

SEXUAL ORIENTATION AND GENDER IDENTITY AS PENALIZING CRITERIA OF HATE SPEECH

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ABSTRACT

The article contains arguments raised in Polish discussion on the problem of sexual orientation and gender identity as penalizing criteria of hate speech. The Author points out regulations of Polish criminal law providing conditions of criminal responsibility for hate speech and binding criteria of the penalization, draft amendments in this area presented in recent years, as well as Polish legal doctrine or Supreme Court reviews referred to the issue. The background of the analyzes are provisions of international and European law as well as selected European states.

Key words: hate speech, sexual orientation, gender identity, penalizing criteria, Polish penal law

1. INTRODUCTION¹

In my opinion the penalization of hate speech should be considered from the perspective of the widest possible axiological platform, that is,

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the principle of human dignity. The issue should be recognized in cases when someone is punished for any behavior expressing or inducing hatred against every human being and every natural community. From that point of view the idea of the penalization of hate speech might be found also in such types of offences like: inciting crime, punishable threat, defamation, insult, incitement to crime, incitement to start an aggressive war, public insults to the Nation, State, the Head of the State, state symbols, a monument, corpses, ashes and graves, religious feelings and more.

However, in the criminology of last decades, hate speech has been identified as the so-called hate crime and has been seen as a political instrument used in a multicultural and pluralistic society to provide safety for various minorities and protect them against discrimination based on nationality, race, disability, religion, sexual orientation, gender identity, etc. This instrument has been thought to provide protection from intolerance, anti-Semitism, racism, chauvinism, xenophobia, nationalism, ethnocentrism, sexism, homophobia, transphobia, ageism, adultism, islamophobia, hostility towards minorities, immigrants, people of migrant origin, etc. For example, Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe defines hate speech as any form of speech that disseminates, incites, supports or justifies racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.

For the last two decades in Poland some groups of MPs have propounded adding to the Polish Penal Code of 1997 (PC) new – for many controversial – criteria of criminal liability for hate speech, i.e. sexual orientation and gender identity. For now, all draft amendments to the Penal Code in this regard have been rejected during consecutive parliamentary terms. However, analogous drafts will undoubtedly come back in the future.

2. HATE SPEECH IN THE POLISH PENAL CODE

When Polish doctrine speaks about crimes classified as hate speech the following types of prohibited acts are primarily referred to: 1) public propagation of totalitarianism or incitement to hatred on the grounds of national, ethnic, racial or religious differences, or because of their lack of religious denomination (Art. 256 § 1 PC), 2) dissemination and other

unlawful use of an object containing content promoting totalitarianism or inciting to hatred (Art. 256 § 2 PC), 3) publicly insulting a group of people or an individual on the grounds of their national, ethnic, racial or religious affiliation or because of their lack of religious denomination (Art. 257 PC), 4) using unlawful threats towards a group of persons or an individual because of their national, ethnic, racial, political or religious affiliation or because of their lack of religious denomination (Art. 119 § 1 PC).

In recent years, some groups of the members of the Polish Parliament have repeatedly submitted draft amendments to penal regulations defining the scope of criminal liability for hate speech. These were, *inter alia*, draft amendments: of 18 April 2011 (print No. 4253), of 7 March 2012 (print No. 340), of 20 April 2012 (print No. 383), of 27 November 2012 (print No. 1078), of 7 March 2014 (print No. 2357), of 4 July 2016 (print No. 878), of 16 February 2018 (print No. 2301). Although they included, among others, a proposal to depenalize the public promotion of fascist or other totalitarian systems of the state, the most frequently proposed amendments concerned the content of Art. 119 § 1, Art. 256 § 1 and Art. 257 PC and were aimed at extending the catalogue of protected categories (groups), and, therefore, the statutory relevant differentiating features being the pre-requisite condition for criminal liability for hate speech. Currently, the categories included in the penal code are: “national, ethnic, racial, religious differences or differences due to lack of religious denomination”. Proposals have been submitted to extend this list with the following: “gender”, “age”, “disability”, “sexual orientation”, “gender identity”, “political affiliation”, “social affiliation”, “natural or acquired personal characters or beliefs”.

