CRITERIA OF AN OFFENCE OF INSULTING THE PUBLIC OFFICER IN A CONTEXT OF APPLICABLE LAW REGULATIONS IN POLAND

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Summary

The issues of protection of the human dignity are a subject of the presented article through the lens of its special type which is a protection of persons holding public functions. Issues taken in the article comes down not only to defining the notion the public officer, but also recommendations of the legal-penal evaluation of the crime of insulting the public officer and its essential premises. All these considerations will be used to determine the scope of the freedom of speech and expression, especially in the situation when the statements are insulting or defaming for the person performing public functions. Finally, the purpose of the article is to determine whether possible defaming or insulting action meets the criteria of an offence both when the perpetrator is acting publicly, or not-publicly.

Key words: human dignity, public officer, insulting, defamation, freedom of expression, public action of the perpetrator, non-public action of the perpetrator

Penalization of the offence of insulting the public officer

The protection of the human dignity, as one of the basic and inherent core values for the individual, constitutes the essential subject of legal and penal protection, both on the domestic, as well as the international ground. Penal code notices the significance and the need of protection in this regard. In Art. 216 § 1 Penal Code penalizes insulting of other person in his presence or absence, but publicly or in the intention so that the insult reaches

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the person. Protection understood in this way, belonging to every individual, requires the additional reinforcement if dignity and the good name is endangered of the people acting on behalf of and for the state. On this account irrespective of regulation included in the provisions of Art. 216 § 1 Penal Code legislator in Art. 226 § 1 Penal Code, introduced a separate and classified type of insult - insulting the public officer or assisting person (person who assists the public officer). There is no doubt that in the legal democratic state it is essential, on account of ensuring the proper functioning of state institutions, to establish the protection of the public officer against both active and verbal attacks and that is accomplished by Art. 226 enables § 1 Penal Code

According to the content of this regulation, every person who insults the public officer or the assisting person during and in relation to performing official duties, will be a subject to the criminal liability. On one hand, the construction of the considered regulation protects the dignity of the subjects indicated in this regulation, on the other, assures proper conducting duties entrusted to them. The Penal code in Art. 226 § 1 protects smooth operations of state and self-government institutions through the protection of the respect necessary for public officers performing official duties.[2] From the legal validity of the law itself, a regulation was implemented involving the special type of the protection of people performing public functions from the violation of their dignity in the connection and during performing official duties. Making the punishability stricter will be connected with the fact that the discussed crime harms not only personal dignity of the officer, but also indirectly undermines the respect of institution[3] represented by the public officer. It is possible to state that the aim of abstracting the crime of the insult of the public officer is a protection of the authority of state institutions and their organs, as well as providing the possibility of effective performance of functions entrusted to them, which in consequence results in the protection of the public order. Normative structure adopted in Art. 226 § 1 Penal Code is based on the assumption that not only a good name, a reverence, an honour or a dignity of a public officer are protected goods, but above all the authority of public institutions and the public order[4].

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[2] A. Zoll, Komentarz do art. 226 k.k., [in:] A. Zoll (red.), G. Bogdan, K. Buchała, Z. Ćwiąkalski, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, Kodeks karny. Część szczególna. Komentarz do art. 117-277, t. II, Zakamycze 1999.

[3] A. Marek, Komentarz do art. 226 kodeksu karnego (Dz.U.97.88.553), [in:] A. Marek, Kodeks karny. Komentarz, Warszawa 2005.

[4] A. Barczak-Oplustil, [in:] Kodeks karny. Komentarz, t. II, A. Zolla (red.), Kraków 2006, s. 932.

Legal definition of the "public officer" and the "assisting person"

It should be underlined, that entity of the act indicated in Art. 226 § 1 Penal Code is based on committing the insult directed at the public officer or the assisting person. Detailed analysis of criteria of the considered act requires explaining the scope of the notion first "public officer" and "assisting person", and also requires referring to the nature of the causative activity which is an insult.

Legal definition of the term "public officer" was included in Art. 115 § 13 Penal Code, and this status is conferred to:

1) the President of the Republic of Poland,
2) Members of Parliament, senators, councillors,
2 a) Members of European Parliament,
3) the judge, the juror, the public prosecutor, the officer of the financial organ of preparatory proceedings or the superior organ to the financial organ of preparatory proceedings, for the notary, the bailiff, the probation officer, the receiver, the court superintendent and the administrator, the person adjudicating at disciplinary bodies acting under the act,
4) employees of the government administration, other state or self-government agency, unless the person performs exclusively service activities, as well as the other person in the scope in which this person is authorised to issue administrative decision,
5) employees of the state inspection authority or inspection authority of the local self-government, unless this person performs exclusively service activities,
6) person who takes managerial position at any other state institution,
7) the officer of the body appointed to the protection of public safety or the prison guard officials,
8) the person who performs the active military service.

