the hate speech came from a church hierarchy enjoying the recognition and authority among his disciples ready to follow his instructions[45].

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[43] In Poland, art. 256 and 257 of the Criminal Code are included in the chapter concerning crimes against public order. Similarly, in the UK, the crime of hate speech is regulated by the Public Order Act 1986 (c 64) and in Hungary it is a crime against the public peace (Article 332 of the Act of 25 June 2012, Criminal Code). In Canada, although the crime of hate speech is included in the chapter on crimes against the person and reputation, the constitutive element of this criminal act is the threat of breach of the peace (Article 319 of the Criminal Code, R.S.C., 1985, c. C–46). To some extent, the opposite is the case in the German Penal Code, where although § 130 is included in the chapter relating to crimes against public order, it refers to "violation of the dignity of persons" (Act of May 15, 1871). This phrase also appears in Art. 510 of the Spanish Penal Code (Organic Law No. 10/1995 of 23 November 1995) in the chapter on offenses related to the exercise of fundamental rights and freedoms. In Italy, the crime of hate speech is included in the chapter of the Penal Code dealing with crimes against individual freedom (Article 604–bis of the King's Decree No. 1398 of October 19, 1930), and specifically against equality, which can be explained by legislature's assumption of the content-related connection between hate speech with discriminatory acts.

[44] See judgments of the Hungarian Supreme Court: BH 1997/165, BH 1998/521, BH 2005/46 i BH 2011/242.

[45] Judgment of the Greek Supreme Court of 29 June 2020, no. 858/2020.

When the crime of hate speech is linked to a threat to public order, the circumstance of from whom the threat comes, i.e. whether it actually comes from the speaker or from listeners, remains relevant. Silencing and punishing a speaker for a threat of violence coming from critical or hostile listeners reacting aggressively to content they do not tolerate constitutes a so–called "heckler's veto" regarded as the antithesis of freedom of speech and the standards of the demo-liberal state. An example of the judicial sanctioning of the heckler's veto is the case of British street Christian preacher Harry Hammond. He preached biblical teaching on homosexuality on the sidewalk, holding up posters with the words: "Stop immorality," "Stop homosexuality", "Stop lesbianism", "Jesus is Lord". A group of dozens of people hostile to the man gathered around him. Hammond was taunted, pelted with clods of soil, doused with water, and turned over on his back. Police officers who arrived at the scene arrested the evangelist, deciding that it was he who was making insulting remarks against homosexuals that was violating public order. This erroneous position was shared by the courts of both instances[46].

Similarly, the flawed reasoning, in which a threat to public order from those prone to violence and aggression who are critical of a speaker's disapproved speech is read as evidence of the illegality of that speaker's act of expression, is also shared by Strasbourg jurisprudence. In E.S. v. Austria, the European Court of Human Rights shared the position of the Austrian courts that it was hate speech threatening religious peace to present at a public seminar the view of the pedophilic nature of the Prophet Muhammad's relationship with his 9-year-old wife Aisha[47]. The Court ignored the circumstance that "the applicant's remark was not made in a context in which it could have directly and inevitably provoked the audience to violence – the applicant did not, for example, go to a mosque on Friday to preach to the people gathered there what madness Muhammad's marriage to Aisha was." Instead, he accepted that the limits of freedom of speech are defined "not so much by the violence of the disputed speech, but by the potential violence of those who claim to feel offended by it. Thus, all it takes is for a few outraged individuals to announce that they feel offended, and as long as they pose a threat, that is enough to justify censorship against their opponents"[48].

[46] Hammond v. DPP [2004] EWHC 69.

[47] Judgment of the ECtHR of 25 October 2018, E.S. v. Austria, app. no. 38450/12.

[48] G. Puppinck, Cenzura wypowiedzi dotyczących islamu w Europejskim Trybunale Praw Człowieka: uderzający przypadek sprawy E.S. przeciwko Austrii, Chrześcijaństwo–Świat–Polityka 2020, p. 122.

6. Deliberation of the argument from freedom of speech

Since the criminal hate speech act is an act of expression, it should be natural for the courts to take into account the issue of freedom of speech in their deliberations and address whether the defendant's behavior can be considered an exercise of this freedom[49].