Some authors supported those proposals, however, there are criticisms of the concept of broadening the catalogue of categories that differentiate social groups. P. Bachmat emphasizes that without prejudging whether and how far the legislator decides to extend the scope of criminalization of art. 256 § 1 PC, he should certainly refrain from hasty decisions and follow the “ad hoc fashion”. In social life, all sorts of examples of discriminatory behaviour can be successfully found. Their indefinite catalogue is indirectly indicated by the same Constitution of the Republic of Poland. This prohibits discrimination against anyone in political, social or economic life for any reason (Art. 31 par. 2 of the Constitution of the Repub-

lic of Poland). With such an abundance of actually and sometimes only potentially existing examples of discrimination, there is a risk of falling into the trap of revising *ad infinitum* the Art. 256 § 1 PC. The point is, however that, in accordance with the *ultima ratio* and proportionality principles, criminal law should only be involved in the most serious discriminatory situations, that is, those that lead to the most flagrant, socially unacceptable behaviours, and, therefore, deserving a criminal-law response on the part of the state. The idea is to avoid inflation of the provisions of Art. 256 § 1 PC².

In the comments of the Supreme Court (letter SN BSA II-021–114 /14) regarding the draft amendment of 7 March 2014 (Sejm print No. 2357)³, Lech Paprzycki states that the proposed regulations are intended to achieve a general preventive purpose by shaping certain social attitudes. This cannot be, however, the only or even the main motive of criminalization. Pursuant to the *ultima ratio* principle, criminal law should not perform exclusively or primarily an educational function. Meanwhile, as it stems from the reasoning, the proposed changes are aimed primarily at shaping certain social attitudes. Particularly irrelevant seems to be a legislative measure consisting in extending the catalogue of hallmarks of Art. 119 of the Penal Code with gender, gender identity, age, disability or sexual orientation. This provision is aimed at protecting humanity as a whole, as well as international public order. Placing this type of crime in the first chapter of the Specific Section of the Penal Code (“Crimes against peace, humanity and war crimes”) is certainly a clue from the legislator with regard to the importance and nature of legal interests protected in this way. However, through the proposed amendments, the drafter interferes with the axiological coherence of the legal system, introducing arbitrary and

² Paweł Bachmat, Przesłębstwo publicznoo propaowania faszystowskiego lub innego totalitarnego ustroju państwa lub nawoływania do nienawiści (art. 256 § 1 k.k.), In: Stosowanie prawa. Księga jubileuszowa z okazji XX-lecia Instytutu Wymiaru Sprawiedliwości, Andrzej Siemaszko, ed., Warszawa: LEX, 2011.

³ Druk nr 2357 Sejmu Rzeczypospolitej Polskiej VII kadencji [Sejm RP print No. 2357], <http://orka.sejm.gov.pl/Druki7ka.nsf/0/AF063793536190B7C1257CD100309301/%24File/2357.pdf> [date of access: 30.01.2020].

erratic amendments which may even be considered a violation of proper legislation principles⁴.

According to Lech Paprzycki, the biggest problem of the proposed criminalization of hate speech is the casuistry of regulation, instead of its abstractness. Adding several important reasons for discrimination to Art. 256 and 257 PC does not cover all possible discriminating hallmarks, while disregarding those similarly important. Among these are: mental illness, AIDS, addiction to alcohol or intoxicants, obesity and homelessness. This type of legislative technique means that the regulations will have to be revised indefinitely, otherwise the regulation will fail to treat all the discriminated groups equally. Instead, the court should rather try to find and apply a determinant of the discriminatory feature that is the smallest common denominator and apply it to avoid dangerous casuistry in an abstract legal norm. If it proves impossible, then while maintaining the intent to criminalize the behaviours described in the draft, the court should list all possible grounds for discrimination⁵.