The indicated definition has a full character which means, that as defined in the provisions of the code, a person who belongs to none of above mentioned categories cannot be regarded as the public officer. In consequence, such a person is not a public officer as defined in the provisions of the code, even if special provisions guarantee such a legal protection, similar to one offered to public officers. The Supreme Court had aptly paid attention to this situation in the verdict from 27th November 2000[5].

[5] The verdict of the Supreme Court from 27th November 2000, WKN 27/00, OSNKW 2001, no. 3-4, pos.21.

However, "assisting person" is defined in a different way. This notion encloses both the reference to a person was clearly appointed or called for such an assistance but also to the person who spontaneously helps the public officer performing public duties with the knowledge and the consent of the public officer[6]. This provision requires the condition that this person will be embraced by the protection, exclusively while performing official duties by public officer, with his knowledge and consent.

Definition of the causative act of the insulting

The subject of direct action of the perpetrator in the type of the forbidden act determined in Art. 226 § 1 Penal Code can be exclusively a public officer or an assisting person, however, causative activity itself comes down to insulting.

According to popular understanding of this term, it must be assumed that "to insult" means the same as "to violate someone's dignity"[7] , or "to insult somebody, to offend somebody"[8]. Dictionary definition of the expression "to insult" does not eliminate the questionable nature of its understanding, since it operates equally vague and evaluative notions.

In the subject literature there is no consensus as how to understand the notion of "the insult." W. Kulesza shows that one should understand the insult as "such a behaviour, which according to culturally determined and universally accepted evaluations, constitutes contempt for the other person"[9] . According to W. Wolter the insult contains "negative evaluation of such behaviours which violate the dignity entitled to every man due to his humanity"[10] . Then in J. Raglewski's opinion, the notion of the insult should be interpreted as "various types of behaviours, which bear the same feature of expressing the contempt for the dignity of the other person, in addition aesthetic means which were used by the perpetrator, are indifferent"[11] . However, A. Marek claims, that "a behaviour demeaning, expressing disregard or the contempt should be considered the

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[6] A. Zoll, Komentarz do art. 222 k.k., [in:] A. Zoll (red.), G. Bogdan, K. Buchała, Z. Ćwiąkalski, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, Kodeks karny. Część szczególna. Komentarz do art. 117-277. t. II, Zakamycze 1999.

[7] http://sjp.pwn.pl/slownik/2547000/znieważyć.

[8] E. Sobol (red.), Słownik języka polskiego, Warszawa 2005, s. 1281.

[9] W. Kulesza, Zniesławienie i zniewaga, Warszawa 1984, s. 169.

[10] W. Wolter, Kodeks karny z komentarzem, Warszawa 1973, s. 530.

[11] J. Raglewski, Kodeks karny, Komentarz, A. Zoll (red), t. II, Kraków 2006, s. 828.

insult”[12] . Similar opinion is shared by M. Filar who thinks that: “an insult is a behaviour which (...) constitutes contempt for the other person, so it is something more than only demonstrating the disrespect or the lack of application of rules of good conduct (which is only a sign of disregarding)”[13] . On the basis of presented definitions it is possible to draw a conclusion that such a behaviour which violates the dignity of the other person, constitutes the sign of the extremely disregarding, deprived of respect, or straight out contemptuous behaviour of the perpetrator.

It should be additionally underlined that it is not possible to identify the insult only with disregarding which means, that the insult must be something more than only showing the lack of respect or ignoring duties resulting from the good manners. According to O. Górniok: “the insult can assume the shape of vituperating, deriding, or even disregarding. However, it must be something more than the obscene behaviour or the faux pas”[14]. W. Kulesza aptly stated that: “the nature of insult is showing the contempt which expresses more negative attitude to the value a person represents than just disregarding”[15] . Objective criteria, rather than feelings of insulting and the insulted, should decide whether the given statement will have a nature of the insult. In M. Filar’s opinion “comprehending of the insult should be interpreted objectively, since the evaluation of only a subjective element is insufficient; the feeling of the addressee of the insult is not significant, even if provisions of the statement cause the feeling of violating the personal dignity. To recognize the insult, the statement must contain such objective elements which for universal and cultural standards are deemed offensive “[16]. Similar viewpoint is shared by J. Raglewski who points out that: “To establish, whether the specific behaviour of the perpetrator has insulting nature, objective criteria are decisive (...), in addition one should mainly take into consideration generally accepted social norms.[17] “ . T. Dukiet-Nagórska aptly acknowledges that “to recognize the insult, such behaviour of the perpetrator which in universal feeling is abusive or such a character is conferred by cultural and customary conditioning which is combined with the specificity of certain geographical areas, since some expressions which

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[12] A. Marek, Kodeks karny, Warszawa 2006, s. 407.

