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An insult of the President of Polish Republic. Regulation, practice and demand for change.

Summary:

The crime of insulting the President is one of the most controversial polish criminal regulations. From time to time appears initiatives to change regulations or to repeal it. Some political groups point at the demand for change regulation so the prosecution in such case will be initiated in the private prosecution. About constitutionality this regulation also made decision Polish Constitutional Tribunal. In the text the author analyses different regulations from different countries protecting the head of state against insulting and defamation. This analysis of foreign regulations and polish judicial practice in this regard helps to criticize present polish regulations and is a basis to find better solution draw from the concepts from other countries.

Key words: insult, President, criminal code, Polish Constitutional Tribunal, European Court on Human Rights.

1. Introduction

The crime of insult of the President is one of the most controversial in the polish penal law. Every couple of years, some political parties call for decriminalisation of this crime. Some scientist claim, that this regulation is needed and should not be changed. Looking for answer whether this regulation should be repealed or not is

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useful to analyse cases connected with this article and similar regulations in other countries.

2. History of regulation in polish criminal code

Looking for the first regulations forbidding the insult of the President we can point at the polish criminal code from the year 1932. The article 125 paragraph 2 stated: “A penalty of up five years imprisonment shall be imposed on whoever disparage dignity or severity of the President of Polish Republic”. The sanction was higher than the sanction for committing an insult on other people and was no matter whether the President was present at the place and time of committing the crime of insult or not. It was even no difference whether the crime was committed in public or not. At present article 135 paragraph 2 of polish criminal code from year 1997 states that “A penalty of up three years imprisonment shall be imposed on whoever disrespects in public the President of Polish Republic”. This provision is included in the chapter 17 which contains the crimes against the Polish Republic.

3. Experience based on operational practice

Not less important than the history of regulation is practice of using this regulation. One of the first well known case relates to the Z.S², who was accused of insulting the President of Polish Republic. On November 1998 he applied a portrait of the President and some other polish politicians with insulting inscriptions on his car. The prosecutor wanted for the accused one year of imprisonment with a probation of three years. The court decided on conditional discontinuance of proceedings. Arguing the decision, the court pointed that “We can conclude without any doubt, that Z.S. committed the crime of insulting the President, but at the time of decline of political morals the court is in position, that he should not be punished. The court must consider common courtesy. Little known person, who imitate behaviours of politicians, who offend each other without any liability, cannot be treated as a fall guy³”. This explanatory statement was commonly criticized. It was pointed that basing on its

² In Poland personalities of people sentenced are anonymised in the court sentences which are made public.

³ S.Hoc, *Przestępstwa przeciwko Rzeczypospolitej Polskiej*, Opole 2002, p. 136.

every crime can be explained basing on statement, that in the community of somebody who is accused of crime, this type of crime is committed commonly, that is why the accused person should not be punished and court should decide on conditional discontinuance of proceeding⁴.

Another well-known case relates to H.H. At the day of the committing the crime of insulting the President of Polish Republic he was drunk at the Central Railway Station in Warsaw. Due to disturbing public order, the staff of the railway station called for the police. During the intervention, he called the policemen “the Kaczynski’s bumpkins” (Lech Kaczynski was at that time the President of Polish Republic). During the preceding the Circuit Court of Warsaw decided that the accused committed the crime but decided to discontinue the proceedings due to exiguous social noxiousness of an act. The court argument that nonsignificant act could not cause fraying the dignity of the office of the President of Polish Republic⁵.

Another well-known case relates to R.F. – the creator of the website which aspersed Bronisław Komorowski – the President of Polish Republic. This case is undoubtedly the best-known case of the insulting the President of Polish Republic due to arresting the suspected by the officers of Polish Agency of Interior Security – the agency which was created to counteract the most serious crimes and to fight against most dangerous criminals. Acting the Agency of Interior Security caused intension of the discussion about the meaningfulness of the criminalization of the act of insulting the President. In this case the Court of First Instance sentenced the accused on one year and three months of the punishment of detention order. During this period, he had to serve each month forty hours of community services. This decision was contested to the Court of Appeal, which found the suspected not guilty of the crime of insulting the President (he was also accused of forge and the court found him guilty of this crime and sentenced him on one year of the punishment of detention order which consist of thirty hours of community service each month during this year). The court argued decision basing on the exiguous social noxiousness of the committed crime

⁴ Ibidem, p.137.