Theoretically ground for the criminal pursuit of discrimination is only limited by imagination. Indeed, it could include: height (statistically, low growth reduces the chances of professional and social advancement), having children (e.g. four or more children), education (e.g. primary), social origin (e.g. rural), colour of skin (e.g. any other than white), diet (e.g. vegetarian or vegan), means of transport used (e.g. bike), hair colour (e.g. red or grey) or lack thereof, property status, occupied living space, distance from home to workplace, visual styling (*image*), possession of tattoos or earrings, etc. Of course, some examples are exaggerated, but nevertheless they point to the essence of the problem.

It should be said that the legal expert opinion concerning the penalization of hate speech shall focus not only on technical issues related to compliance with the rules of correct legislation, but, above all, shall include a substantive assessment of individual revision proposals based on constitutional regulations. Legal assessment must be based on normative, systemic, internal valuation criteria, expressed primarily in axiology and the norms of the Constitution of the Republic of Poland. The output of

⁴ Ibidem.

⁵ Ibidem.

any statistical and other empirical studies in the field of sociology, criminology, social psychology, etc. are important only if their conclusions comply with the axiology and norms of the Polish Constitution.

To demonstrate the outline of a correct argumentative model drawn from constitutional principles and norms, it is worth focusing on the relevant features determining criminal liability on the basis of Art. 256 § 1 and 257 PC, i.e. normative references to “national, ethnic, racial, religious differences or differences due to lack of religious denomination.” The indicated *de lege lata* features that differentiate groups and persons being representatives of these groups are privileged in terms of their criminal-law protection when compared to other people and social groups. Penalties for committing crimes under Art. 256 § 1 and 257 PC are more severe than penalties for defamation or insult on the basis of Art. 212 and 216 PC. Moreover, different is the prosecution mode: persons from the privileged groups can take advantage of the mode which is more convenient for the victim.

Still, the privilege in terms of criminal-law protection of groups and persons indicated as per the criterion of relevant features on the ground of applicable regulations is constitutionally justified. The provision of Art. 35 par. 1 and 2 of the Constitution of the Republic of Poland guarantees the protection of the cultural identity of national and ethnic minorities, thus, the identity of national and ethnic minorities represents a constitutional value. Paragraph 2 also protects the religious identity of minorities, which in reference to the content of Art. 53, generally allows for the identification of religious identity as a legal value on the ground of the Constitution of the Republic of Poland. The decision of the ordinary legislator, whose task is to implement and refine constitutional values, principles and norms, regarding the specification of “national, ethnic, racial, religious differences or differences due to lack of religious denomination” as deserving of increased criminal law protection finds constitutional reasoning.

Following this argumentation path, one can easily ascertain the necessity of drafting specific amendments on penalizing hate speech. For example, in order to evaluate the proposal to distinguish the criterion of disability as a determinant for the scope of special protection pursuant to Art. 256 § 1 of the Penal Code, this criterion (disability) should be relativized to the decisions of the constitutional legislator expressed in Basic

Law. The provision of Art. 68 par. 3 of the Constitution of the Republic of Poland guarantees special care for people with disabilities, but this applies only to health care. Therefore, there is no specific constitutional foundation so that any such person would be privileged towards the other (non-disabled) persons as regards prosecution in the case of, for example, defamation or insult. There is no obstacle, hence, to the ordinary legislator, within the framework of regulatory freedom, in providing disabled people with special criminal law protection. Still, sociological, psychological, and not normative arguments should decide here. Thus, only the results of empirical and statistical analyses, etc., should generate an answer to the question as to whether a privileged status for disabled persons in terms of criminal-law protection against hate speech is justifiable or is excessive towards other people. Therefore, there is no abstractly determined normative obstacles. It should be emphasized, however, that in general terms, people with disabilities are protected against hate speech, and in exceptional situations, when the public interest so requires, a prosecutor's interference is possible (Art. 60 of the Code of Criminal Procedure). This situation solves the problem of singular event situations of hatred.