[13] M. Filar: Odpowiedzialność karna za nieuzasadnione zarzuty wobec lekarza lub zakładu opieki zdrowotnej, Prawo i Medycyna 2006, no. 23, s. 99.

[14] O. Górniok (in:) Kodeks karny. Część szczegółowa, Komentarz, A. Wąsek (red.), t. II, Warszawa 2005, s. 41-42.

[15] W. Kulesza, Zniesławienie i zniewaga (ochrona czci i godności osobistej człowieka w polskim prawie karnym – zagadnienia podstawowe), Warszawa 1984, s. 174.

[16] M. Filar: Odpowiedzialność karna..., s. 99.

[17] J. Raglewski, (in:) Kodeks karny. Część szczególna..., s. 828.

in certain regions of the country are treated as vulgarisms, exist in other regions where their connotation is different"[18]. The similar conclusion can be drawn from analysis of the judicature which indicates that "the criminal law protects the dignity comprehended in more objective way, determined by universally adopted cultural-social norms"[19] .

The form of insulting behaviours

However, against this background a question appears. What form of above mentioned insulting behaviour of the perpetrator should be taken in order to constitute the base of the criminal liability? It is aptly indicated in the doctrine that the insult can come down to acts taken in the verbal as well as nonverbal forms, embracing the word, the gesture, the facial expression, the letter, or the picture. In the J. Raglewski's opinion "the insulting behaviour can have a verbal form (using the vulgar vocabulary), can be expressed with the help of the picture (e.g. caricature), symbols of signs or other type of medium (film, photograph), by creating the relevant website on the Internet, or by gesture which expresses the disrespect in view of the other person"[20]. P. Hofmański perceives this issues in the similar way, he assumes that "the insult can be committed through the various ways of working e.g. words, pictures, gestures, signs and faces. It is important so that the behaviour offends somebody or insults him"[21]. It must be additionally underlined that when the insult is expressed with the words, it is not significant for the criminal liability whether the insulted person understands their meaning. The insult can be committed by using the expression, which meaning remains unknown to the aggrieved party, e.g. expressed in a foreign language that the insulted person does not speak, also in the sign language or through the inscription drafted in the Braille alphabet[22] .

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[18] T. Dukiet-Nagórska, Prawnokarna ochrona Prezydenta Rzeczypospolitej Polskiej [in:] P. Hofmański, K. Zgryzk (red.), Współczesne problemy procesu karnego i wymiaru sprawiedliwości. Księga ku czci Prof. K. Marszała, Katowice 2003, s. 55–56.

[19] The Verdict of the Supreme Court from 17th February 1993, III KRN 24/92, Wokanda 1993, no. 10, s. 8.

[20] J. Raglewski, Kodeks karny. Część szczególna, s. 828.

[21] P. Hofmański, J. Satko, Przestępstwa przeciwko czci i nietykalności cielesnej. Orzecznictwo. Przegląd problematyki. Orzecznictwo (SN 1918-2000). Piśmiennictwo, Zakamycze 2002, s. 48.

[22] J. Piorkowska-Flieger, S. Partyka, Przestępstwo zniewagi Prezydenta RP, Prok. i Pr. 2012, no. 3, s. 17

To sum up this part of deliberations, it must be assumed, that violating the good name can be connected with any conduct that will turn out to be unlawful, unethical or will be against the common customs. Its essence does not consist in the substantive statement assessing the properties or the conduct of a given person, based on alleged or existing facts, but on the statement offending the personal dignity on account of its form, rather than provisions. The crime of insulting the public officer or the assisting person will come down to the unlawful interference in his or the assisting person's reverence in a way that personal dignity of any of them is violated. The insult will be a behaviour calculated for the infringement of the dignity, manifesting itself most often in the form of words which generally recognized as offensive thus violating the reverence in her internal presentation.