⁵ T.Dukiet-Nagórska, Prawo karne. Część ogólna, szczególna i wojskowa, Warsaw 2012, p. 298.

that at the time of proceeding this type of materials, which were published by the suspected were popular on the internet and at the public sphere. Very important argument for the court was President's attitude to the proceeded case. Being asked about his attitude to the case, the President of Polish Republic Bronisław Komorowski highlighted that he was not interested in arresting R.F. and it was unnecessary. The court also stressed that this decision should be made at the period of preparatory proceeding what was made in many this type of cases very similar to this one. Very important was conclusion that it should be undertaken an effort to change legal regulation in this aspect to not leave the decision whether the proceeding in the case should be undertaken or not to the law-enforcement agencies, which decision is sometimes made discretionary⁶.

The problem of regulation the crime of insulting the President of Polish Republic was such problematic, that it was directed question to the polish Constitutional Tribunal, whether this regulation is constitutional. In the Provincial Court of Gdańsk was conducted trial against former President of Polish Republic Lech Wałęsa who said, "We have an idiot as a President". During this trial he Court decided to ask the Polish Constitutional Tribunal whether the criminalization the act of insulting the President is constitutional. The court argued that this regulation can be found as a threat to freedom of speech and can be found incompatible with the standards of the democratic country. The proper functioning democratic country must let citizens to criticize the head of state even if this critic will be expressed emotionally and that is why sometimes hurting and offending the addressee of these words. Asking court also found it questionable why the President of Polish Republic is protected against the insult better than other citizens. Committing the crime of insult is generally criminalized basing at the article 216 of polish criminal code which provide the punishment of fine or community sentence while committing the crime of insulting the President is criminalised basing on the article 135 paragraph 2 which provide the punishment of imprisonment of up to three years⁷. The court found that is no reason

⁶ Sentence of the Court of Appeal in Łódź on the 17th January 2013, signature II Aka 273/13 (LEX nr 1294813).

⁷ On this delimitation pointed also a constitutionalist professor Ewa Łętowska – E. Łętowska, *Rzeźbienie państwa prawa 20 lat później*. Warsaw 2012, p. 327.

in differentiate the protection against the insulting basing on that whether insulted person is the president or not. The court found it also important that this regulation might be incompatible with the judicature of the European Tribunal of the Human Rights. In the judgement delivered on the 6th of July 2011 Constitutional Tribunal found the regulation constitutional⁸. Arguing the regulation of article 135 paragraph 2 of polish criminal code the Constitutional Tribunal first pointed at the justification of the stricter protection against insulting granted for the President. The Constitutional Tribunal stressed that different protection is based on the different subject matter. Therefore, the civil servants (who also is the President of Polish Republic) are not in the same group of subjects as civils and cannot be compared basing on the same characteristics. This approach had been created in the previously made decision of the Constitutional Tribunal from the year 2006⁹. The Constitutional Tribunal pointed that plea about disproportionate regulation has no lawful basis. Tribunal based his point of view at two arguments. First, Tribunal pointed at the regulation of articles 58 and 59 of polish criminal code. This article stated that if the article of criminal code provides for a crime a punishment up to five years the court can instead of imprisonment decide on the community sentence up to two years or a fine. This article of polish criminal code is now void and instead of it was recently adopted the article 37a of polish criminal code which states that if the code provides a punishment up to eight years the court can instead decide on fine or a community service. Moreover, the Constitutional Tribunal pointed at that this argument is not proved by the practice of polish courts. The Tribunal pointed at that courts are very cautious at deciding about responsibility for insulting the President of Polish Republic. The Constitutional Tribunal based his point of view at the statistics presented during the trial by the General Prosecutor, who stressed that before 1998 and 2009 it was conducted 210 proceedings. 121 of them was ended with a resolution of rejection to commence the proceeding, 63 of proceeding were amortized and only 10 of them was ended with a decision of a court out of which 2 was ended with a decision

⁸ Sentence of the polish Constitutional Tribunal from the 6th of July 2011, signature P 12/09 (OTK-A 2011/6/51).

⁹ Sentence of the Polish Constitutional Tribunal from the 11th of October 2006, signature P 3/06 (OTK ZU nr 9/A/2006, poz. 121).

of amortize basing on the due to the minor social noxiousness of an act. Arguing the reason of the regulation the Constitutional Tribunal based on the difference between the crimes of defamation and insulting¹⁰. In point of view the Constitutional Tribunal the crime of insulting is not connected with the freedom of speech. This freedom may relate to the crime of defamation but not with the crime of insulting. Crime of defamation is based on rational and reasonable allegation while insulting is based only on desire to offend¹¹.