Different conclusions can be drawn, however, from the constitutional analysis of the proposal of adding a privileging feature (criterion) in the form of "sexual identity". In the draft amendment to the Penal Code of February 22, 2012, submitted by the SLD Deputies' Group, the drafters on the basis of accepted assumptions and definitions, explain that the distinguishing the criterion of "gender identity" is to counteract the phenomenon of transphobia, the counterpart of homophobia, but which is aimed at transgender people. According to the drafters, "gender identity" is "the affiliation to a given sex, or the positioning between sexes, and also the relation of sex and perceived sex to gender. Transsexuality is the most widely known form of transgenderism, i.e. the lack of conformity between sex and perceived sex (the only way to remove non-conformity is to match sex to perceived sex by means of surgical treatment and hormonal therapy). However, the spectrum of transgenderism is much wider. In the broadest sense, the identity of a transgender person does not match the conventional views on the masculine and feminine genders, but combines both genders or moves between them.

In the language of classical anthropology, which treats man's sexual dimorphism as a biological norm stemming from nature, it can be considered that the drafters seek to strengthen the criminal-law protection of men and women with physical anomalies of sexual characteristics or mental disorders of sexual identity. An attempt to include the term "gender identity" into the Penal Code indicates the drafters' willingness to implement specific anthropological assumptions into the criminal law system. The revision of criminal law in the proposed scope would be based (which stems from the argumentation given in reasoning of the draft amendment) on the affirmation of assumption that the number of sexes is infinite, the same sex is only a matter of social role and free choice of individual, and the expression of one's gender identity other than a man and woman is treated by the legislator as equal and even promoted due to having special distinction in terms of criminal law protection. It should be emphasized, however, that because the legal system must be coherent, most of all in terms of the human concept, this proposal should be confronted with constitutional axiology, and, in particular, with the anthropological assumptions of the Polish constitutional legislator.

In the founding rules set out in Chapter I of the Constitution of the Republic of Poland, as part of constitutional principles representing prescriptive expressions of special significance for the whole legal system and which provide framework assumptions in the legislative process (hence, having interpretational meaning for other provisions of the Basic Law), in Art. 18, the constitutional legislator decided that marriage is a relationship between a woman and a man, and that family, motherhood and parenthood are under the protection and care of the Republic of Poland (the supreme constitutional principle). Hence, the legislation provides full protection and legal care of marriage, family, motherhood and parenthood, and such care is not limited to, for example, health-care. In the law-making and law-applying process, the protection and care of public authorities is thus to be focused on specific marriages and families, but also on marriage and family as an institution of social order and legal order.

The constitutional legislator indicated in Art. 18, the anthropological position (assumption) that was taken in terms of gender determination – it is only about a man and a woman. The constitutional legislator has made axiological (anthropological) settlement for the needs of building

a legal system that is of normative significance. It is based on (using operationally the conceptual network of deputies drafters) – “conventional views on the masculine and feminine genders”. In Art. 18, the constitutional legislator has distinguished the division of sex between a woman and a man, and has also placed affirmative human sexual dimorphism directly next to marriage and motherhood. This, on the normative level, implies binding the constitutional understanding of sex with the biological diversity of sex necessary for contracting a marriage and giving birth to offspring. In the assumption of the constitutional legislator, a woman and a man are complementary in relation to each other biologically (reference to the motherhood and the parenthood) and socially (reference to the family).

Therefore, the assumptions underlying the introduction to the Penal Code of the category of “gender identity” as being relevant to criminal liability for hate speech are contradictory to anthropological assumptions expressed in the constitutional principles set out in Art. 18 of the Constitution of the Republic of Poland. Thus, statutory regulation in fact favouring persons with gender identity disorders, has the intended or unintended effect of affirming on the statutory level of an ideology contrary to constitutional axiology. Thus, it must be regarded as contrary to the axiological assumptions of Basic Law.

For analogous reasons, the category of “sexual orientation” should not be introduced into the Penal Code so as to privilege, in terms of criminal law protection, persons of the so-called “non-heteronormative sexual expression”, i.e. persons with homosexual, bisexual, transsexual, etc. inclinations. This is because this would distort the constitutional axiological and normative model of identification of nature and purpose of human sexuality (normative reference of sex to marriage stemming from system analysis – as a relationship between a woman and a man, motherhood and parenthood). It should be clearly emphasised that Polish criminal legislation does not discriminate against persons with homosexual, bisexual, etc. inclinations, as well as persons committing homosexual acts, because these categories are not excluded from the scope of general criminal law protection (e.g. against hate speech pursuant to Art. 212 and 216 of the Penal Code). Persons with these type of inclinations or sexual lifestyles are protected by criminal law norms, just like anyone else, on the basis of univer-

sal principles of protection and the underlying inherent and inalienable dignity of man⁶.