The renage of penalization of insulting the public officer

For its essence, the penalization of the insult of the public officer requires it to come into existence in relation with performing official duties by the public officer, as well as while performing these obligations, and at the same time it is required that they take place during the performance of duties assigned to the officer as a part of his responsibilities. The insult will be recognised as made while performing official duties, when the perpetrator committed it during performing activities assigned to the officer as a part of his responsibilities. The premise of relating the insults to the official activities of the officer means that the punishable offence takes place on account of behaviours of a given person as the officer, so it is a manifestation of the assessment of this person's evaluation as the individual performing determined public functions (official activities), rather than as person itself or the person who acts also in other spheres of activities. The insult of the public officer will be associated with performing his official duties, if the specific activity performed by the public officer which is assigned to him in a framework of his official duties, constitutes the motive for the perpetrator[23], or the perpetrator commits the insult because a given person is a public officer or a public officer of the determined category[24] . In the doctrine, it is emphasized that the activity performed by the public officer which is located within a category of official activities is supposed to be a motive, motor, reason for the perpetrator's activity[25]. Additionally, A. Zoll

[23] A. Zoll, Komentarz do art. 226 k.k., op. cit.

[24] T . Dukiet-Nagórska, Prawnokarna ochrona …, op. cit., s. 57.

[25] A. Barczak-Oplustil, op.cit., s. 895.

shows that one should not identify the time of performing official duties with office hours, but real character of action is significant for the evaluation (whether or not it is included in official duties)[26]. Such interpretation of time issue of committing the insult results from the necessity of associating public officer's assigned official duties with the perpetrator's motive which is closely connected with the specific activity undertaken by the officer or the assisting person. The perpetrator aims at disregarding the public officer or the assisting person.

Against the background of presented disquisitions, a question appears whether the criminal liability for acts having insulting character should be tied with the content or the form of the statement. It seems that answer to this kind of question should take into account only a shape of the very statement, omitting its provisions. The distinction should be made between acceptable criticism and defaming acts. Unquestionably, in the frames of the first one, the society has a right, or even duty to express its opinions on functioning of the state authority and its representatives which can take a shape of critical statements, and excluding or rationing this possibility should be considered as the unjustified restriction of the freedom of speech, or even the desire to gag the society. However, the problem of the criminal liability appears when that acceptable criticism assumes the unacceptable form. J. Raglewski aptly underlines that one should clearly distinguish the acceptable criticism from insults, because only then we can avoid the collision between the legal-penal protection of the good name of so-called public persons against insulting charges, and the right of every man to express his views. That collision would force us into sacrificing one of these legal goods[27]. It must be recognized, that obviously Art. 226 § 1 Penal Code constitutes the sign of reducing the freedom of speech, a very fact of expressing sharp, or even "unpleasant" opinions should not constitute the base of liability, until the form of these statements conceal the offensive nature. The criticism of the activity of public servant or assisting person in connection with and while carrying out official duties does not constitute sufficient premise to call somebody to criminal liability on account of statements which are unpleasant or even unfavourable for the state authority.

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[26] A. Zoll, Komentarz do art. 226 k.k., op. cit.

[27] J. Raglewski, Wybrane zagadnienia prawnokarnej ochrony czci w Kodeksie karnym z 1997 r., CzPKNiP 2003, no. 2, s. 63.

The premises of punishability of insulting the public officer with the regard to Polish judicature

Being aware of the nature of acts having insulting character efforts must be made aiming at arbitrating the issue of punishability of the public attack on the public officer. As a result of amendments to legislative introduced by the legislator in relation to the unconstitutionality of previously applicable regulations, the current wording of the regulation determining the criteria of insulting the public officer, making the responsibility conditional as to acting in the connection with and during performing official duties and by him and the assisting person, were introduced by the act from 9th May 2008 about the amendment to the act - the Penal Code (Journal of Laws No. 122, pos. 782). New wording of Art. 226 § replaced the part of the sentence after the comma, the word "or", with the word "and" which means that the insulting behaviour must take place currently both while performing official duties, as well as in relation to it.