4. Approach to act of an insult the head of state from other countries

We can notice that other countries have different approach to act of an insult the head of state, some of them treat it as a crime while others allow their citizens to criticize their head of state in more radical way. We can also notice that different countries determine different conditions which allow the law enforcement authorities to conduct trial against person who commits this crime.

The first is a group of countries where insulting the president is not treated as a crime. The best-known example of a such country is the United States of America. The first amendment to the Constitution of United States guarantees the freedom of speech which is also connected with the right to criticize the President and other officials. The amendment states: Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. In the United States it is understood, that there cannot be enacted any law that can limit the freedom of speech, that is why insulting the president is not a crime in the United States. I was also confirmed in the decision of the United States Supreme Court made on the 23th November 1964. In the judgement the Supreme Court stated that “The Constitution limits state power to impose sanctions for criticism of the official conduct of public offi-

¹⁰ B. Kunicka-Michalska [in:] B.Kunicka-Michalska, J.Wojciechowska, *Przestępstwa przeciwko wolności, wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej*, Warsaw 2001, p. 246-247.

¹¹ W. Kulesza, *Zniesławienie i zniewaga (ochrona czci i godności osobistej człowieka w polskim prawie karnym – zagadnienia podstawowe)*, Warsaw 1984, p. 174.

cials, in criminal cases as in civil cases, to false statements concerning official conduct made with knowledge of their falsity or with reckless disregard of whether they were false or not”¹².

On the opposite side are countries where insulting the head of state is strictly punished. We can point at the Belarus, Tajikistan, Kazakhstan and Turkmenistan. For example, in the last-mentioned country insulting the head of the state is treated as a treason and provides a punishment of up life imprisonment.

Between this two already mentioned regulations is the third one which provides a punishment for insulting the head of state but also provides requirements to engage in legal proceedings. We can mention for example Germany where insulting the Federal President is forbidden. The provision provides a punishment of up five years of imprisonment, but the prosecution is subject to the consent of the Federal President¹³. Similar regulation provides the Japanese criminal code¹⁴. In Japan the prosecution is conducted only upon complaint, which on behalf of the Emperor shall file the Prime Minister, but filing it requires the Emperor consent. Important in this regulation is fact, that in Japan is considered that it is not proper for the Emperor to give his consent for the prosecution. That is why in the recent history of Japan nobody was accused of insulting the Emperor. And finally, many countries in their criminal codes provides crimes of insulting the head of state but for the very long time it has not been initiated the procedure basing on this article. We can for example point at Denmark where the procedure has not been initiated since the year 1930.

The problem of collision the freedom of speech and protection the politicians against defamation and insult was also a subject of a sentence made by the European Court of Human Rights on the 1st July 1997 in the case *Oberschlick vs. Austria* (number of complain 20834/92)¹⁵. In the case proceeded in the Court Mr. Oberschlick called the

12 U.S. Supreme Court, *Garrison vs. Louisiana*, 379 U.S. 64 (1964) <https://supreme.justia.com/cases/federal/us/379/64/> (access: 20.01.2016).

13 Section 90 of the German Criminal Code, available on the website: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1699 (access 20.01.2016).

14 Article 232 of Japanese Penal Code (Act No. 45 of 1907) available on the website: <http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf> (access: 20.01.2016).

15 Full text of the case available on the website: [http://cambodia.ohchr.org/sites/default/files/echrsources/Oberschlick%20v.%20Austria%20\[23%20May%201991\]%20\[EN\].pdf](http://cambodia.ohchr.org/sites/default/files/echrsources/Oberschlick%20v.%20Austria%20[23%20May%201991]%20[EN].pdf) (access: 20.01.2016).

politician “an idiot”. The Court decided that article 10 of the European Convention on Human Rights protects not only the content of the statement but also its form how the information is presented¹⁶. The Court also underlined that in some circumstances an offending statement for example called somebody “an idiot” is protected as a freedom of speech because shocking behaviours or statements made by politicians can cause radical comment.