It should be clearly emphasized that what is called discrimination from the point of view of a specific, even widespread ideology, is not necessarily discrimination from the point of view of the legal system. The revision consistent with the aforementioned draft, *de facto* would distinguish the category of sexual minorities on the ground of criminal law, and thus would suggest on the normative level the affirmation of non-heteronormative orientations, preferences, sexual inclinations, which does not correspond to constitutional axiology.

3. INTERNATIONAL AND EUROPEAN UNION LAW BACKGROUND

There are some provisions that could be connected with the problem of penalization of hate speech in the Universal Declaration of Human Rights (UDHR)⁷, but without indicating neither sexual orientation nor gender identity as the criterion of intolerant behaviour. Article 2 states that all human beings have all the rights and freedoms included therein, regardless of any differences in race, colour of skin, gender, language, religion, political and other views, nationality, social background, property, birth or any other state. Article 7 adds that everyone has the right to equal protection against any discrimination which is a violation of the UDHR and against any exposure to such discrimination.

The European Convention on the protection of human rights and fundamental freedoms (ECHR)⁸ in Art. 14, states that the exercise of rights and freedoms listed in this convention should be ensured without discrimination based on gender, race, colour, language, religion, political and other beliefs, national or social origin, affiliation to national minority, property, birth or for any other reason. On the other hand, ECHR's

⁶ See: John M. Finnis, Law, Morality, and Sexual Orientation, Notre Damme Law Review 69 (1994).

⁷ Universal Declaration of Human Rights, resolution 217/III A of the General Assembly of the United Nations of December 10, 1948.

⁸ Convention for the protection of human rights and fundamental freedoms of November 4, 1950, OJ of 1993, No. 61, item 284 as amended.

Art. 17 provides for a general prohibition of abuse of the Convention's provisions. This cannot, however, be interpreted as granting anyone the right to take actions or to commit a criminal act aimed at annihilating the rights and freedoms or limiting them to a greater extent than the Convention provides for. The content of Art. 17 is invoked basically in two contexts: attempts to replace democratic systems with anti-democratic systems and totalitarian regimes, as well as incitement to hatred and violence on racial, national or religious ground⁹.

Within the European convention area, it is also worth paying attention to Art. 3–7 of the Additional Protocol to the Council of Europe Convention on cybercrime regarding the penalization of acts of a racist or xenophobic nature committed with the use of computer systems¹⁰, as well as Art. 5 of the Council of Europe Convention on the prevention of terrorism¹¹.

As it concerns the soft law of the Council of Europe in this area, the first document adopted by the Committee of Ministers was a resolution 68 (30) of 31 October 1968 on taking legal measures against incitement to hatred on the grounds of race, nationality and religion affiliation.

⁹ See more: Commissioner for Human Rights, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (Council of Europe, 2013); Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013); Paul Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford University Press, 2016).

¹⁰ Additional Protocol to the Council of Europe Convention on cybercrime regarding the penalization of acts of a racist or xenophobic nature committed with the use of computer systems, drafted in Strasbourg on 28 January 2003, OJ of 2015, item 730. The Republic of Poland stipulated that a prerequisite for criminalizing the act set out in Art. 3 par. 1 is discrimination associated with violence or hatred referred to in par. 2 of this Article, and, therefore, directed against a person or a group of persons, on grounds of race, colour, national or ethnic origin and religion. On the other hand, based on Art. 6 par. 2 letter a of the Protocol, the Republic of Poland stipulated that the prerequisite for criminalizing the act set out in paragraph 1 of this Article is the intention set out in par. 2 letter a of this Article. See: Government Statement of 24 March 2015 on the legal effect of the Additional Protocol to the Council of Europe Convention on cybercrime regarding the penalization of acts of a racist or xenophobic nature committed with the use of computer systems, drafted in Strasbourg on 28 January 2003, OJ C, of 2015, item 731.