Depending on the content and context of the incriminated speech, freedom of religion, artistic freedom and freedom of scientific research may come into play in addition to freedom of speech. This by no means means that an argument from freedom of speech – or the other listed freedoms – on its own excludes the unlawfulness of an incriminated act. For freedom of expression is not an *ius absolutum*. When criminalizing hate speech, just as when criminalizing slander or insult, the legislator should consider freedom of expression when giving particular shape to statutory provisions. In other words, on the basis of the concept of a rational legislator, one can assume that, for example, the form of Articles 256 or 257 of the Polish Criminal Code is the result of a proportional balance between the constitutional legal values protected by these provisions (such as public order and human dignity) and the values regulated by these provisions (such as precisely freedom of expression). Only that the legislative process allows such a balancing at the general–abstract level. This does not abolish the need to confront the same competing values at the stage of application of the law, only that with regard to the specifics and circumstances of a particular state of facts.

In a ruling, the German Federal Constitutional Court overturning criminal court convictions for incitement to hatred – by publishing a poster calling for the deportation of immigrants – argued that the courts reviewing the case either did not consider the constitutional principle of freedom of speech at all, or did not give it sufficient weight in the legal evaluation of the defendants' incriminated behavior[50].

The technique of proportional balancing by its very nature implies discretion. The application of the principle of proportionality, including its element in the form of balancing conflicting values, however, requires recognition of the importance, the significance of competing legal goods. Even at the outset, downplaying or trivializing the argument from freedom

[49] See: T. Bojanowski, Wybrane prawnokarne aspekty mowy nienawiści w kontekście standardów ochrony wolności słowa, Prawo w Działaniu 2021, No. 47, p. 168–186.

[50] Decision of the German Federal Constitutional Tribunal of 4 February 2010, 1 BvR 369/04.

of speech or freedom of religion in unlawful hate speech cases makes that the court's considerations of the possibility of reconciling a conviction with respect for freedom of expression are merely apparent, and the conclusion reached arbitrary.

Failure to sufficiently consider the argument from freedom of speech and freedom of religion in its deliberation was the case of the Zurich District Court (*Bezirksgericht*), which in 2022 fined a street Christian preacher for publicly criticizing homosexuality from a religious perspective. The man taught on a public sidewalk during the city's Pride Month that homosexuality is a sin, "evil lust" and "shameful desire", homosexual marriages are not valid before God, and that one can "convert" from homosexuality. Public proclamation of these contents with reference to Scripture was considered a crime of discrimination and incitement to hatred[51]. The court, in qualifying pointing out the sinfulness of homosexual acts, questioning the legalization of same-sex unions and calling for repentance as criminal humiliation of persons on the basis of their sexual orientation, ignored, or at least did not give due weight to, the fact that the accused communicated and convinced others of his sincerely professed Christian teaching on the subject of homosexuality and same–sex unions[52].

This position contrasts with the ruling of the US Supreme Court, which, while declaring the unconstitutionality of the ban on same–sex marriage, at the same time made it clear that the legalization of such unions in no way deprives religious people of the opportunity to proclaim their sincere views that "by divine precepts, same-sex marriage should not be condoned... The same is true of those who oppose same–sex marriage for other reasons"[53].

It must be acknowledged, however, that courts face a lack of consistent jurisprudential standards for balancing competing values in unlawful hate speech cases. Strasbourg jurisprudence, which could be

[51] Art. 261 bis Swiss Criminal Code (*Schweizerisches Strafgesetzbuch*) of 21 December 1937, https://www.fedlex.admin.ch/eli/cc/54/757_781_799/de.

[52] See: J. Schumacher, Straßenprediger in Zürich wegen Hassrede verurteilt, https://www.pro–medienmagazin.de/strassenprediger–in–zuerich–wegen–hassrede–verurteilt/.