5. Conclusions

Comparing polish regulations to the regulations enacted in other countries we can undoubtedly conclude, that polish regulations are less restrictive than in many countries around the world. The main important problem seems to be not the rawness of the regulation, but fact, that the procedure must be initiated under any circumstances. That is why the police deal with every case of insulting the President of polish Republic also that one's which seems to be unimportant. Most of them finds popular only because of the procedure initiated by the police and would be imperceptible without this procedure. It is also important to emphasise that some of people committing this crime may find this to reach popularity and may want to commit this crime only to get profits from this popularity¹⁷. Moreover, none of the former presidents was interested in the criminal proceedings and did not want to restrict the freedom of speech by punish people who commits such a crime. That is why many political groups call for amendments to the legal regulations. Some of them propose to resign from the security for officials against insulting. Others propose an amendment that provides less restrictive punishment for example of up to one year of imprisonment¹⁸ and, to change this crime from initiated ex officio to initiated by the

¹⁶ I.C. Kamiński, *Swoboda wypowiedzi w orzeczeniach Europejskiego Trybunału Praw Człowieka w Strasburgu*, Krakow 2006, p. 120.

¹⁷ We can point at the example of R.F. who finally was found not guilty due to exiguous social noxiousness of the committed crime. For the record we can point at that at present he resigned from conducting his website and offers it to sell. The owner of the website emphasises on his website (antykomor.pl) that he accepts only offers at the amount of minimum 50 thousands zlotys. Taking all costs made by the owner on functioning the page into consideration and compare it with previous mentioned price we can undoubtedly conclude, that it is a nice way of business and that the criminal trial ensured the owner priceless nationwide advertise.

¹⁸ The reason why punishment is indicate at one year is because of the possibility of suspending the punishment in the polish criminal code. Nowadays the court can suspend only punishment of up one year – in the past it was two years.

private prosecution¹⁹. People who criticize the proposal of initiation the trial by the private prosecution pointed at that the seriousness of the Office of the President is not to reconcile with the private prosecution. On the other hand, we must stress that initiating the procedure in case of every case of committing the crime of insult also is hard to reconcile with the seriousness of the Office of the President. The police must act in every also minor case. Every procedure conducted in such minor case is commonly discussed in public. Conducting procedure in such cases provides that the office of the president is not treated seriously but is a reason to another mockery. That is why the best option seems to be amended provisions to make it like German or Japanese ones. This solution ensure that the trial would not be conducted in minor cases when conducting it may jeopardize the seriousness of the Office of the President. On the other hand, some cases may require legal action that is why the President should have the possibility to agree for the trial to defend his office. Some experts point at that changing the regulation regarding protection the President against an insult cause that polish President will be protected against insult worse than other heads of states. On the other hand, we can point at that for example the President of the United States is at present better protected against an insult in Poland than in his own country. That is why changing legal solutions in the way above mentioned seems to be desired option. On the one hand it protects values important for the country, on the other hand it ensure a right to criticize a head of state and ensure that trials would not be provided in minor irrelevant cases and the office of state should not became disrespected. The most important part of changes that should be made in the approach to the critics the head of state and to the crime of insulting the President is to teach the respect to the office of President. This work should be more important and, in my opinion, will be more effective than even the most restrictive legal solutions.

¹⁹ For example we can point at the proposal made on year 2012 in which the rime of the insulting the President of Polish Republic is initiated by the private prosecution. More information about the project at: <http://orka.sejm.gov.pl/Druki7ka.nsf/0/F45EC81623B0256BC1257ABE004DB9EF/%24File/913.pdf> (access 20.01.2016).

Przestępstwo znieważenia Prezydenta RP. Regulacja prawna, praktyka stosowania oraz postulat zmian.

Streszczenie: Przestępstwo znieważenia Prezydenta jest jednym z najbardziej kontrowersyjnych przestępstw w polskim kodeksie karnym. Co jakiś czas pojawiają się inicjatywy mające za cel zmianę regulacji poprzez albo zmianę formę ścigania przestępstwa z publicznego na prywatnoskargowy lub też wyrugowanie tego przestępstwa z polskiego kodeksu karnego. Przestępstwo znieważenia Prezydenta było ponadto przedmiotem rozważań Trybunału Konstytucyjnego w 2009 roku. W tekście autor dokonuje analizy regulacji w zakresie znieważenia głowy państwa w różnych krajach, by poprzez porównanie treści przepisów, jak również analizę praktyki stosowania polskich przepisów przez sądy dokonać krytycznej analizy polskich rozwiązań i na tej podstawie spróbować poszukać lepszych rozwiązań legislacyjnych w omawianym zakresie.

Słowa kluczowe: znieważenie, Prezydent, kodeks karny, Trybunał Konstytucyjny, Europejski Trybunał Praw Człowieka.