¹¹ Council of Europe Convention on prevention of terrorism, drafted in Warsaw on May 16, 2005, OJ of 2008, No. 161, item 998.

However, the comprehensive legal document regarding the discussed issue is the recommendation R (97) 20 of October 30, 1997 on “hate speech”. This recommendation advises the Council of Europe states to take appropriate measures to combat hate speech, as well as to create an adequate policy to combat social, economic, political, cultural and other causes of this phenomenon. Hate speech is understood here as any form of speech that disseminates, encourages, supports or justifies racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance in the form of aggressive nationalism or ethnocentrism, discrimination and hostility towards minorities, immigrants or people of immigrant origin.

As for the relationship between European Union law and national criminal law systems, due to the diverse cultural and legal traditions of member states, only partial harmonization of criminal laws is possible and desirable. This also refers to penalization of hate speech and the content of Art. 67 par. 1 and 3 of the Treaty on the Functioning of the European Union¹². Regarding hate speech penalization, special attention should be paid to the Council Framework Decision 2008/913/JHA, on countering certain forms and expressions of racism and xenophobia by means of criminal law measures¹³. According to Art. 1 par. 1 of the decision, each Member State should apply necessary measures to ensure penalization of the intentionally committed act of public incitement of violence or hatred towards a group of persons who can be defined by race, colour of skin, religion, origin or national affiliation, or against a member of such group. There is no sexual orientation nor gender identity as penalizing criteria of hate speech.

These criteria could be found in certain non-normative acts, *inter alia*: the resolution of the European Parliament of 24 May 2012 on opposing homophobia in Europe (2012/2657(RSP))¹⁴, the resolution of

¹² Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union 2012/C 326/01, U. UE C 326, 2012.10.06, pp. 0001-390.

¹³ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and signs of racism and xenophobia by means of criminal law measures, OJ.UE.L.2008.328.55.

¹⁴ OJ EU.C.2013.264E.54.

the European Parliament of 4 February 2014 on the EU plan to counteract homophobia and discrimination based on sexual orientation and gender identity (2013/2183(INI))¹⁵; the resolution of the European Parliament of 8 September 2015 on the situation of fundamental rights in the European Union (2013–2014) (2014/2254(INI))¹⁶; the resolution of the European Parliament of 25 November 2015 on preventing radicalization and recruitment of European citizens by terrorist organizations (2015/2063(INI))¹⁷. The axiology assumed therein does not have full treaty's authorization and is not shared in its entirety in all Member States.

4. COMPARATIVE LAW PERSPECTIVE

In the legal system of the French Republic provisions that penalize hate speech are mainly included in two normative acts, i.e. in the act on press freedom of 29 July 1881 (hereinafter: APF)¹⁸ and the Penal Code of the Republic of France, which entered into force on 1 March 1994 (hereinafter: CCRF)¹⁹. Criminal liability for hate speech is based on the liability for publicly provoking to a particular behaviour. The French doctrine distinguishes direct provocation (inciting to commit certain types of prohibited acts or material crimes) and indirect provocation (subjective, subject-related), which consists in creating a certain favourable atmosphere for committing prohibited acts (formal crime). It also distinguishes intermediate provocation in a *strict sense* that involves apology and revisionism. Indirect provocation of a *strict sense* is provoking to discrimination, hatred or violence because of origin, affiliation or lack thereof to a specific ethnic group, nation, race or religion, and also because of gender, sexual orientation, gender identity or disability. The provocation in this case is a statement which by its very nature arouses a feeling of hatred. Moreover, the intent of commission is to have a public character, but it does not

¹⁵ OJ EU.C.2017.93.21.

¹⁶ OJ EU.C.2017.316.2.

¹⁷ OJ EU.C.2017.366.101.

¹⁸ Loi du 29 juillet 1881 sur la liberté de la presse, Bulletin LOIS N° 637 p. 125.