[53] Obergeffel v. Hodges, 576 U.S. 644 (2015). See similarly judgment of the South Africa Constitutional Tribunal, National Coalition for Gay and Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC). The Court noted that the belief that sexual acts are limited to marriage between a woman and a man for procreative purposes cannot be attributed only to "primitive bigots", as it is sincerely shared by a number of people for religious and non-religious reasons.

expected to act as a benchmark in this regard with an instructive function for national courts, is itself internally heterogeneous, often being more a source of confusion than unification of jurisdictional practice[54]. It is telling that the Swedish Supreme Court, acquitting Pastor Ake Green in 2005 of the charge of the crime of expressing contempt for homosexuals through a sermon[55] critical of them, stated that, although the clergyman fulfilled the elements of the crime with his behavior, at the same time it assumed that his conviction would be contrary to the standards of freedom of expression developed in ECtHR case law, in particular, it would violate the principle of proportionality[56]. From the perspective of the ECtHR's two subsequent judgments in analogous cases, the Swedish court's prediction of a possible ECtHR recognition of Pastor Green's conviction as a violation of Article 10 of the Convention is highly questionable[57].

7. The criterion of truthfulness of the incriminated speech

When hate speech takes the form of group defamation, courts should verify in each case whether the incriminated statements are truthful, regardless of whether the criterion of truthfulness of the statements formally excludes liability or criminality, as, for example, on the grounds of Article 319(3)(a) of the Criminal Code of Canada. Indeed, also in legal orders in which the truthfulness of the statement *ipso jure* does not abolish the illegality of the act, such as with regard to Article 212 of the Polish Criminal Code, the issue nevertheless remains relevant to the overall contextual assessment of the case. A manifestation of judicial arbitrari-

[54] Zob. S. Sottiaux, Conflicting Conceptions of Hate Speech in the ECtHR's Case Law, German Law Journal 2022, Vol. 23, p. 1193–1211.

[55] During the sermon, the pastor criticized homosexuality and homosexual acts from a biblical perspective as manifestations of man's departure from God. He presented them as immoral, sinful, filthy, sick, unclean, and at the same time consciously chosen. He included them, along with bestiality, as abnormal human sexual behavior, which is "a deep cancerous tumor on the entire body of society". Moreover, he linked homosexuality with the emergence and spread of AIDS and pedophilia ("defilers of boys"), although he also noted that not all homosexuals are people with AIDS or sexually abusing children.

[56] Judgment of the Swedish Supreme Court of 29 November 2005, B 1050–05, http://www.emaso.com/links/ref–articles/ref29e/ref29s.htm

[57] Judgment of the ECtHR of 12 May 2020, Lilliendahl v. Iceland, app. no. 29297/18; judgment of the ECtHR of 9 February 2012, Vejdeland and others v. Sweden, app. no. 1813.

ness is the *apriori* categorization of statements critical of a given group of people as unlawful, or outright punishable, hate speech without even attempting to determine whether they reflect reality or, having the form of a value judgment, have a sufficient factual basis[58].

The above-mentioned Canadian case of R. v. Whatcott, in which criminal hate speech was charged in connection with the distribution of leaflets critical of homosexuality during the 2016 Toronto Pride Parade, may serve as an example of the court's proper approach. On the one hand, they depicted homosexual acts as contrary to God's law. On the other hand, they pointed out the health risks associated with practicing homosexuality, such as, in particular, shorter statistical life expectancy, higher incidence of HIV infection and AIDS, increased risk of contracting various other diseases. The court, objectively approaching the body of scientific medical literature on the subject, came to the conclusion that the content communicated on the leaflets was essentially "plausible." It found some claims to be admittedly "inaccurate," fraught with "exaggeration" and partly "misleading," but still not reaching the level of hate speech[59].

The opposite attitude is presented in a number of ECtHR rulings. In cases involving anti-Muslim and anti-immigrant expressions, the Court has been rather laconic and cursory in addressing their facts. In a way, it manifests a tendency to label many critical remarks against Muslims as acts of expression that are somewhat *a priori* defamatory, expressing contempt without even attempting to verify whether the evaluative and somewhat generalized statements are sufficiently grounded in facts. It happens, as in the case of Le Pen v. France, that the Court rejects evidence submitted by the applicant to prove the unsubstantiated nature of the assessments he makes, without recounting and responding to them. All that can be learned from the text of the ruling is that Le Pen referred to certain unspecified "alleged facts" that discredited both the national courts and the Court[60]. The persuasive power of this type of explanation is negligible. The recipient of the justification must take the Court's word for it that the applicant has not sufficiently substantiated the thesis that the Muslim community poses a threat to public order and security in France. Similarly, in Féret v. Belgium, the Court uncritically followed the Belgian court in accepting that an electoral leaflet circulated by the complainant stating that the operation of

[58] E.g. Saskatchewan (Human Rights Commission) v. Whatcott (pts 182–183, 188).
[59] R. v. Whatcott (pts 51–52, 58, 69).
[60] Judgment of the ECtHR of 20 April 2010 r., Le Pen v. France, app. no. 18788/09.

a refugee center had a negative impact on the neighborhood was "undocumented on cause and effect" comments[61].