The change of provisions of the regulation was supposed to affirm Constitutional Tribunal decision from 11th October 2006 which stated that: "Art. 226 § 1 Penal Code (in the wording before the amendment) in such a scope in which it penalized non-public or public insulting of the public officer or the assisting person, but not while performing official activities, is inconsistent with Art. 54 sec. 1 in relation to Art. 31, sec 3 of Polish Constitution"[28] . The Constitutional Tribunal indicated that the interpretation based on the earlier regulation Art. 226 § 1 Penal Code, allowed prosecuting ex officio of any non-public insulting of the public officer which means the inconsistency with the directive of Art. of 54 sec. 1 in relation to Art. 31 sec. 3 Constitutions. Moreover, it was inconsistent with shown clauses of the Constitution the prosecuting ex officio public insulting of the public officer, but not while performing official activities. Justifying its stance, and especially making pro-constitutional interpretation, the Tribunal acknowledged that correct constitutional interpretation of the discussed regulation, consistent with the Constitution, orders to acknowledge that in the light of constitutional patterns prosecuting every insulting of the public officer ex officio is only acceptable if it is made publicly, moreover while performing official activities, and both premises must appear together.

Basing on this train of thought the Supreme Court in the verdict from 9th February 2010 shared the position expressed by the Tribunal, pointing that: "admittedly, in the amended provision the legislator does not directly

[28] The verdict of the Constitutional Tribunal from 11th October 2006, P 3/06, http://trybunal.gov.pl/rozprawy/wyroki/art/5264-zniewazenie-funkcjonariusza-publicznego/s/p-306/

state that the insulting behaviour must be made "public", but when taking into consideration the position of The Constitutional Tribunal formulated in the appointed verdict, applying the pro-constitutional interpretation, it must be assumed that "publicity" of an action belongs to constituent elements of the misdemeanour determined in Art. 226 § 1 Penal Code, in current wording."[29]. This concept was also adopted in the verdict of the Supreme Court from 2nd February 2011

Based on the shown line of reasoning, it must be accepted that admittedly in the amended provision the legislator does not directly states that the insulting behaviour must be made publicly, however, taking into account the position of the Constitutional Tribunal and applying the pro-constitutional interpretation, it was accepted that to criteria of the misdemeanour determined in Art. 226 § 1 Penal Code, in the current wording, belongs "publicity of action".

The opposite stance was expressed in the verdict of The Supreme Court from 25th October 2011. Therein was accepted that: "for the realization of criteria of an offence from Art. 226 § 1 Penal Code, in the wording modified with the act from 9th May 2008 about the amendment to the act - the Penal Code (Journal of Laws No. 122, pos. 782), it is not necessary for insulting of the public officer to take place in public"[30]. Justifying above mentioned stance the Supreme Court acknowledged, that in accordance modifications introduced to the provisions of Art. 226 §1 Penal Code the one should be penalized who is insulting the public officer or the assisting person, during and in relation to performing official duties, there is a lack of causes justifying the need to introduce the additional criteria in the form of "public" nature of the insulting, since this provision does not directly pronounce it. It was also underlined by questioning the legitimacy of citing the above shown Constitutional Tribunal decision, that provided under rule of Art. 226 § 1 Penal Code before its modification, the penalization of such public or non-public insulting of the officer which was not made while performing official activities was legitimately recognised unconstitutional, after the amendment to the provision this issue stopped being meaningful due to the fact that the new wording clearly made the criminal liability conditional for insult during and in relation to performing official duties by the public officer, not excluding the non-public action of the perpetrator. What is characteristic, in that stance the Supreme Court underlined that: "standard

[29] The verdict of the Supreme Court from 9th February 2010, II KK 176/09, OSNKW 2010, no. 7, pos. 61.

[30] The verdict of the Supreme Court from 25th October 2011, OSNKW 2011/12/109, LEX no. 1099327

effects of the Constitutional Tribunal decision do not refer to Art. 226 § 1 Penal Code in the wording modified by amending act. It is the new normative act which was not an object of the control before the Constitutional Tribunal, and hence the earlier passed sentence perhaps can only be used as an auxiliary measure for interpretation of this provision, and what is more only within the limits of the acceptable interpretation in accordance with the Constitution (pro-constitutional interpretation)."[31]

Furthermore, in the following verdicts from 8th November 2011, from 10th January 2012[32] the Supreme Court underlined that thesis concerning the admissibility of public, as well as non-public insulting pushed through in both verdicts, is justified by the conclusions of the linguistic and system interpretation as well as ambits of pro-constitutional interpretation. Each time it was also underlined that amendment of the provision of Art. 226 § 1 Penal Code only consisted in introducing to its provisions the combined condition of appearance of both legal premises, it is "during and in relation to performing official duties", not introducing to the constituent elements of this crime the acting by the perpetrator "publicly".