¹⁹ Code pénal, Bulletin LOIS N° 92 p. 683 (version consolidée au 9 juin 2018, www.legifrance.gouv.fr/affichCode).

have to bring any effect. The provocation, too, does not have to be direct – that is, it does not have to consist of inciting to commit any specific prohibited act. This leads to practical problems. Courts, in almost every case, must set the limits between an admissible statement and a punishable provocation, somehow non-statutorily clarifying the features of punishable behaviour.

The provision of Art. 29 of APF provides for criminal penalization of defamation, whereas its qualified types are included in Art. 30–35 of APF. These include, respectively: defamation of public authorities and public officers (Art. 3031), defamation of a deceased person (Art. 34), public defamation or by means of mass media, and (essential from the point of view of identification of crime of hate speech) defamation of a person or group of persons because of their origin or affiliation or lack thereof to a specific ethnic group, nation, race or religion, as well as specific defamation of a person or group of persons because of their gender, sexual orientation, gender identity (since 2017) or disability (Art. 32). On the other hand, petty offences related to hate speech include: non-public provocation to discrimination, hatred or violence against a person or group of persons because of origin or affiliation or lack thereof, real or assumed, to ethnic group, nation, race or religion, and also because of gender, sexual orientation, gender identity or disability (Art. R625–7 of CCRF); non-public defamation of a person or a group of persons because of the abovementioned features (Art. R625–8 of CCRF); non-public insult of such a person or group (Art. R625–8-1 of CCRF).

German regulations penalizing hate speech are perceived in the context of confronting the racial prejudices and Nazi ideology. Statement § 130 of the German Criminal Code of May 15, 1871 (*Strafgesetzbuch*, hereinafter: StGB)²⁰ refers to hate speech. Pursuant to § 130 of StGB par. 1, the individual who induces a disturbance of public peace, incites hatred against a particular national, racial, religious or ethnic group, as well as against a group of persons or individuals because of their affiliation to one of the above-mentioned groups; or calls for the use of violence or compulsory measures against them; or attacks the human dignity of others by insulting, maliciously mud-slinging or defaming a group of persons or individ-

²⁰ Accessed January 10, 2020, <https://www.gesetze-im-internet.de/stgb>.

uals because of their affiliation to one of the above-mentioned groups or parts of the population, is subject to imprisonment of 3 months to 5 years. On the other hand, pursuant to § 130 par. 2, a penalty of imprisonment of up to 3 years or a fine is imposed on anyone who attacks the dignity of other people by insulting, or maliciously mud-slinging a specific group or part of the population or individuals because of their affiliation to one of the specified groups or part of the population; or defames a part of the population, by disseminating written material, displaying, publishing, presenting or sharing in any other way. Sexual orientation or gender identity are not being mentioned.

In criminal law of other European states there is sexual orientation as penalising criterion of hate speech for example in legal system of: Austria, Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Spain, Netherlands, Ireland, Lithuania, Hungary. There is also gender identity as penalising criterion of hate speech in legal system of: Belgium, Croatia, Hungary. On the other hand, there is no sexual orientation nor gender identity as penalising criterion of hate speech in legal system of: Czech Republic, Latvia nor Slovakia²¹.

5. CONCLUSION

Within Polish substantive criminal law, norms of international law do not constitute a robust and precise instrument for the implementation of international standards in terms of specific law-making decisions. Sparse commitments in this respect are of a general and limited nature, primarily to counter racism and xenophobia. These, current normative regulations in Poland already comply with.

In Polish criminal law, types of crimes determining the conditions of criminal liability for hate speech should be viewed in broad terms. Crimes

²¹ See: Consiliul National Pentru Combaterea Discriminarii, Comparative study on legislation sanctioning hate speech and discrimination in member states of the European Union (Bucharest: 2014), <http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf> [accessed: January 10, 2020], <https://www.legislationline.org/documents/section/criminal-codes>.

of hate speech include all types of prohibited acts in which the behaviour by its very nature expresses or may express hatred or induce or constitute a real threat of inducing feeling of hatred against another person or group of persons. Criminal law protection is universal and refers to residual values of the legal order, i.e. the obligation to respect human dignity and to ensure public order and the security of all citizens. Protection against hate speech is very extensive in Polish criminal law. It is universal and basically does not differentiate victims into categories more or less deserving of protection. This is a desirable solution from the axiological and technical side (avoidance of casuistry).