8. Catalog of groups of people protected from hate speech

It is impossible to judge other than as judicial arbitrariness the modification, and in fact the expansion, by the courts – as bodies of law application – of the statutory catalog of groups of persons protected against hate speech. In such a case, a law-making *interpretatio extensiva* takes place. On the grounds of criminal law, it also means a violation of the principle of *nullum crimen sine lege* and the prohibition of analogy to the detriment of the accused. Thus, the Polish Supreme Court correctly objected to the self-proclaimed judicial addition to the persons protected by Article 257 of the Criminal Code of those singled out by their sexual orientation. As it noted, if the reason for insulting a group of people is their sexual orientation, the statement does not exhaust the elements of an offense under Article 257 of the Criminal Code. This provision "contains a closed catalog of reasons for the perpetrator's actions, and therefore it is not permissible to interpret this legal norm extending the protection contained therein to a group of people not mentioned therein"[62]. Determination of the subjective scope of criminalized hate speech belongs, according to the division of powers, to the legislature, which in turn should take into account the social, cultural, demographic and criminological factors accompanying hate speech.

However, it happens that the legislator, in selecting the groups of persons subject to protection from hate speech, violates constitutional principles. In such a case, in countries where there is no judicial review institution, it is up to the constitutional court to challenge the statutory framing of the hate speech ban. In 2008, for example, the Hungarian Constitutional Court declared a provision of the Civil Code making group defamation of any minority group unlawful, contrary to the Basic Law. In the opinion of the Court, the provision was, on the one hand, too broad and at the same time indefinite in scope, as it protected any minority group, and on the other hand, its scope was too narrow, as it did not cover majority groups in a discriminatory man-

[61] Judgment of the ECtHR of 16 July 2009, Féret v. Belgium, app. no. 15615/07. See more: G. Maroń, Mowa „antymuzułmańska" i „antyimigrancka" w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka w Strasburgu, Przegląd Prawa Publicznego 2016, No. 1, p. 9–28.

[62] Judgment of the Supreme Court of 3 March 2022, II KK 534/21, LEX No. 34091.

ner[63]. Similarly, it deemed unconstitutional, because it introduced too broad a scope of criminalization, a provision of the Criminal Code criminalizing hate speech against "any group of persons"[64].

9. Legal evaluation vs. ethical evaluation of hate speech

Despite the undoubted links between law and morality, these are not identical normative orders. Law is not a "mirror image" of morality[65]. The court's recognition of the incriminated behavior as immoral in light of the prevailing ethical assessments in a given society cannot be the same basis for simultaneously treating it as unlawful. For example, in criminal cases, the acceptance of the ethical reprehensibility of the accused's alleged act does not relieve the court of the duty to verify whether the elements of the type of criminal act have been fulfilled, whether all the elements of the subject and object sides of the crime have occurred. The acquittal of the accused on the grounds that he did not commit a crime cannot be perceived as affirming, praising, sympathizing or legitimizing his immoral behavior by the court. It is unacceptable to condition the direction of the settlement of unlawful hate speech cases – as well as all other court cases – on social expectations and the expected critical social reaction, but juridically indefensible, to this or that verdict. This would be a misappropriation of the essence of the administration of justice.

The above remarks, however truistic they may seem, need to be raised again and again. Justifiably, the Canadian court in the above-cited case of Robert Whatcott emphasized that finding him not guilty should not be seen as "a vindication or as an endorsement of his views". As the court explained: "Our values as a free society and our centuries–old legal tradition requires that our system not criminalize those who hold views that are merely obnoxious and unpopular. We take this approach not because we like or approve of Mr. Whatcott's views but because protection

[63] Judgment of the Hungarian Constitutional Court, no. 96/2008, https://api.alkotmanybirosag.hu/ en/wp–content/uploads/sites/3/2017/11/en_0096_2008.pdf.