By quoting above mentioned conflicting stances, it becomes obvious that there are divergences attesting to the lack of the consistent interpretation of limits of penal responsibility resulting from Art. 226 § 1 Penal Code.

The Supreme Court clearly indicated these discrepancies in the verdict from 20th June 2012[33]. Analysis of the provisions of Art. 226 § 1 Penal Code from the semantic point of view in fact rules out the hallmark of "public" action from the provision. By characterizing the action described within the considered regulation, the legislator indicated only the hallmark of "acting in the time and in relation to performing official duties". Therefore, The Supreme Court assumed if the legislator did not directly include punishability of exclusively public action, what was made in the same article, but in § 3 stipulating the penalization of only "public insulting or humiliating of the constitutional organ the Republic of Poland", it must be acknowledged that it was the will of the creator of the norms was keeping the punishability of both public and non-public action of the perpetrator which aimed at insulting the public officer or assisting persons. The Supreme Court also emphasized that in its evaluation, the acting of the legislator in this respect did not have an incidental nature, due to the fact that as a part of other

[31] Ibidem.

[32] The verdict of the Supreme Court from 8th November 2011, II KK 93/11, R-OSNKW 2011, pos. 2023, The Verdict of the Supreme Court from 10th January 2012, II KK 215/11, LEX no. 1108461.

[33] The verdict of the Supreme Court from 20th June 2012, I KZP 8/12, LEX no. 1165312.

legal-penal solutions, the legislator clearly stipulates the cases of a necessity to take the criteria of only "public action" into account, it can be found among others in Art. 133 Penal Code, Art. 136 § 3 and 4 Penal Code, Art. 137 Penal Code, with reference to crimes, in which the perpetrator's acts consist in insulting, also by underlining the hallmark of the public action in other provisions of the special part of the Penal Code e.g. in Art. 202 § 1 Penal Code, Art. 241 § 1 and 2 Penal Code, Art. 255 § 1, 2 and 3 Penal Code, Art. 256 and the Art. of 257 Penal Code. On the contrary, it must be acknowledged, by taking linguistic interpretation into consideration, provided we can aptly interpret from the provision of Art. 226 § 1 Penal Code the necessity to insult the public officer or the assisting person during and in relation to performing official duties, but basing on the semantic interpretation it is not possible to decide on the issue of the audience, or non-audience of the perpetrator's acts. Accepting the conclusions of the linguistic interpretation would have to settle that the legislator's will, who consciously and in the intentional way formulates legal-penal provisions, was the admission of also non-public insulting of the public officer or assisting person in the time and in relation to carrying out official duties. This assumption would be irrational.

Continuing the process of the interpretation, and especially pointing ratio legis of current wording of Art. 226 § 1 Penal Code The Supreme Court further refers to the repeated analysis of assumptions made by the Constitutional Tribunal. Interpreting thesis adopted by the Constitutional Tribunal, showing the inconsistency of Art. 226 § 1 Penal Code in the wording from before the amendment with the Art. of 54 sec. 1 in relation to the Art. 31 sec. 3, the Supreme Court allowed the possibility of its twofold interpretation. Firstly, The Supreme Court pointed out that the inconsistency with the Constitution presented by the Tribunal could concern every non-public insulting, as well the public one which was not made while performing official activities. Secondly, the punishing for insulting the officer or assisting person is unconstitutional both publicly, and non-publicly, but not while performing official activities[34]. On the basis of these concepts, the Supreme Court states that the second stance is accurate, because it is necessary that the insulting happens while performing official activities and, in relation to performed official activities.

[34] Ibidem.

Punishability of insulting the public officer – *de lege lata* and *de lege ferenda* remarks