The directive on the universalization of protected category and syncretization of regulations penalizing hate speech is to lead to a more comprehensive implementation of the constitutional principle of equality. Apprehension of hate speech on the ground of universal protection, based on the principles of dignity and equality set out in Art. 30 and 32 of the Constitution of the Republic of Poland, and not in the perspective of political concepts of equalizing opportunities, repressive tolerance or positive discrimination, is to deprive the idea of penalizing hate speech of the odium of being an instrument of ideological confrontation.

The assessment of penalization of hate speech should focus not only on technical issues related to compliance with the rules of correct legislation, but, above all, should include a substantive assessment of individual revision proposals on the basis of constitutional regulations. Legal assessment must be based on normative, systemic, internal valuation criteria, above all, the axiology and the norms of the Constitution of the Republic of Poland. The outcome of any statistical research and other findings in the field of sociology, criminology, social psychology, etc. is important only if their conclusions comply with the axiology and norms of Basic Law.

The distinguishing regulation in terms of criminal law protection of certain categories of persons against hate speech, according to the proposed parliamentary draft amendments of the Penal Code, e.g. according to “gender identity” or “sexual orientation” criteria, would be kind of affirmation of ideology contradictory to constitutional anthropology and axiology on the ground of criminal law. Freedom of speech, as a constitutional freedom, may be limited on the statutory level only due to other

constitutional values, and not to social ideas diverging from the axiological settlements of the constitutional legislator.

The exclusion of persons with gender identity disorders, persons with homosexual, bisexual, etc. inclinations, or persons who commit homosexual acts from criminal-law protection against hate speech would be an unacceptable discrimination. These persons are protected, however, as are all others, on the basis of universal protection stemming from the principle of the dignity of the human being (Art. 212 and Art. 216 of the Penal Code). However, the prohibition of discrimination does not imply the obligation of being placed in a privileged position in terms of increased criminal law protection.

Pursuant to ECHR, the determination of prohibited acts and criminal sanctions essentially constitutes the authorisation of national institutions which enjoy wide discretionary power in this matter. This is defined as a national margin of appreciation. The ECHR control focuses on the legitimacy of limitations autonomously exercised by the state, and, above all, on the implementation of procedural guarantees. Individual states belonging to the Council of Europe define the scope of penalization of hate speech in a diversified way.

Legal norms of the European Union base the issue of penalization of specific behaviours in individual Member States on the principle of establishing an area of freedom, security and justice in respecting the fundamental rights of the EU and the different legal systems and traditions of the Member States. The Union makes every effort to ensure a high level of security through measures to prevent crime, racism and xenophobia and to overcome these phenomena, where appropriate, by approximating criminal laws. The Council Framework Decision 2008/913/JHA on countering certain forms and signs of racism and xenophobia by means of criminal law measures, states, however, that the decision is limited to opposing by means of criminal law only the particularly serious forms of racism and xenophobia. This, current normative regulations in Poland correspond with. The decision also states that the cultural and legal traditions of individual Member States differ, especially in this field, and full harmonization of criminal law is not currently possible.

A number of European states penalize hate speech and do so to a different extent. In French law, for example, the provisions of law that penalize

hate speech distinguish such features as sexual orientation or gender identity, while these types of categories are not specified in German law. The comparative legal analysis of normative solutions of individual states may lead both to the conclusion about the need to approximate Polish solutions to specific foreign concepts, and to maintain or increase discrepancies in this field. The content of the criminal law provisions of each state is nuanced by the diversity of its culture, tradition, and system of values expressed in a democratic society, above all in constitutional values, principles and norms. The theoretical and legal directive of axiological coherence of criminal law with the autogenic moral and cultural code of every nation prevents the normative argumentation in the light of comparative law. The outcome of the comparative legal analysis in this field is only a theoretical, non-binding *exemplum* that can become both a model, and, on the contrary, a counterpoint to Polish solutions and possible revision postulates.

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