[64] Judgment of the Hungarian Constitutional Court, no. 95/2008, http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun–2008–2–005?fn=document–frameset. htm$f=templates$3.0.

[65] See: A. Wąsek, Prawo karne – minimum moralności? Annales UMCS. Sectio G Ius 1984, Vol. 31, No. 3, pp. 35–65.

of speech we dislike, or even despise, protects everyone in a free and democratic society"[66].

Prejudicial character is not implied for the court by the result of the evaluation or adjudication of a case by entities outside the judiciary, even if they enjoy moral authority in society. In a judgment dated September 22, 2022, a Maltese court acquitted Catholic priest David Muscat of a charge of inciting hatred against another person(s) because of his or her sexual orientation[67]. The incriminated act consisted of posting two posts on social media regarding a bisexual person experiencing mental problems and with satanic inclinations suspected of committing murder and rape. In the first post, the priest categorized identification with the LGBTQ community as a disorder, along with schizophrenia and demonic possession, while adding that "the least serious problem is possession by the devil... being gay is the worst"[68]. In a second post, referring to a photo of the suspect wearing a T–shirt with a rainbow logo, Father Muscat wrote that he looked like he was just coming back from "gay pride". According to the court, the priest expressed his opinions on social media, which, although morally reprehensible in judge's view, did not constitute a crime due to the lack of intent on his part to incite hatred or violence against homosexuals. The court ruling was not influenced by the fact that the priest's ecclesiastical superior, Metropolitan Charles Scicluna of Malta, formally admonished Father Muscat. He urged him to desist from "inflammatory and hurtful comments" under threat of being banned from public priestly ministry[69].

10. Judicial moralizing

A related issue to the influence of moral judgments on the resolution of court cases is the making of moralizing remarks with an educational function by the court in the oral justification of the judgment or in the written reasons for the decision, usually to a party to the proceedings. Judicial moralizing may be within the limits of discretion or combined with arbitrariness. It is permissible under three conditions. First, moral admonitions must not go beyond the axiology of the legal order. The point of ref-

[66] R. v. Whatcott (pt 95).

[67] See art. 82A Maltese Criminal Code of 10 June 1854, https://legislation.mt/eli/cap/9/eng/pdf.

[68] Fr David Muscat not guilty of homophobic comments, https://tvmnews.mt/en/news/fr–david–muscat–not–guilty–of–homophobic–comments/.

[69] E. Brincat, Court…

erence for them must be values and ethical judgments close to the legislator, not so much personally to the judge. Second, with its remarks, the court must not cast reasonable doubt on its own impartiality towards the parties to the proceedings. Thirdly, in formulating comments of this type, one must remember to respect the principle of ideological neutrality of public authorities, that is, courts as well. Otherwise, the court becomes not an organ of law application, but an indoctrinator[70].

Arbitrary in nature were the remarks made by the Zurich District Court in the above–mentioned case of a self–proclaimed street preacher accused of inciting hatred against homosexuals by publicly criticizing homosexuality from a biblical perspective. The court accused the defendant of embedding the Scripture quotes used in his own literalist and fundamentalist interpretation, in a situation where "these views are definitely outdated in Central Europe in 2022." He suggested to him the need to revise and change his religiously dictated approach to homosexuality, analogous to his departure from the Old Testament prohibition of interest on loans. He also reproached the preacher for hypocrisy, or at the very least inconsistent behaviour, since he holds a mortgage in violation of the letter of the Scripture, while at the same time, citing the same Bible, radically condemns homosexuality.

The moralizing rhetoric of the Zurich District Court is unacceptable for several reasons. Firstly, the court in self-proclaimed manner limits the scope of legally protected religious freedom, excluding religious content that is not accepted by the social majority. An astonishing reasoning is that the permissibility of expressing religious views does not apply to those arbitrarily deemed "outdated". Secondly, the court ignores the fact that strictly religious matters are not within the court's jurisdiction. The role of the courts in a secular state is not to review religious doctrine, make authoritative exegesis of holy books, or decide which interpretation of the Holy Scripture is the right one and which is the result of an allegedly erroneous, because of "literal and fundamentalist" reading of the Bible. Thirdly, the court exceeded its competences by assessing the orthodoxy of the accused and calling on him to abandon some of his religious views[71].