There is no doubt that the legislator intentionally limited the freedom of speech and expression, and in consequence limited the applicability of Art. of 54 sec. 1 Constitution, by introducing the derogation from the principle of the freedom of speech into the legal system in the form of Art. 226 § 1 Penal Code, to ensure the public order and the protection for the dignity of the public officer. Limiting the freedom of speech for its protection by legal-penal regulation does not raise reservations, because the freedom of the individual in this respect is not an absolute right, hence can be confronted with other constitutionally protected values, that is e.g. with the protection of the public order, achieved by undisturbed functioning of public authorities. In fact, the crime mentioned in Art. 226 §1 Penal Code can be associated with both public and non-public behaviour". It is a crucial element distinguishing the analysed normative structure from the crime included in Art. 135 § 2 Penal Code and Art. 226 §3 Penal Code, at the same time non-public nature of the perpetrator's behaviour, was intentionally included by the legislator within the scope of the prosecution. Insulting the public officer or the assisting person in relation to performing the official duties causes the penalization of behaviours in the much greater scope than in case of the "ordinary" insult, imposing criminal liability among others public insulting statements that can include contents regarded insulting, especially statements (in relation to performing official duties) presented in the press and electronic media, irrespective of power and the weight of the real influence of such statements, as well as non-public which took place in other time and circumstances than the actual performance of official activities, including the following acts in the sphere of purely private, non-public statements not-aimed at expressing them in the public sphere. Penalization based on Art. 226 § 1 Penal Code can also include private behaviours, appearing in the private life, or even in the narrowest social circles, provided that the expressing of the statement took place, and the message about such a behaviour reached the law enforcement agencies. The current construction of Art. 226 § 1 Penal Code includes with the scope of penalization also statements between private persons which take shape of neither the so-called public insult, nor the indirect insult (intentionally addressed so it reaches the aggrieved party). The view of the Constitutional Tribunal remains up-to-date, assuming that: "in the hypothesis of the questioned regulation are located situations, in which the statement containing insulting contents was formulated privately, in terms of social or family

relations and accidentally found its way to the awareness of other persons, or became a publicly known fact"[35]. Such a significant interference with the criminal liability, including the situation in which the aggrieved party was not subjectively touched by the insult, or was not even aware of its existence, seems to be far-reaching, even only due to the evidence problems in this respect. It triggers the situation, in which statement heard by chance, or passed on by the third party against the will and intentions of the perpetrator, can constitute, according to accepted in Art. 226 § 1 Penal Code regulation, ground for applying the criminal sanction, if only the content of the statement regards the public officer and the sphere of his official activities. On the basis of current solutions, the assumptions of the Constitutional Tribunal seem accurate. They underline that: "nobody should incur the criminal liability for displaying extremely subjective and unfair views and even insulting evaluations, if it is his intention to keep these statements in the closely determined group of people and there is no intention of hurting the person who such statements concern "[36] .

Moreover, free public debate in the democracy is one of the most important guarantors of the freedom and civil liberties. Art. 54 of Constitution provides everyone with the freedom of expression as well as acquiring and spreading information. In consequence, the expression used in this provision should be understood as broadly as possible, not only as expressing personal evaluations as for facts and phenomena in all aspects of life, but also as presenting the opinions, speculations and forecasts, in particular informing about real as well as alleged facts[37]. This freedom cannot be limited to information and views which are perceived as harmless, indifferent or even favourable. The regard for the fundamental role of the freedom of speech in the legal democratic state demands particularly strict control of the precision of provisions of acts introducing restrictions in using this freedom[38]. The criticism of public institutions and people holding public functions cannot assume forms which paralyse the possibility of the effective performance of their functions for the sake of the common good. However, it is not the existence of the restrictions which is a measure of freedom of speech in the democracy, because they are obvious, but their intensity, and they way of marking out by the legal system borders of this freedoms.

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[35] The verdict of the Constitutional Tribunal from 11th October 2006, op. cit.

[36] Ibidem.

[37] P. Sarnecki, [in:] L. Garlicki (red.) Komentarz do Konstytucji RP, Warszawa 2003, t. III, note 5 to art. 54

[38] The verdict of the Constitutional Tribunal from 12th January 1999 r., P 2/98, OTK ZU no. 3/A/2006, pos. 32.

It should be acknowledged, that implementing the restriction of freedom of expression in such a wide range how, as results from Art. 226 § 1 Penal Code, is not an essential mean to achieve the desired purpose. It is aptly underlined, that so broad structure of insulting based on Art. 226 § 1 Penal Code causes the public officer or the assisting person to be protected incomparably more widely than any other subject, just because of admitting not only a penalization of public but also non-public action of the perpetrator. Such a provision is surprising as the protection of the "ordinary public officer" is put in an excessive way, in the face of situation when criminal liability for insulting the president of Poland (Art. 135 § 2 Penal Code), or other constitutional organs of the Republic of Poland (Art. 226 § 3 Penal Code) was rightfully limited - only to public insulting. Such differentiation should be considered even under the rule of current regulation Art. 226 § 1 Penal Code, as the striking action against the constitutional principle of equality before law. The view of the Constitutional Tribunal is justified and it assumes that: "there are no reasons that in the democratic state, respecting the separation of the public and private sphere of citizens activity, the authority of public institutions and the personal dignity of public officers, is overly protected by law also in relations between individuals, or in the broader sense between private entities"[39] . Exaggerated restrictiveness of the criminal liability, imposing, at least indirectly, barriers for the freedom of expression - especially when it is connected with high level of freedom of evaluation of distinguished constituent elements of an offence – it can lead to the inadmissible interference in the sphere guaranteed by the constitutional freedom. In this regard it should be underlined that even after the amendment, from provision of the Art. 226 § 1 Penal Code it is possible to conclude criminal liability both for public, as well as non-public insulting. It must be pointed out that such a normative understanding of this regulation proclaims its incorrect construction. The regard for the fundamental role of the freedom of speech in the legal democratic state demands particularly strict control of the precision of provisions of acts introducing restrictions in using this freedom[40]. Underlining the need to protect the public institutions and freedom of speech limitations that are connected with it, the possibility of the criticism of these institutions' activities must be allowed and protections of their good name must appear in reasonable limits. By penalizing only these cases which paralyse the possibility of the effective performance of public functions, which can be associated with the penalization of only public actions of the perpetrator. There is no doubt that the