[70] G. Maroń, Sędziowie jako „arbitrzy moralni" i „moraliści" na przykładzie wybranych orzeczeń sądów karnych, Prokuratura i Prawo 2020, No. 10–11, p. 7–8.

[71] G. Maroń, Jurysdykcja sądów w „sprawach religijnych" w ujęciu komparatystycznym, (in:) P. Sobczyk (ed.), (Nie)odpowiedzialność cywilnoprawna kościelnych osób prawnych za czyny niedozwolone popełnione przez osoby duchowne, Warszawa 2022, p. 113–144.

11. Ideologically motivated bias and partiality in the application of the law

The most glaring example of judicial arbitrariness in cases involving hate speech is the biased application of the law according to the key of "political correctness." The adjudicatory process then ceases to be an impartial enforcement of the law against everyone with respect to the principle of equality, becoming a tool in the service of social engineering. There is no shortage of examples where courts in various countries, for political reasons, have not treated as unlawful hate speech those acts of expression that are even textbook examples of it.

In 2022, a court in Johannesburg, South Africa, ruled that the repeated singing at political rallies by the leftist group Economic Freedom Fighters of a song with the words "Kill the Boer/kill the farmer" did not constitute legally prohibited hate speech[72]. The case did not involve words "merely" expressing contempt or praising physical violence against others – which would have to be considered unlawful anyway – but directly calling for the murder of Boers, or representatives of South Africa's white community. The group attacked was one that was distinguished on the basis of race, and at the same time a demographically minority group. In addition, the incriminated words "Kill the Boer/ kill the farmer" cannot be interpreted in isolation from the socio-cultural context, part of which are the not-so-individual killings of white farmers in South Africa, where the perpetrators' dominant robbery motive is not infrequently accompanied by a racist motive as well[73].

Cases of selective and biased application of the law prohibiting hate speech also involve the judiciary of countries with mature democracies considered to be the model of a demo-liberal country. The Australian case of McLeod v. Power can be cited as an exemplification. The vulgar taunting[74] of a prison guard by an aboriginal woman with several references to his skin color was not considered racial vilification[75]. In the peculiar reasoning of the court, the term "white" used by the defendant did

[72] Afriforum v. Economic Freedom Fighters and Others (EQ 04/2020) [2022] ZAEQC 2; 2022 (6) SA 357 (GJ).

[73] Country Report: South Africa https://www.genocidewatch.com/_files/ugd/c67f7d_b8bcca0fdaee42079432de28103d54dc.pdf.

[74] The Racial Discrimination Act 1975.

[75] The following words were addressed to the prison guard and white people in general: “you white piece of shit”, “you fucking white piece of shit” and “fuck you whites, you're all fucking shit”.

not refer to a racial group and had no connection with the race of the prison guard. In the court's conviction – which defies common sense – a reasonable light–skinned prison guard hearing vulgarities containing the phrases "white" or "whites" at his address would not perceive them for precisely this reason as offending, insulting, humiliating or intimidating to him. According to the court, the above-quoted phrases are not racist because "white or pale skinned people form the majority of the population in Australia"[76]. The court completely arbitrarily ruled that racist speech can only refer to a demographically minority group.

12. Summary

In the scientific discussion of the legal prohibition of hate speech, especially its criminalization, it is impossible to abstract from the practice of jurisprudence. On the basis of the assumptions of the school of legal realism, it is jurisprudence *nolens volens* that ultimately determines the form of the law (the so-called “law in action”). When debating one or another form of legislation criminalizing hate speech, one should keep in mind the judicial operationalization of existing regulations in this regard. For the reasons indicated above, the application of the law prohibiting hate speech is associated with a considerable amount of discretion. This is, on its own, nothing atypical for the legal order. In the current law, including criminal law, a number of issues are regulated with the help of vague and evaluative terms marked axiologically, while balancing the legal goods and values in conflict, such as the criminalization of insulting religious feelings. Courts sometimes make improper use of their decision-making discretion, performing *in concreto* erroneous acts of evaluation, valuation and interpretation. This applies to many different categories of cases. Mistaken findings, faulty reasoning, and misguided argumentation testify to the human imperfect nature of the administration of justice.

Although such situations are always painful for litigants wronged by judicial error, they do not, in principle, radically and completely undermine the legitimacy of the judiciary and public confidence in it. A much bigger problem is judicial arbitrariness, representing a glaring distortion of

[76] McLeod v. Power [2003] FMCA 2. See also similar case Gibbs v. Wanganeen [2001] FMCA 14, in which it was found that an aboriginal prisoner had not racially vilified a white prison guard by the words: "fucking white cunt", "white trash".

the standards of the judicial process and the role of the judiciary in the rule of law.

An exemplary case study from the jurisprudence of various countries shows that in cases of unlawful hate speech, judicial discretion sometimes unfortunately gives way to arbitrariness, which takes various forms, such as, in particular: selective and biased application of the law according to the ideological key; self-proclaimed expansion of the statutory catalogue of groups of people protected from hate speech; disregard or depreciation by the court in its considerations of the argument formulated by the accused on the basis of freedom of speech or freedom of religion; a priori assumption that the expression of hateful content is the same as stirring up or incitement to hatred; ignoring the question of the relationship of the discriminated behaviour of the accused with the violation or threat to the protected legal good.

All such cases being abuses of judicial power do not undermine the desirability of legal prohibitions, including through criminal means, of hate speech. Instead, they are an empirically grounded argument for the need to pay closer attention – both on the part of the legal community and society in general – to how courts apply the law targeting hate speech. The idea is that, on the one hand, the normative category of hate speech ban should not become an instrument of judicial silencing of those spreading views opposed to mainstream ideological orthodoxy[77] (e.g., those giving expression to religious conviction about the immorality and sinfulness of homosexual acts), and, on the other hand, that legal responsibility in the name of political correctness should not be avoided by those who actually incite hatred against other people (e.g., against white people or Christians[78]). The legal prohibition of hate speech is supposed, with the help of the courts, to uphold public order and the dignity and safety of human beings, and not to be a tool of censorship in the service of social engineering.

[77] Similarly: A. Dziadzio, Wolność słowa a mowa nienawiści – dawniej i dziś, Forum Prawnicze 2015, No. 4, p. 15.

[78] Raport przedstawiający przypadki naruszania prawa do wolności religijnej w Polsce w 2020 roku, https://laboratoriumwolnosci.pl/wp–content/uploads/2021/08/LWR–Raport– 2020.pdf.

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Prawny zakaz mowy nienawiści w praktyce orzeczniczej – pomiędzy sędziowską dyskrecjonalnością a arbitralizmem

Streszczenie

W oparciu o komparatystyczne studium orzecznictwa w sprawach o mowę nienawiści, zwłaszcza sprawach karnych, poczyniono rozważania nad sędziowską dyskrecjonalnością i arbitralizmem. Autor twierdzi, że dyskrecjonalność – w rozumieniu pewnej mieszczącej się w granicach prawa swobody po stronie sądu w czynieniu ustaleń i podejmowaniu rozstrzygnięć – jest nieunikniona i potrzebna. Niejednokrotnie jednak sądy sprawując wymiar sprawiedliwości uciekają się do działań arbitralnych, co w sprawach dotyczących hate speech *przybiera formy, takie jak zwłaszcza: wybiórcze i tendencyjne stosowanie prawa według klucza ideologicznego; samozwańcze poszerzanie ustawowego katalogu chronionych przed mową nienawiści grup osób; nieuwzględnianie czy deprecjonowanie przez sąd w swoich rozważaniach formułowanego przez oskarżonego argumentu z wolności słowa bądź wolności wyznania; aprioryczne zakładanie, że ekspresja treści nienawistnych jest tym samym co podżeganie czy nawoływanie do nienawiści; pomijanie kwestii związku inkryminowanego zachowania oskarżonego z naruszeniem bądź zagrożeniem dla chronionego dobra prawnego, w szczególności porządku publicznego. Sędziowski arbitralizm stanowi jaskrawe wypaczenie standardów procesu orzeczniczego i roli judykatywy w państwie prawa.*

Słowa kluczowe

Sędziowska dyskrecjonalność, sędziowski arbitralizm, mowa nienawiści, orzecznictwo.