[39] Ibidem.

[40] Ibidem.

authority of public institutions should be built, not solely by basing on the penalization of private statements of citizens, even the most extreme and critical ones, but on other relations established between the official authority and the citizen, leading to build the mutual respect and trust, not on bans and the repression.

By recognizing the need to protect the authority of state institutions, it is hard to base it only on the need to conduct the functions of the state agency. That is why, it is not possible to justify the need of sanctioning public as well as non-public insulting of the officer in this way. Underlining the argument putting forward that the legal system cannot tolerate the situation, when action taken by the state agency would be crippled or at the least significantly weakened by behaviour of addressees of such action in progress (during) the performance of activities, it should be acknowledged as sign of weakness of this state. Such a serious interfering of the state in the sphere of the freedom of speech, but especially a possibility to apply the measures of the criminal liability, reduces the prestige of the state and can bring about the pathology in the sphere of applying legal instruments. In such case increasing the intensity of the criminal sanction by no means seems justified by the need of effective, undisturbed conducting the functions of the state agency. It is possible to agree with the statement that the institutional authority is administered to people holding public functions and inversely, so the insult of the officer will often be an insult of institution, however, such a connection does not truly justify administering more drastic means of the criminal liability than in relation to the typical insult (Art. 216 Penal Code).

The view of the Constitutional Tribunal should be shared, stating that: "the sole effectiveness of functioning of the public institution, the possibility of effective achieving the objectives of the authority does not undergo […] the weakening by the fact of appearing fiercely critical, even insulting statements formulated in the public sphere. Certainly, it does not mean that the fact that the legal system should not use its determined means in such situations. However, in such a case instruments stipulated in other regulations seem sufficient, they are directly launched from the initiative of the aggrieved parties who were directly insulted (apart from legal-penal means - Art. 216 Penal Code, these people have means of the civil law protection at their disposal including means of the property protection). The public prosecutor always makes use of the possibility of joining proper criminal proceedings, if the need of protection of the public interest occurs (Art. 60 Code of Criminal Procedure)"[41].

[41] The verdict of the Constitutional Tribunal from 11th October 2006, op. cit.

For the evaluation of the applied solution, from a point of view of the guarantee of the freedom of the expression, the fact cannot be indifferent that it is crucial for characteristics of the act, the notion of insult is based on evaluative criteria, dependent on many additional premises resulting from the sensitivity of the public opinion, the level of public approval for some of assessing and critical phrases in public debate, as well as the circumstances, in which determined judgements and opinions are formulated.

Conclusions

Concluding, one must oppose the acceptability of criminal liability of non-public action a perpetrator in relation to Art. 226 § 1 Penal Code. Indictment of the non-public insult of the public officer is always at variance with Art. 54 section 1 and 31 section 3 Constitution. As for the insult made publicly - prosecuting it ex officio is possible only if it took place while performing official activities. It should be postulated that insulting the public officer or the assisting person can be recognized only when took place publicly[42]. By acknowledging that performing the activities of persons holding public functions is exposed to stricter public judgement than any other activity of other people, it should be recommended that only these acts constitute the basis of liability for the perpetrator, in which in frames of the public criticism the assessment based on merits was replaced by offensive statements or other behaviours close in the form or nature. Therefore, one should waive from the punishability of every case when negative, offensive publications concerning public officers are published, making it the obligation of public authorities to interfere, through initiating criminal proceedings, only in their public expressions.

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